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Johnson v The MDU: 'processing' under the DPA

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David Johnson v The Medical Defence Union [2007] EWCA Civ 262 (28 March 2007). Does the 'selection' of information from personal data for inputting into a computer, or, more specifically, the act of analysis leading to that selection, amount to processing of personal data for the purposes of the Data Protection Act 1998? At first instance, Mr. Justice Rimer thought it did. To the relief of many, the Court of Appeal, Lady Justice Arden dissenting, thought otherwise, dismissing the appeal of the claimant, Paul Johnson, and allowing the cross-appeal of the defendant, the Medical Defence Union, in relation to alleged unfair processing of data relating to Mr. Johnson by the MDU's risk manager that ultimately led to the termination of Mr. Johnson's MDU membership.

Background

Mr. Johnson was a consultant orthopaedic surgeon and a member of the MDU. The MDU provides its members with discretionary benefits such as advice and assistance as well as discretionary professional indemnity cover. Whilst Mr. Johnson had never had a professional negligence claim against him, his track record caused the MDU to carry out a risk assessment, requiring the MDU's risk manager, Dr. Roberts, to consider Mr. Johnson's files. Most of the files were electronic. Dr. Roberts selected information from the files and entered it into a computer-created document, namely a risk assessment review form. On the basis of the information entered into that document, an MDU committee decided to terminate Mr. Johnson's MDU membership.

Mr. Johnson issued proceedings for compensation under Section 13 of the 1998 Act on the ground that the MDU had processed his personal data unfairly in breach of the First Data Protection Principle and that this had led to his expulsion. At first instance, Rimer J held that the risk review had involved processing of Mr. Johnson's personal data for the purposes of the Act, but that the processing was unfair only to a minor and inconsequential degree. He also held that, even if the processing had been fair, the termination decision would probably have been the same and that Mr. Johnson would therefore be entitled to limited compensation, in the form of £10.50 for pecuniary loss and £5,000 for distress. The judge was not convinced that damage to reputation was a valid head of claim under the 1998 Act, but even if it were would have awarded only £1,000.

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Mr. Johnson appealed against the judge's approach to compensation and the MDU cross-appealed against the judge's findings on processing and entitlement to damages at all.

Processing

On appeal, the main issue was whether the selection of information by Dr. Roberts amounted to "processing" under the Act. The MDU submitted that it did not since it was not done by means of equipment operating automatically in response to instructions given for the purpose, as s 1(1) of the Act requires. Nor, in the MDU's submission, was it the processing of personal data "wholly or partly by automatic means", to which Article 3.1 of the Data Protection Directive (95/46/EC) says that its provisions (other than those relating to relevant filing systems) are limited. Rather, the selection of data was done not by a machine but by a human being, namely Dr. Roberts. She made the decisions complained of, and no automatic process entered into that decision-making.

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Lord Justice Buxton, voicing the majority decision, essentially agreed with the MDU. Buxton LJ stressed that the court should be very cautious about a reading of Article 2(b) of the Directive that allows the words "whether or not by automatic means" effectively to override the scheme of the rest of the Directive as borne out by Article 3.1 and the Directive's recitals. Article 3.1 limits the scope of the Directive to either processing wholly or partly by automatic means, or processing of data in relation to a relevant filing system. This was not a relevant filing system and, in Buxton LJ's view, the act of selection of data by Dr. Roberts was not partly by automatic means, but not by any automatic means at all.

In this respect Buxton LJ distinguished both *Campbell v MGN* [2003] QB 633 and the European Court of Justice Decision in *Case C-101/01 Lindqvist* [2004] QB 1014, upon which Mr. Johnson sought to rely. In *Lindqvist* the ECJ held that that the listing of fellow parishioners by an individual on a self-made internet home page amounted to 'processing' of their personal data, because the process had been "performed, at least in part, automatically" owing to the loading of the page on to the server. The selection of the data had been based on analysis by a human operator, yet the processing taken as a whole was deemed automatic. This, however, did not help Mr. Johnson, because his complaint related to unfair conduct regarding the selection of information by Dr. Roberts as opposed to the processing of her conclusions, while the *Lindqvist* case concerned an alleged Data Protection transfer breach with regard to the loading of the page onto the server. Additionally, and contrary to Rimer J's view, Buxton LJ did not consider *Campbell* conclusive in Mr. Johnson's favour on the processing issue either since, amongst other things, the court's focus in that case was the protection of privacy of information whereas in the current case Mr. Johnson made no complaint of invasion of privacy.

