SHERIFFDOM OF TAYSIDE, CENTRAL AND FIFE AT DUNFERMLINE

[2023] SC DNF 8

DNF-A31-22

JUDGMENT OF SHERIFF CHARLES LUGTON

in causa

COURTNEY TIMONEY RILEY

Applicant

against

THE STUDENT HOUSING COMPANY (OPS) LIMITED

Respondent

Act: Sloan, Advocate
Alt: McWhirter, Advocate

Dunfermline, 8 February 2023

Introduction

[1] On 20 December 2022 I heard a debate on both parties' preliminary pleas.

[2] The pursuer is a former employee of the defender. In this action he contends that the defender breached Article 5(1)(a) and Article 5(1)(b) of the United Kingdom General Data Protection Regulation ("UK GDPR") while processing his personal data in the course of defending employment tribunal proceedings brought by another former employee, Connor Adamson.

[3] The defender avers that it was exempted from the requirement to comply with these provisions by virtue of Paragraphs 5(3)(a) and 5(3)(c) of Schedule 2 of the Data Protection Act 2018 ("The 2018 Act"), as any disclosures of the pursuer's personal data were made in connection with legal proceedings and for the purposes of defending legal rights.

The Pursuer's Case

[4] The material facts as averred are as follows: the pursuer's contract of employment with the defender was terminated on 31 December 2019. Following this, the defender used his personal data while defending itself in employment tribunal proceedings which were raised against it by Mr Adamson, based on breaches of Sections 15 and 26 of the Equality Act 2010. The pursuer had been Mr Adamson's line manager. Prior to the end of the pursuer's employment Mr Adamson had made a number of complaints about the pursuer, including an allegation that he had been subject to a number of jokes by one of the pursuer's friends, who was visiting him at the defender's premises. In the employment tribunal proceedings Mr Adamson made allegations about the behaviour of the pursuer and other members of staff. He claimed that the pursuer had used derogatory language which referred to his disability.

[5] After three days of evidence and two deliberation days Mr Adamson's claim succeeded and he was awarded £9,500. In the written decision of the tribunal, the pursuer is referred to on 162 separate occasions.

[6] On 22 March 2022 the decision was reported in an Article on The Sun's website, entitled "VILE JIBE: Disabled Scots janitor wins £10k in compensation after colleague called him a f****** retard." The pursuer is named in the Article on six occasions. In particular, the Article notes that "Connor started working nightshifts as a facilities assistant in March 2019 but suffered at the hands of ex general manager Courtney Riley and his friends." The Article remains available to be read online.

[7] The pursuer avers that the defender processed his personal data while defending the employment tribunal proceedings. He contends that the defender should have told him

about the employment tribunal proceedings, provided him with copies of the tribunal bundles, asked him to comment on the allegations that had been made against him and invited him to provide a witness statement to be put to the employment tribunal. The pursuer's position is that the defender's failure to take these steps constituted a breach of its duty to process his personal data fairly and transparently, in terms of Article 5(1)(a). It also amounted to a breach of the requirement not to process data in a way that is incompatible with the purpose for which it was collected, in terms of Article 5(1)(b).

[8] The pursuer sues for £75,000. He advances a claim for distress and anxiety. He also avers that his employment prospects have been impacted.

The Issues

[9] Counsel for both parties furnished me with detailed written submissions, which they supplemented with attractively presented oral presentations at the hearing. I am grateful to them for their assistance.

[10] The principal issue that was argued at debate was whether the defender was exempted from its duty to comply with the two provisions on which the pursuer's claim is based, Article 5(1)(a) and Article 5(1)(b). Paragraph 5(3) of Schedule 2 of the 2018 Act provides that in certain circumstances relating to legal proceedings data controllers are exempted from complying with a number of data protection principles, known as "the listed GDPR provisions." It is in the following terms:

> "The listed GDPR provisions do not apply to personal data where disclosure of the data—
>
> (a) is necessary for the purpose of, or in connection with, legal proceedings (including prospective legal proceedings),
>
> (b) is necessary for the purpose of obtaining legal advice, or

> (c) is otherwise necessary for the purposes of establishing, exercising or defending legal rights,
>
> to the extent that the application of those provisions would prevent the controller from making the disclosure."

[11] The listed GDPR provisions are specified in Paragraph 1 of Schedule 2 of the 2018 Act. Among them are Article 5(1)(a) and Article 5(1)(b). These are as follows:

> **"Article 5 Principles relating to processing of personal data**
>
> 1. Personal data shall be:
>
> (a) processed lawfully, fairly and in a transparent manner in relation to the data subject ('lawfulness, fairness and transparency');
>
> (b) collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes; further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes shall, in accordance with Article 89(1), not be considered to be incompatible with the initial purposes ('purpose limitation')."

[12] The debate centred on the closing words of Paragraph 5(3) of Schedule 2, which state that the listed GDPR provisions do not apply:

> "to the extent that the application of those provisions would prevent the controller from making the disclosure."

[13] What is the meaning of these words and how, if at all, do they qualify the exemption? Is their effect that the data controller must attempt to apply the listed GDPR provisions *before* seeking to rely on the exemption? This was the pursuer's position. Alternatively, is the data controller exempted from even attempting to apply the listed GDPR provisions? This was the defender's position. This was the core issue in dispute.

[14] In addition, both parties submitted that their opponents' averments regarding causation were irrelevant; and the defender challenged the pursuer's averments in relation to the data involved and as regards quantum, as lacking in specification.

[15] I deal with each of these arguments separately, below.

Exemption for disclosures in connection with legal proceedings

Submission for Defender

[16] Counsel for the defender submitted that Paragraph 5(3) of Schedule 2 of the 2018 Act exempted the defender from having to comply with the requirements of Article 5(1)(a) and Article 5(1)(b) of UK GDPR. In particular, he relied on Paragraph 5(3)(a) of Schedule 2 which provides an exemption from compliance where a disclosure is necessary for the purpose of, or in connection with, legal proceedings; and on Paragraph 5(3)(c) which exempts a controller where a disclosure is necessary for the purposes of establishing, exercising or defending legal rights.

