[2024] EWCA Civ 781

Case No: CA-2024-000578

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST
Mr Justice Nicklin
[2024] EWHC 383 (KB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 July 2024

Before :

LORD JUSTICE PETER JACKSON
and
LORD JUSTICE WARBY

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Between :

(1) MICHAEL FARLEY **(2) to (432) THE OTHER INDIVIDUALS IDENTIFIED IN THE ANNEX TO THE APPELLANT'S NOTICE**	**Claimants/ Applicants**
- and -	
PAYMASTER (1836) LIMITED, T/A EQUINITI	**Defendant/ Respondent**

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Oliver Campbell KC and Pepin Aslett (instructed by **KP Law Limited**) for the **Appellant**
Andrew Sharland KC and Hannah Ready (instructed by **Freeths LLP**) for the **Respondent**

Hearing date: 9 July 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 11 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE WARBY :

1. This is an application for permission to appeal against the striking out of claims for infringement of data protection rights following a data breach. The issue for us is whether it is reasonably arguable that the High Court was wrong to treat the claim as turning on proof that anyone read the personal data in question.

2. We heard the application on 9 July 2024. By the end of the hearing a single ground of appeal was before us for decision. We announced our decision to grant permission to appeal on that ground for reasons to be given later. These are my reasons for joining in that decision.

3. The 432 applicants are all current or former officers of Sussex Police and members of a pension scheme administered by the respondent. In 2019 the respondent sent the annual benefit statements (ABS) of the applicants and another 43 individuals by post to the wrong address. Claims for compensation were brought by all 475. These were pleaded in tort as claims for misuse of private information and/or infringement of data protection rights under the UK GDPR and Data Protection Act 2018. The respondent applied to strike out all the claims or for summary judgment in its favour.

4. Nicklin J held that it was an essential ingredient of a viable claim for misuse of private information or infringement of data protection rights that the claimant should have a real prospect of demonstrating that the ABS was opened and read by a third party. Otherwise there could be no misuse of private information nor any real "processing" of personal data.

5. The judge concluded that on the face of their pleaded case 14 of the claimants had a real prospect of establishing that their ABS had been opened and read. The respondents' applications against those claimants were dismissed and those claims are now proceeding. The pleaded claims of the remaining claimants including these applicants were held to disclose no reasonable basis for a claim that the information was disclosed to anybody.

6. The judge rejected a submission that compensation could be claimed for anxiety or distress suffered due to apprehension that personal data might be disclosed to a third party. He regarded that situation as involving a "near miss" which involved no tort and hence gave rise to no tenable basis for claiming compensation. The strike out application against these applicants was therefore granted and their claims were dismissed.

7. The applicants do not seek to challenge the judge's decision or order so far as misuse of private information is concerned. Nor do they challenge the judge's conclusion that they cannot prove that the envelopes were opened and the ABS were read. There were two grounds of appeal.

8. Ground one is that the judge was wrong in law to hold that in order to have a viable claim for infringement of their data protection rights the applicants needed to allege and prove that the ABS was opened and read by someone. The applicants contend that they have sufficiently pleaded a tenable case that, independently of any opening or reading of the ABS, they have a complete cause of action for compensation for distress caused by infringement of their data protection rights.

9. The applicants' factual case is that the data that went into the ABS were extracted from a database, electronically transferred to the paper document along with the mistaken address, and then sent out by post. The applicants now accept that the ABS were not read by anyone but maintain their case that when they found out about what had happened they suffered the distress complained of. They were fearful of what might have happened and/or what might occur. The applicants' legal case is that the respondent's conduct involved "processing" within the scope of the very broad definitions to be found in the UK GDPR and the DPA 2018, which was undertaken in breach of the data protection principles and/or otherwise involved infringements of the applicants' rights, and was causative of the distress and embarrassment complained of.

10. The applicants' case on the key issue of infringement has been put in two main ways, which appear to overlap to some degree. The primary argument has been that the respondent's dealings with the applicants' data involved "processing" those data within the scope of the definitions in a variety of ways. It is said that (a) putting the ABS in the post involved a "disclosure" or at least a "making available" of the data or at worst a "use" of them and/or (b) the antecedent steps of preparing the ABS and the envelope with a view to posting them involved (among other things) collecting, structuring and storing the data, then retrieving and using them. These activities are said to have involved breaches of the principles of lawfulness, fairness, data minimisation, accuracy, storage limitation, integrity and confidentiality. That is the argument foreshadowed in the grounds of appeal and skeleton arguments.

11. In oral argument Mr Campbell KC advanced the further contention that whether or not there was any "processing" there was nonetheless "infringement" because, as pleaded in the Master Particulars of Claim at paragraphs 8.8 and following, the respondent failed to implement appropriate technical and organisational measures in breach of Articles 24 and/or 25 and/or 32 of the UK GDPR. This argument took Counsel for the respondent and the court by surprise. None of the three Articles mentioned was in the authorities bundle.