[17] Counsel identified the core issue as being the meaning of the phrase that appears at the end of Paragraph 5(3) (to which I referred earlier): "to the extent that the application of those provisions would prevent the controller from making the disclosure." Counsel advised me that the meaning of this phrase has never been considered by a UK court; and that there is no specific guidance on the point. Counsel submitted that the phrase does not mean that a controller must demonstrate that it is impossible to comply with the listed GDPR provisions in order to rely on the exemption.

[18] Insofar as Article 5(1)(a) was concerned, the pursuer's case was that the defender could only process his data if it fulfilled the requirement of fairness, which meant taking the various steps specified in his averments. But counsel for the defender submitted that the effect of Paragraph 5(3) of Schedule 2 is that there is no need for data to be processed in accordance with the normal principles, including fairness. If the defender was required to comply with Article 5(1)(a) then the statutory exemption served no purpose.

[19] Counsel alighted on the words "the disclosure," within the closing phrase of Paragraph 5(3) of Schedule 2. He argued that if the defender was required to take the steps that the pursuer proposed, it would not be making the disclosure that it had intended to make, but an alternative disclosure that now included additional documentation, notably a witness statement for the pursuer. In other words, if the defender had applied Article 5(1)(a) as argued for by the pursuer, the consequence would have been "to prevent the controller (i.e. the defender) from making the disclosure."

[20] Turning to Article 5(1)(b), counsel submitted that as the provision requires that data should only be processed for the purpose for which it had been collected, it would inevitably serve to prevent disclosure for the purposes of litigation in the absence of the exemption provided by Paragraph 5(3) of Schedule 2.

[21] In contrast to Article 5(1)(a) and Article 5(1)(b) there were other listed GDPR provisions, compliance with which would not prevent disclosure in legal proceedings – for example, Article 16 of UK GDPR, which provides a right to rectification. Counsel submitted that the closing words of Paragraph 5(3) of Schedule 2 are directed to provisions such as these, rather than to Article 5(1)(a) and Article 5(1)(b).

[22] Counsel explained that the exemption contained in Paragraph 5(3) of Schedule 2 had been foreshadowed by Section 35 of the Data Protection Act 1998 ("the 1998 Act"), which contained a similar exemption. The exemption under the 1998 Act was similar in its scope and effects to Paragraph 5(3), although the two provisions are not identically worded.

[23] Counsel next addressed the broader potential consequences of requiring a controller to take steps such as those identified by the pursuer. He submitted that a feature of the adversarial process is that parties to a litigation are entitled to choose whom to call as witnesses. A party might elect not to call a particular witness for any number of reasons,

including its assessment of the credibility and reliability of the witness. In a case involving vicarious liability for the actions of an alleged wrongdoer, a defender is not obliged to call the wrongdoer. Where the court makes findings about the conduct of a non-party who was not called as a witness, it is open to the judge to consider anonymising the individual if the judgment is to be published. Thus, in *Oil States Industries (UK) Limited* v *"S" Limited and Others* 2022 SLT 919, which concerned allegations that bribes were given as part of the procurement of a building contract, Lord Braid considered exercising his discretion to anonymise individuals who had not been called as witnesses, although ultimately he decided not to do so. By contrast, the court anonymised individuals who were not called as witnesses in *Billy Graham Evangelistic Association* v *Scottish Event Campus Limited* [2022].

[24] Counsel reminded me that in civil proceedings if a witness says something that may be defamatory, the law of privilege applies. The witness cannot, therefore, be sued for defamation. The purpose of this is to allow witnesses to speak freely in court. By contrast, if the pursuer's interpretation of the 2018 Act and UK GDPR was correct, it would follow that witnesses would have to watch what they said in court for fear of facing a claim for breaching their duties under the legislation.

[25] Counsel submitted that to place a litigant under an obligation to take steps such as lodging a witness statement, would be to restrict its discretion to conduct the litigation as it deemed appropriate. But the 2018 Act does not operate in this way. Paragraph 5(3) of Schedule 2 provides a wide exemption to data protection principles for the purposes of litigation, consistently with a party's right to a fair trial as per Article 6 of the European Convention of Human Rights (ECHR): *Dunn* v *Durham County Council [2013] 1 WLR 2305.* The court's discretionary power to anonymise judgments affords appropriate protection of a non-party's right to privacy or confidentiality in terms of Article 8 of ECHR.

[26] Turning to two points raised by the pursuer, counsel accepted the validity of the criticisms that were of made of his averments anent the vital interests ground of lawfulness. But this was academic as the pursuer had conceded that the processing of his data was lawful on a different basis (see paragraph [31], below). Counsel also took no issue with the pursuer's submissions regarding the interpretation of "fairness" which I have recorded at Paragraphs [32] – [36], but he submitted that this was also academic as Article 5(1)(a) does not apply by virtue of the exemption.

Submission for Pursuer

[27] Counsel for the pursuer began by adopting his Note of Argument and Written Submission in full.

[28] Counsel submitted that the exemption only bites if the controller cannot otherwise comply with the listed GDPR provisions. The correct reading of the contentious phrase at the end of paragraph 5(3) of Schedule 2 is that the controller must be able to demonstrate that it could not comply with these before seeking to rely on the exemption. While the defender's position was that it was exempted from complying with Article 5(1)(a) and Article 5(1)(b), the pursuer contended that the legislation provides for a two-stage process by which one must first attempt to apply these provisions, only relying on the exemption if their application would prevent disclosure of the data.

[29] Counsel contrasted Paragraph 5(3) of Schedule 2 of the 2018 Act with the exemption contained in the predecessor legislation, Section 35 of the 1998 Act. He submitted that the wording and effects of the two provisions are materially different: Section 35 provided a general and unqualified exemption whereas under Paragraph 5(3) a controller must show that it would have been prevented from making the disclosure if it had to comply with the

Article 5 principles. Counsel submitted that as the defender has failed to aver why compliance with Article 5(1)(a) and Article 5(1)(b) would have prevented the disclosure, its case is irrelevant.

[30] In answer to the defender's submission regarding privilege in civil proceedings (see paragraph [24], above), counsel for the pursuer referred me to *Dawson-Damer and Others* v *Taylor Wessing LLp and Others* [2020] EWCA Civ 352. He had not anticipated relying on this authority, but he helpfully provided the court with a copy shortly after the hearing. Having considered *Dawson-Damer,* I note that it is concerned with the legal professional privilege exception provided by Paragraph 10 to Schedule 7 of the 1998 Act; and relates to data held by solicitors on behalf of a trustee. It seems to have no obvious bearing on the submission advanced by the defender, which concerned the operation of privilege in the different context of statements made by witnesses while giving evidence in court.

[31] Insofar as the principle of lawfulness, fairness and transparency provided for by Article 5(1)(a) was concerned, counsel accepted that the disclosure had been lawful as it was made in the context of the defender's involvement in the tribunal proceedings. He did, however, take issue with the defender's reliance on the vital interest ground as a lawful basis for processing (as averred at answer 9), as this is only available where there is no other lawful ground for processing; and the test for vital interests is that the disclosure is essential for the life of the data subject or that of another natural person. Accordingly, counsel submitted the defender's averments regarding vital interests are plainly irrelevant.

[32] Counsel submitted that while the defender had a lawful basis for processing, it breached the requirements of fairness and transparency. Counsel explained that in this context the term lawfulness refers to the lawful processing of data under the legislation (as per Article 6 and Article 10 of UK GDPR): it does not mean lawfulness in a broader sense,

which would encompass fairness. It followed that lawfulness and fairness are distinct concepts and that it is possible for a disclosure to be lawful but unfair.

[33] Counsel provided detailed written submissions regarding how the term fairness should be interpreted in the context of Article 5(1)(a). He submitted that the text of UK GDPR does not provide assistance. Similarly, the 2018 Act does not include provisions to guide the court with the assessment of fairness, in contrast to its predecessor, the 1998 Act. In addition, there are no authorities that deal with the meaning of fairness within Article 5(1)(a). However, Counsel submitted that when interpreting fairness, the court must ensure the fundamental right of the individual to protection in relation to the processing of personal data under retained EU law. He explained that UK GDPR is retained EU law, as defined by Section 6(7) of the EU Law (European Union (Withdrawal) Act 2018 ("the EU 2018 Act").

[34] This means that insofar as it remains unmodified it must be interpreted in accordance with retained case law and any retained general principles of EU law, as per Section 6(3)(a) of the EU 2018 Act. Counsel further submitted that the protection of the fundamental rights of the individual is a general principle of EU law: *Stauder* v *City of Ulm* 1970 CMLR 112. Counsel highlighted that the first Recital to UK GDPR states that "the protection of natural persons in relation to the processing of personal data is a fundamental right." The Recital then goes on to cite the Charter of Fundamental Rights of the European Union, which counsel acknowledged has ceased to apply in the UK, by virtue of Section 5(4) of the EU 2018 Act. But counsel submitted that the fundamental right to protection in relation to processing exists irrespective of the Charter. Counsel also made reference to the right to a private and family life, provided by Article 8 of ECHR; and to Section 6 of the Human Rights Act 1998, which prevents a public authority (including the employment

tribunal and this court) from acting in a way that is incompatible with a person's convention rights.

[35] Against this background, counsel submitted that fairness is a highly fact-sensitive issue and that what a controller is required to do to comply depends on the circumstances of the case. While this introduces a degree of difficulty for controllers it is not inconsistent with the way in which the statutory scheme operates in general: for example, when determining whether a disclosure is lawful, a controller has to assess the factual matrix before it. In legal proceedings, the demands of fairness might differ depending on whether the personal data is the essence of what is before the tribunal or whether the disclosure involves an inconsequential reference to an individual's personal data. By way of illustration, counsel suggested that the references to Mr Adamson in these proceedings are so inconsequential that there would not necessarily be any need to inform him of them. What steps require to be taken depend on the facts of the case.

[36] Applying that approach to the present action, counsel submitted that if the court held that the requirement for the defender to lodge a witness statement was a step too far, the simple fact that the pursuer had not been told that his personal data was being processed for the purposes of the tribunal proceedings might amount to a breach of Article 5(1)(a). In his written submission, counsel argued that whether the defender has breached Article 5(1)(a) is a question of fact to be determined at proof.

[37] Turning to the purpose limitation principle provided for by Article 5(1)(b), counsel explained that he did not contend that disclosure of the pursuer's personal data breached the principle because it was incompatible with the purpose for which it had been collected. Instead, he relied on Recital 61 to UK GDPR, which provides that where data is to be disclosed for a reason other than that for which it was collected the data subject should be

informed. Accordingly, the defender should have told the pursuer that his data had been disclosed to the employment tribunal. Counsel submitted that in addition to constituting a breach of Article 5(1)(b) this feeds into the pursuer's case based on fairness and transparency in terms of Article 5(1)(a).

Discussion

Non-contentious issues

[38] Before turning to the operation of the exemption, it is worth highlighting that three related matters are not in issue.

Lawfulness of processing

[39] Firstly, the pursuer conceded that the defender's processing of his personal data was lawful for the purposes of Article 5(1)(a), as I have recorded above. He maintained his position that the vital interests ground could not form a lawful basis for the processing, but as he accepted that the processing was lawful on a different basis this is academic; and the defender's averments regarding vital interests at answer 9 are simply otiose. Accordingly, the pursuer's case under Article 5(1)(a) is confined to the contention that the processing was not fair and transparent; and throughout this opinion I refer to the principle of "fairness and transparency" while omitting the word lawfulness.