12. Ground two was that the judge erred in failing (to quote the grounds of appeal) "to have regard to the apprehension or fear that the applicants say they suffered as a result of the possible misuse of their personal data by a third party as a result of an infringement of the GDPR by the respondent…" In support of this ground of appeal reliance is placed on the decision of the Court of Justice of the European Union in *VB v Natsionalna agentsia za prihodite* Case C-340/21 (14 December 2023)[2024] 1 WLR 2559, that (and again I quote from the grounds) "an interpretation of Article 82(1) of the GDPR which excludes a situation where a data subject holds a fear of how their personal data will be misused in the future is not consistent with a broad interpretation of the concept of non-material damage and is not consistent with the guarantee of protection afforded to natural persons."

13. I have been persuaded that an appeal on ground one would have a real prospect of success.

14. There is no doubt that the statutory definition of processing is very wide. It does have limits. It may be that the act of placing a document containing an individual's personal data in an envelope does not fall within the definition. It may be that the act of sending such an envelope in the post does not in itself amount to processing by this standard. We have been shown some material suggesting that the Information Commissioner

does not consider this to involve processing. I do not consider, however, that these propositions are clear beyond argument.

15. What is clear is that in principle an individual may establish that personal data have been processed in breach of their data protection rights without proving that the information or data have in fact been read or otherwise communicated to anyone. One example could be the automatic transfer of data from one secure location to another that is insecure. The case law shows that the transfer of personal data to a foreign jurisdiction in which it is "liable" to be processed in ways that fall short of GDPR standards may amount to "processing" in breach of the GDPR: See *Data Protection Commissioner v Facebook Ireland Ltd* (Case C-311/18) [2021] 1 WLR 751. Examples could no doubt be multiplied.

16. Cases in which non-trivial emotional harm is caused by processing of this kind, falling short of disclosure in the sense contemplated by the judge, may be rare but it cannot be said that this is impossible as a matter of principle.

17. I can see some force in the respondent's argument that the applicant's statements of case do not comply with the requirements of clarity that are included in PD53B paragraph 9(2) (and, I would add, paragraph 9(3)). Mr Campbell KC accepted in the course of argument that paragraph 12.1(a) of the Master Particulars of Claim does not fully or accurately reflect the way these applicants now put their case on distress. But this was not a ground relied on in the written application to strike out nor does it appear to have been argued before the judge. In any event, I consider it arguable that the Particulars of Claim do sufficiently aver (a) that the respondent engaged in the kinds of processing on which reliance has been placed in support of the appeal and (b) that these applicants sustained emotional harm as a result. And even if the statements of case fall short of the standards of precision prescribed by the Practice Direction the court would not usually strike out for that reason without first affording the pleader an opportunity to amend.

18. I have considered the other reasons advanced by the respondent for refusing permission to appeal on ground one. Mr Sharland KC has contended, in particular, that the applicants' case on emotional harm is so clearly ill-founded that their claims should not be allowed to go to trial, or alternatively that the claims are at best of such minimal value such that they are an abuse of process or the grant of a remedy would be disproportionate. Some at least of these arguments were advanced unsuccessfully before the judge. Of course, we should not grant permission to appeal if the judge's decision would inevitably be upheld on different grounds. But I am not persuaded that is the case. These are points to be pursued by way of cross-appeal or respondent's notice if the respondent is so advised.

19. The second ground of appeal fell away in the course of oral argument. This was essentially for the reasons I gave when first considering this application on the papers. I said then that the applicants' reliance on *VB* appeared to be tilting at windmills:-

> "The judge did not … hold that the law does not allow the victim of a data protection infringement to claim compensation for emotional harm of that kind. He dismissed the data protection claim on the basis that (a) the distress alleged could not ground recovery in the absence of a tort; and (b) unless there had been

> disclosure of the data there was no relevant processing and hence no tort."

For those reasons, I said, the case of *VB,* where a tort was undoubtedly established, provides at best limited assistance. Pressed with this point at the hearing Mr Campbell KC realistically accepted that his clients could not recover compensation if they failed to prove a tort; so, if he failed on ground one he could not succeed on ground two. The application on ground two was withdrawn on the understanding that this would in no way prejudice the applicants' ability to rely on the case of *VB* in support of their arguments on ground one.

20. For these reasons I would grant permission to appeal on ground one only. I would propose three directions:-

(1) First, that if the appellants (as they now are) wish to advance any argument that the judge erred by failing to consider whether the respondent's conduct involved "infringement" even if it did not amount to "processing" they should formally apply to amend the Grounds of Appeal, any such application to be made within 21 days and determined at the same time as the appeal. The reason for this direction is that the arguments summarised at [11] above were not pleaded in the grounds of appeal. We cannot dismiss them; unless and until an application to amend is made and granted they do not fall for consideration as part of the appeal. The purpose of this direction is accordingly to avoid any further surprises at the substantive appeal hearing.

(2) Secondly, that the appellants must within 21 days prepare, file and serve a draft amended statement of their case, following the format of the Master Particulars of Claim, which excises any contentions that are no longer relevant or sustainable in the light of the judge's unchallenged conclusions. The purpose of this direction is to clarify and focus attention on the allegations that matter for the purposes of the appeal. It does not permit the case that the appellants wish to put at trial to be enlarged.

(3) Thirdly, as the points arising are of some general importance, the Information Commissioner will be notified by the court of the grant of permission and invited to consider making an application to intervene to assist the court.

LORD JUSTICE PETER JACKSON:

21. I agree.