Fairness and transparency of processing

[40] The second point concerns the steps that the pursuer avers the defender should have taken in order to comply with the requirements of fairness and transparency. It should be emphasised that the issue at debate was not whether the defender actually required to take

these steps to avoid breaching Article 5(1)(a), but whether Paragraph 5(3) of Schedule 2 exempted the defender from having to comply with Article 5(1)(a) in the first place. As I have recorded above, counsel for the pursuer made submissions regarding the meaning of fairness, in light of the pursuer's fundamental right to protection of his personal data under retained EU law and his right to a private and family life, in terms of Article 8 of ECHR (see paragraphs [32] – [36]). Counsel for the defender indicated that no issue was taken with this interpretation of fairness and I am therefore prepared to accept the pursuer's submissions on this point for present purposes. But the pursuer's ultimate position was that the question of whether the defender's conduct breached the fairness and transparency limbs of Article 5(1)(a) is a matter of fact to be determined at proof (written submission, para 21). Accordingly, this is not an issue that I am invited to decide at debate.

[41] I would add only that while the discussion below features repeated references to the practical effects of applying the principle of fairness and transparency where data is to be processed in connection with litigation, this is in the context of exploring the purpose and scope of the exemption. I express no opinion on what the defender should in fact have done in order to comply with the principle of fairness and transparency, as this is not the issue before me.

Actions falling within the definition of processing

[42] The third point concerns the definition of "processing" data. The pursuer's case is that in order to process his data in such a way as to comply with Article 5(1)(a) and Article 5(1)(b) the defender ought to have taken various steps, including showing him the tribunal papers, taking a witness statement from him and lodging it with the tribunal. At the debate I asked counsel for the pursuer whether taking action of this kind would fall

within the definition of processing data. He replied that Article 4 of UK GDPR defines processing in terms that are sufficiently wide to encompass steps such as these, as it includes "any operation or set of operations which is performed on personal data … such as … adaptation or alteration, dissemination or otherwise making available." No submission to the contrary was advanced on the defender's behalf. In view of the breadth of this definition I proceed on the basis that all of the steps that the pursuer contends should have been taken would fall within its terms.

The rationale for the exemption

[43] The rationale for the exemption contained in Paragraph 5(3) of Schedule 2 appears to be that a party's duties as a data controller should not fetter its discretion to conduct litigation as it sees fit in pursuance of the vindication of its legal rights, or impinge on its right to a fair trial in terms of Article 6 of ECHR. It is because of the potential for tension to arise between these considerations that the exemption is necessary.

[44] This was made clear in the English case of *Dunn* v *Durham County Council [2013] 1 WLR 2305*, in which the Court of Appeal explored the purpose and ambit of the equivalent statutory exemption under the 1998 Act, together with the competing interests of litigants and those of non-parties whose personal data may be processed for the purposes of litigation. In *Dunn* a party sought to avoid having to comply with standard disclosure requirements under the CPR, on the basis that to do so would be to breach its duties under the 1998 Act. At paragraph 21 Kay LJ said:

> "In my judgment, it is misleading to refer to a duty to protect data as if it were a category of exemption from disclosure or inspection. The true position is that CPR31, read as a whole, enables and requires the court to excuse disclosure or inspection on public interest grounds. In a case such as the present one, it may be misleading to describe the issue as one of public interest immunity (a point to which

> I shall return). The requisite balancing exercise is between, on the one hand, a party's right to a fair trial at common law and pursuant to Article 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) and, on the other hand, the rights of his opponent or a non-party to privacy or confidentiality which may most conveniently be protected through the lens of Article 8. It is a distraction to start with the DPA, as the Act itself acknowledges. Section 35 exempts a data controller from the non-disclosure provisions where disclosure is required in the context of litigation. In effect, it leaves it to the court to determine the issue by the application of the appropriate balancing exercise under the umbrella of the CPR, whereupon the court's decision impacts upon the operation of disclosure under the DPA."

[45] While Kay LJ was concerned with the operation of the CPR, as counsel for the defender submitted, his observations are of broader application: he interprets the exemption for the purposes of litigation under the 1998 Act as being widely drawn and holds that the rights of a non-party fall to be protected via Article 8 of ECHR rather than with reference to the provisions of the 1998 Act.

[46] Is the scope of the exemption under the 2018 Act narrower than under the 1998 Act? The parties were divided on this point. Section 35 of the 1998 Act is in the following terms:

> **"35.— Disclosures required by law or made in connection with legal proceedings etc.**
>
> (1) Personal data are exempt from the non-disclosure provisions where the disclosure is required by or under any enactment, by any rule of law or by the order of a court.
>
> (2) Personal data are exempt from the non-disclosure provisions where the disclosure is necessary—
>
> (a) for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings), or
>
> (b) for the purpose of obtaining legal advice,
> or is otherwise necessary for the purposes of establishing, exercising or defending legal rights."

It is similarly worded to Paragraph 5(3) of Schedule 2 of the 2018 Act, but it does not include the qualification that a controller is exempted from complying with the listed GDPR provisions only to the extent that their application would prevent the disclosure from being

made. However, Section 27(3) defines the term "the non-disclosure provisions" as meaning various specified provisions "to the extent to which they are inconsistent with the disclosure in question." Counsel for the defender submitted that these words introduced an equivalent qualification to that contained within Paragraph 5(3) of Schedule 2. Conversely, counsel for the pursuer argued that the words "are inconsistent with" were not as strong as the words "would prevent." He maintained that the exemption under the 2018 Act is qualified, whereas the previous exemption contained in the 1998 Act was not.

[47] In my opinion, the submissions of counsel for the defender are to be preferred. To ask if a disclosure is "inconsistent" with a provision is really to ask whether the application of that provision "would prevent" the disclosure from being made. In other words, the requirements placed on a controller by Sections 35 and 27(3) of the 1998 Act and Paragraph 5(3) of Schedule 2 of the 2018 Act are similar in substance. I will return to the wording of the legislation shortly, but at this stage I observe that as there is no material difference between the relevant provisions of the 1998 Act and its successor, the passage from *Dunn* regarding the wide scope of the exemption, to which I have referred above, is applicable to the 2018 Act.

[48] The potential identified in *Dunn* for a litigant's duties as a data controller to encroach upon its right to a fair trial is apparent from the pursuer's case in the present action. The pursuer avers that in fulfilment of the principle of fairness and transparency under Article 5(1)(a) of the 2018 Act the defender should have invited him to comment on the allegations that related to him and taken a witness statement from him to be lodged. The problem with requiring the defender to take these steps is that this would have undercut its discretion as a litigant to prepare and present its case as it deemed fit. The right of a party to a litigation to do so is a central tenet of an adversarial system, which in turn is a vital

characteristic of a fair hearing: *Avotins* v *Latvia [GC]*, no. 17502/07, (2017) 64 EHRR 2 119; Murdoch *A Guide to Human Rights Law in Scotland* para 5.106. In an adversarial system each party enjoys the right to choose whom to call as witnesses; and may decide not to cite a potential witness if, for example, there is a concern that the witness might be found not to be credible or reliable. This is as true of a case involving vicarious liability for the alleged actions of a non-party as of any other case: the defender is under no obligation to call the alleged wrongdoer as a witness. In some circumstances the court may draw an adverse inference from a defender's failure to do so, depending on the context and particular circumstances: *Oil States Industries (UK) Limited* v *"S" Limited and Others* 2022 SLT 919 (paragraphs 79 – 81); *Royal Mail Group Ltd* v *Efobi* [2021] 1 WLR 3863 (paragraph 41). But this is a risk that the defender is entitled to take.

[49] To require a party take steps such as the lodging of a witness statement of a particular individual pursuant to its duties as a data controller would mark a significant departure from the adversarial process as it is generally understood to operate, with potentially far reaching consequences. For example, what if the witness statement turned out to be unsupportive of the party's position? Presumably the party would be confronted with the unenviable choice of either lodging unhelpful evidence or breaching its duty under Article 5(1)(a). Another scenario that counsel for the defender presented was that while a pursuer would be free to lead evidence of the conduct of an alleged wrongdoer, the defender might be constrained when responding, for fear of facing a potential claim under Article 5(1)(a). This contrasts with the normal position under which witnesses may speak freely in court, by virtue of the law of privilege. The result would be to place the defender at a disadvantage at proof, infringing the principle of equality of arms between parties.

[50] This second scenario reveals a fundamental difficulty with attempting to apply Article 5(1)(a) in the context of litigation: irrespective of what particular steps might be identified as being necessary in the interests of fairness and transparency, the *process* of seeking to apply the principle is liable to fetter a party's conduct of the litigation. Counsel for the pursuer submitted that when data is to be disclosed in the context of litigation the data controller must undertake a two-stage process, first assessing what the requirements of fairness and transparency demand in the circumstances and only seeking to rely on the exemption if those steps would prevent disclosure. He described this as an inherently fact-sensitive exercise. But in practice requiring a party to go through an evaluative process of this kind (which might then be challenged by the data subject in a separate action, as in the present case), would have the potential to inhibit a party's conduct of the litigation. It is not hard to imagine the looming spectre of a possible claim for a breach of Article 5(1)(a) interfering with the sort of tactical decisions that a litigant will usually take at the point of lodging productions and citing witnesses. It is not consistent with the right to a fair trial that a party should have to look in two directions in this way. In my opinion, it is precisely this tension between data protection requirements and the demands of litigation that the exemption is intended to address. It follows that the two-stage process that the pursuer proposes would defeat the purpose of the exemption.

Interpretation and application of Paragraph 5(3) of Schedule 2

Interpretation

[51] I turn now to the wording of Paragraph 5(3) of Schedule 2 and, in particular, to the question of how its closing phrase is to be interpreted.

[52] In his submissions, counsel for the defender placed emphasis on the words "the disclosure" at the end of the closing phrase. His point was that if the defender required to consider adding additional witness statements to the material to be produced, as the pursuer contends, "the disclosure" would have been prevented from being disclosed - at least in its original form - as an amended disclosure would have been substituted for it.

[53] It seems to me that this submission is well founded and that its logic is capable of being applied not just to the paragraph's final line, but to its structure and language more generally. The main body of paragraph 5(3) provides that the listed GDPR provisions do not apply to personal data where the disclosure of the data "is necessary" for the purposes of litigation. This wording seems to contemplate a situation in which personal data has been identified to be disclosed and the disclosure of that specific data is necessary. If one interprets the final line of the paragraph with this in mind, the words "the disclosure" take on the meaning that counsel for the defender suggested; and where the application of a listed GDPR provision would result in a change to the content of the disclosure it should not be applied. This is because otherwise the effect would be to prevent a necessary disclosure from being made in its intended form.

Application of the exemption to Article 5(1)(a)

[54] As I have explained above, as soon as a data controller is tasked with attempting to apply Article 5(1)(a) the potential arises for a disclosure that would otherwise have been deemed necessary for the purposes of the litigation to be prevented. The risk of facing a claim made by a data subject based on an alleged breach of Article 5(1)(a) is apt to influence the material that a data controller may be prepared to risk placing before the court in any litigation to which it is a party. This is particularly so given the uncertainty that would

accompany having to work out what steps might have to be taken in fulfilment of the principle of fairness and transparency in the particular circumstances of each individual case. This is brought into sharp focus by the idea that a data controller might have to go as far as to take a witness statement from a data subject and lodge it. It was, of course, submitted on the pursuer's behalf that his claim might ultimately succeed on the narrower basis that the defender ought to have informed him that his data was to be used. But the point is that requiring a litigant to undertake the process of identifying what action is necessary creates the mischief in itself, regardless of what steps are ultimately identified and how limited (or extensive) they might turn out to be.

[55] In my opinion, given this scope for the process of applying Article 5(1)(a) to restrict or prevent the content of disclosures, Paragraph 5(3) of Schedule 2 exempts a data controller from complying with it. This interpretation is consistent with the purpose of the exemption, which is to ensure that a litigant's duties as a data controller do not impinge on its right to a fair trial.

Application of the exemption to Article 5(1)(b)

[56] The operation of the exemption in relation to Article 5(1)(b) is more straightforward. Under the purpose limitation principle for which Article 5(1)(b) provides, data must not be processed in a manner that is incompatible with the purpose for which it was collected. As counsel for the defender submitted, either disclosing data in connection with a litigation is compatible with the purpose for which it was collected, in which case there is no breach of the duty, or it is incompatible, in which case the exemption applies. Neither of these scenarios leaves any room for a claim to be brought by a data subject under Article 5(1)(b) when his data is disclosed in connection with litigation.

[57] Counsel for the pursuer submitted that the defender was under a duty to inform the pursuer that his data was to be used for the purposes of the tribunal proceedings, in terms of Article 5(1)(b). He contended that this duty to inform also fed into the defender's duty to act in a fair and transparent manner under Article 5(1)(a). In support of this submission, counsel referred me to Recital 61 of UK GDPR, which provides:

> "Where personal data can be legitimately disclosed to another recipient, the data subject should be informed when the personal data are first disclosed to the recipient. Where the controller intends to process the personal data are first to be disclosed to the recipient. Where the controller intends to process the personal data for a purpose other than that for which they were collected, the controller should provide the data subject prior to that further processing with information on that other purpose and other necessary information."

The problem with this submission is that, notwithstanding the terms of Recital 61, Article 5(1)(b) says nothing about informing data subjects or providing them with additional information. The defender might be subject to the duty contended for in terms of another of the listed GDPR provisions, Article 13(3), but the pursuer did not rely on this and I heard no submissions on the operation of the exemption in relation to Article 13(3). In my view, instead of incorporating an independent duty to inform into the terms of Article 5(1)(b), Recital 61 effectively indicates that other relevant provisions, in particular Article 13(3) and Article 5(1)(a), are applicable where data is to be disclosed for a purpose other than that for which it was collected. But the pursuer does not plead a case based on the first of these provisions, as I have said, and I have held that the defender is exempt from having to comply with the second. In these circumstances, the pursuer does not aver a relevant case under Article 5(1)(b), in my view.

Protection of data subjects

[58] If a data subject is not entitled to rely on Article 5(1)(a) and Article 5(1)(b) when the disclosure of his personal data in connection with litigation is in prospect, what protection is available to him? In *Dunn* the Court of Appeal held that the right of a non-party to privacy or confidentiality is most conveniently protected through the lens of Article 8 of ECHR. I accept the submission of counsel for the defender that the appropriate procedural mechanism for ensuring the protection to a data subject's Article 8 rights lies in the discretion of courts and tribunals to anonymise judgments. The power to anonymise is exercised sparingly, as it involves interfering with the open justice principle, which the Inner House recently described as the cornerstone of the legal system: *BBC* v *Chair of the Scottish Child Abuse Inquiry* 2022 SLT 385 (paragraph [44]). Nonetheless, it is a power that the courts hold. I was referred to two recent examples of the Scottish courts giving consideration to anonymising a judgment to protect the interests of a non-party: *Oil States Industries (UK) Limited* v *"S" Limited and Others* 2022 SLT 919 and *Billy Graham Evangelistic Association* v *Scottish Event Campus Limited* [2022].

[59] The employment tribunal has a similar power. Rule 50 of the employment tribunal rules empowers the employment tribunal to anonymise judgments; and non-parties are entitled to apply for a judgment to be anonymised. It is also competent for a judgment to be anonymised after it has been published on the HMCTS website: *X* v *Y* [2021] ICR 147; *TYU* v *ILA Spa Limited* [2022] ICR 287.

[60] As a matter of practice, therefore, the power of the court (or tribunal) to anonymise a judgment appears to be the procedural means by which the right of a data subject to privacy and confidentiality may be afforded appropriate protection.

Conclusion

[61] As the pursuer's case is based on Article 5(1)(a) and Article 5(1)(b), and as I have held that the effect of Paragraph 5(3) of Schedule 2 is to exempt the defender from having to comply with these provisions, it follows that the pursuer's case is irrelevant.

[62] Before I leave this issue, it is worth highlighting two points. Firstly, the parties were agreed that the exemption is generally understood to excuse a data controller from having to comply with Article 5(1)(a) and Article 5(1)(b); and counsel for the pursuer very fairly acknowledged that a decision in the pursuer's favour would have potentially far reaching consequences. It would seem, therefore, that the interpretation of the legislation that I have accepted accords with the general understanding of its meaning and application within the legal profession.

[63] Secondly, the pursuer's position was in part premised on the notion that the 2018 Act differs from its predecessor – i.e. whereas previously the exemption was absolute, the enactment of the new legislation heralded the introduction of the two-stage process suggested by the pursuer. But at the risk of repetition, in my view there is no material difference between the exemptions contained in the 1998 Act and the 2018 Act.

Averments regarding the personal data involved

[64] Counsel for the defender submitted that the pursuer fails to specify which of his personal data was involved in the alleged breaches on the part of the defender. Conversely, counsel for the pursuer argued that sufficient notice of the personal data involved was given at Article 9 of condescendence.

[65] Looking at Article 9, the material averments are as follows:

> "To progress and defend the Tribunal proceedings, the defender had to process the pursuer's personal data. Pleadings were drafted, damaging allegations were made about the pursuer, and were responded to, or were not responded to as the case may be, without the pursuer's knowledge. Documents referring to the pursuer were produced in evidence without his knowledge."

In my view there is merit in the defender's criticism of these averments. They set out, in very general terms, the use to which the pursuer's data is alleged to have been put; but beyond a fleeting reference to unspecified "documents" in the final sentence, there are no averments that define the content of the personal data involved. As the pursuer does not offer to prove what personal data was processed, it is difficult to see how he can establish either that the defender breached its duties or that he suffered any damage as a result. Accordingly, I consider that the pursuer's averments regarding the personal data alleged to have been processed are so lacking in specification as to be irrelevant.

Causation

[66] Both parties challenged the relevancy of their opponent's averments regarding causation. In part, the arguments revolved around the correct construction to be placed upon Article 82 of UK GDPR, which makes provision for liability for infringements of UK GDPR and for a right to compensation. It may be helpful to consider the parties' competing positions on this issue before turning to the pleadings.

Article 82 of UK GDPR

[67] Insofar as relevant for present purposes, Article 82 is in the following terms:

> 1. Any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered.

2. Any controller involved in processing shall be liable for the damage caused by processing which infringes this Regulation. A processor shall be liable for the damage caused by processing only where it has not complied with obligations of this Regulation specifically directed to processors or where it has acted outside or contrary to lawful instructions of the controller.

3. A controller or processor shall be exempt from liability under paragraph 2 if it proves that it is not in any way responsible for the event giving rise to the damage.

Submissions

[68] Counsel for the defender highlighted that Article 82(1) provides a right to compensation where a pursuer establishes that he or she "has suffered material or non-material damage *as a result* of an infringement of this Regulation" (my italics). The effect of the words "as a result of" is that the pursuer must prove both that there has been an infringement and that this has caused the pursuer damage.

[69] Counsel for the defender then referred me to Article 82(3) which exempts a controller or processor from liability "if it proves that it is not in any way responsible for the event giving rise to the damage." He submitted that Article 82(3) does not have the effect of removing the initial requirement for a pursuer to prove causation under Article 82(1). In light of this, I asked counsel what the effect of Article 82(3) is; and, in particular, whether its purpose is to cater for the occurrence of a *novus actus interveniens.* He agreed that this is its purpose.

[70] Conversely, counsel for the pursuer submitted that the effect of Article 82 is to impose something close to strict liability after a pursuer has established that the defender

has infringed the regulation. At the point of applying Article 82(1) the court should focus narrowly on the conduct of the defender, rather than having regard to extraneous factors. Thereafter, if a defender wishes to escape liability by pointing to some other cause of damage suffered by the pursuer, it must satisfy the requirements of Article 82(3). For completeness, counsel for the pursuer explained that the effect of Articles 82(4), (5) and (6) (which I have found it unnecessary to reproduce here) is to impose joint and several liability and to provide a right of relief where more than one controller or processor is involved in an infringement. Counsel for the pursuer also explained the meaning of the terms "non-material damage" and "material damage". He submitted that "non-material damage" means distress and anxiety, while "material damage" covers all other forms of loss.

[71] Neither party referred me to any authority as regards the interpretation of Article 82.

Interpretation of Article 82

[72] Articles 82(1), 82(2) and 82(3) appear to fit together as a coherent framework, which falls to be applied sequentially.

[73] First, Article 82(1) provides a right to compensation where a person has suffered damage as a result of an infringement of UK GDPR. It is apparent from the wording of the provision that a pursuer seeking to establish liability under its terms must prove: (1) that there has been an infringement; (2) that the pursuer has suffered material or non-material damage; and - critically, for current purposes - (3) that the damage has occurred "as a result of" the infringement. Self-evidently, this third element is the causal nexus between (1) and (2).

[74] Second, Article 82(2) follows on logically from Article 82(1), as it imposes liability on *inter alia* controllers who are involved in processing "for the damage *caused* by processing

which infringes this Regulation" (my italics). Accordingly, Article 82(2) replicates the three elements that are contained within Article 82(1) – i.e. an infringement of UK GDPR via processing, the eventuation of damage and a causal link between the two. Once again, it is apparent that causation is essential to the establishment of liability. It will be noticed that Article 82(1) and Article 82(2) differ slightly in their wording: under Article 82(1) the court is tasked with asking whether the damage occurred "as a result of" an infringement. By contrast, under Article 82(2) the question is whether the damage was "caused by" processing which infringes UK GDPR. Given that Articles 82(1) and 82(2) appear to dovetail with each other, it seems unlikely that anything is to be taken from this difference in phrasing. Both require a pursuer to prove causation.

[75] I can see no basis in either form of words for the suggestion that the court must focus solely on the conduct of the defender when considering causation under these provisions, as the pursuer contended. A more obvious reading of Article 82(1) and Article 82(2) may be that under both the court must assess whether the infringement is a factual cause of the damage, by asking whether the damage would have occurred but for the infringement, or whether the infringement materially contributed to the damage. If correct, this approach involves evaluating other possible causes of damage, instead of focussing narrowly on the conduct of the defender.

[76] Third, this interpretation of Articles 82(1) and 82(2) ties in with Article 82(3), which exempts a controller (or processor) from liability "if it proves that it is not in any way responsible for the event giving rise to the damage". The term "event" contrasts with the references to infringements of the regulation that are contained in Article 82(1) and Article 82(2) and appears to imply an intervening occurrence of some other kind that breaks

the causal chain. At this stage the defender faces the onerous challenge of establishing that he or she is "not in any way responsible" for the event that has given rise to the damage.

[77] Reading Article 82(1), Article 82(2) and Article 82(3) together, therefore, I think that in the first instance it is for a pursuer to prove causation under Article 82(1) and Article 82(2), having regard not just to the conduct of the defender, but to all of the material circumstances. If the pursuer succeeds in doing so, the onus passes to the defender to establish a break in the causal chain in the form of an intervening event that has given rise to the damage, for which the defender is in no way responsible, in terms of Article 82(3).

The pleadings

Submissions

[78] Turning to the pleadings, counsel for the defender made two related criticisms of the pursuer's case in relation to causation: firstly, on the pursuer's averments, Mr Adamson advanced the allegations relating to the pursuer in the tribunal proceedings, from which it followed that they would have been placed in the public domain irrespective of whether the defender had processed the pursuer's data. Secondly, the pursuer's case is that the defender should have taken various steps in the course of processing his data, rather than that it should not have processed his data in the first place. Once again, therefore, the pursuer's data would have been processed and placed before the employment tribunal anyway.

[79] Counsel for the pursuer's submissions were based on his interpretation of Article 82, which I have summarised above. He argued that the court must focus on the conduct of the defender, in terms of Article 82(1). Accordingly, the actions of Mr Adamson are irrelevant; and it is sufficient that the pursuer avers that the defender had infringed UK GDPR and that he had suffered damage. It falls to the defender to prove that it was not in any way

responsible for the event giving rise to the damage, as per Article 82(3). As the defender does not offer to prove this on Record, it has failed to plead a relevant defence.

Discussion

[80] In my opinion the submissions of counsel for the defender are to be preferred. On the pursuer's averments, Mr Adamson made allegations concerning him in the employment tribunal proceedings, thereby placing them in the public domain. In addition, the pursuer accepts that the defender was entitled to process his data in the course of defending the tribunal proceedings, but avers that he should have taken various steps while doing so. This is the background, as averred by the pursuer. At proof the court would be required to take account of these circumstances when determining whether any damage suffered by the pursuer occurred "a result of" and was "caused by" an infringement on the part of the defender, in terms of Article 82(1) and Article 82(2).

[81] By corollary, in order to plead a relevant case the pursuer would require to aver what difference it would have made to the outcome if the defender had either taken the steps that the pursuer identifies in his pleadings, or simply elected not to process his data. An associated problem with the pursuer's case is that he does not specify which of his data the defender processed, as I have explained above. As the pursuer does not offer to prove what data was involved and how this differed from the material that Mr Adamson had placed before the tribunal, his averments are insufficient to enable him to establish the causal link between any damage suffered and the defender's alleged infringement. Accordingly, the pursuer does not plead a relevant case on causation.

[82] As to counsel for the defender's submission regarding the operation of Article 82, my interpretation of this provision is different, as I have set out above. In my opinion, at the

point of applying Article 82(1) and Article 82(2) the court is not confined to consideration of the defender's conduct, but is tasked with evaluating the circumstances as a whole when assessing whether the defender's alleged infringement was a cause of damage to the pursuer. Thus, I also reject the proposition that the broader circumstances only fall to be considered at the point of applying Article 82(3). From this it follows that I must reject the criticisms made by counsel for the pursuer of the defender's averments regarding causation.

The pursuer's averments of loss

Submissions

[83] The final criticism of the pursuer's pleadings that counsel for defender advanced was that the averments of loss are lacking in specification. He referred me to Article 25 of condescendence, in which £75,000 is averred to be an appropriate figure for compensation. No breakdown of this figure is given. Counsel submitted that the pursuer seeks compensation for distress and anxiety but does not explain how this was caused or how it is to be valued. Awards for distress and anxiety are generally modest: for example, an award of £750 was made in *Haliday* v *Creation Consumer Finance Limited* [2013] EWCA Civ 333. Counsel noted that although Article 25 is headed "distress and anxiety" there are references in the pursuer's averments to a possible loss of employability claim. However, the pursuer does not aver how such a claim is to be calculated. Counsel submitted that the pursuer's averments of loss are so lacking in specification as to be irrelevant.

[84] Counsel for the pursuer submitted that taken together articles 24 and 25 contain sufficient averments regarding quantum. The pursuer avers that he continues to suffer from distress and anxiety. He avers that he is unemployed. Counsel explained that this was the

position when the Record closed. He was uncertain as to whether the pursuer remains unemployed, but this is a matter that would come out at proof.

Discussion

[85] There is considerable force in the defender's criticisms of the pursuer's averments. Despite being entitled "distress and anxiety" articles 24 and 25 contain averments that are directed both to this head of claim and to a claim for loss of employability. Neither head of claim is pled in detail. Insofar as the claim for distress and anxiety is concerned, the pursuer avers only that he has experienced this as a result the defender's breaches of the 2018 Act and UK GDPR, and that he continues to do so. He does not specify the nature or severity of his symptoms, nor does he aver whether they have had any practical effects on his everyday life. As to the loss of employability claim, the pursuer avers that his employment prospects have been impacted, that he has made a number of unsuccessful applications for employment within the student housing market, and that he is reasonably apprehensive that this is attributable to the tribunal decision and to its publication in The Sun. He does not specify how his claim is calculated. If, for example, the claim is based on the pursuer's previous level of earnings and takes account of a projected period of unemployment or reduced earnings, none of this is averred. The figure of £75,000 hangs in a vacuum, unsupported by explanatory averments or calculations under either of the heads of claim.

[86] While the pursuer's averments of loss are far from ideal, I am not persuaded that they are so lacking in specification as to be irrelevant. The pursuer would, I think, be entitled to give evidence of suffering from anxiety and distress at proof, albeit any line of questioning intended to allow him elaborate on his symptoms might well be vulnerable to objection. In these circumstances, I cannot say at this stage that he would have no prospect

of receiving some level of award for anxiety and distress on the strength of the limited evidence that would probably be capable of being led. As regards the pursuer's loss of employability claim, the pursuer has a basis on Record for speaking to having made several unsuccessful applications. It seems to me that the court might be prepared to make some form of award for loss of employability in light of this evidence. In the absence of evidence of the pursuer's previous earnings and of his career prospects but for the defender's alleged breach (none of which he offers to prove), I suspect that any award would be modest, but this would be a matter for the court to decide after proof. Accordingly, had I been prepared to allow a proof before answer in this case, I would have admitted the pursuer's averments of loss to probation.

Conclusion and Disposal

[87] For the reasons given above, I conclude that: (i) the defender was exempted from having to comply with Article 5(1)(a) and Article 5(1)(b) by virtue of Paragraph 5(3) of Schedule 2; (ii) the pursuer's averments regarding the data involved are so lacking in specification as to be irrelevant; and (iii) the pursuer's averments are insufficient to enable him to prove that any material or non-material damage that he suffered was caused by the defender's alleged infringement, for the purposes of Article 82(1) and Article 82(2). Accordingly, the pursuer's case is irrelevant.

[88] I shall therefore sustain the defender's first and second pleas in law, repel the pursuer's first and second pleas in law and dismiss the action.

[89] I shall fix a hearing to allow parties to address me on the question of expenses, although I would ask the parties to notify the court if they are able to reach agreement on this issue.