On this basis, Buxton LJ held that the judge was wrong to find that Dr. Roberts' selection of the data amounted to processing of data in the terms of the 1998 Act. Allowing the cross-appeal on this point, it was therefore not strictly necessary to consider the further issues relating to fairness and compensation. Buxton LJ did so anyway, albeit briefly.

Fairness

In relation to fairness, Mr. Johnson's major complaint was that the MDU's policy was itself unfair. Buxton LJ disagreed. In this respect, he considered Rimer J to be entitled to take the common sense view that the MDU was responsible for running its business in the interests of members as a whole, were in no respect suggested to be acting in bad faith, and had adopted a rationally thought-out policy that, at the lowest, was not clearly unjustified. Accordingly, there was no basis for dislodging the judge's finding that in any relevant respect the MDU's processing was not unfair. In any event, Buxton LJ considered that even if he were wrong, both on the issue of processing and on the issue of fairness, Mr. Johnson's case still failed because his claim that a different policy would have led to a different result was not sufficiently pleaded, and therefore not sufficiently proven.

Compensation

As to compensation, Buxton LJ made the general point that there was no compelling reason to think that "damage" in the Directive had to go beyond its root meaning of pecuniary loss. Nor would he accept the contention that the fact that the Directive envisaged the protection of rights under Article 8 of the European Convention on Human Rights entitled that compensation must be available in every case for loss of a type or category that would be covered by Article 8, for example damages for distress. His Lordship acknowledged that if a party could establish that a breach of the requirements of the Directive had led to a breach of his privacy rights, then he could no doubt recover for that breach under the Directive, without necessarily pursuing the more tortuous path of recovery for a breach of Article 8 as such. However, that was not the case here since Mr. Johnson had no complaint under Article 8. As for reputation, Buxton LJ agreed with the judge that unlike "distress", this head of loss was not envisaged in the 1998 Act and there was no reason to think that it was inherent in the provisions of the Directive.

Comment

Buxton LJ's attempt to distinguish *Campbell* was not entirely convincing. It certainly did not convince Lady Justice Arden who, dissenting, considered Rimer J's conclusion on processing to be consistent with the conclusion of the Court of Appeal in *Campbell*. For Lady Justice Arden, Article 3.1 of the Directive, insofar as it applied to processing "wholly or partly by automatic means", was sufficiently wide to cover the situation as described by the court in *Campbell* where processing had occurred automatically, but there had also been some essential step, linked to the automatic processing, which was not done by automatic means. In her Ladyship's view, the selection and inputting of personal data, such as had occurred in the current case, was an essential step of this type and it was consistent with the reasoning in *Campbell* that such selection and inputting should constitute processing, on the basis that the same reasoning should apply to non-automated steps which occurred before the processing-by-automatic-means as occurred afterwards, and that the whole was therefore a seamless process.

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Furthermore, on the main issue of processing, in Buxton LJ's view there were startling implications if the judge was right and Dr. Roberts was 'processing', whereas in Lady Justice Arden's view there were startling implications if the judge was wrong. Buxton LJ felt that, if the judge were correct, any exercise and decision-making by an individual the results of which were then as part of the same operation recorded or transmitted in electronic form would be subject to scrutiny under the Data Protection Principles, including the requirement that the processing should be conducted fairly – for example, an employer assessing an employee for promotion on the basis of his/her personal data held on a computer.

On the other hand, as Lady Justice Arden explained, if the judge was wrong, neither the Data Protection Principles nor the special protection for sensitive personal data under the Act would apply in cases where, for example, an employee has provided his employer with a medical report in hard copy and the employer then selects and obtains information from that report, even going beyond what the employer needs to discharge his own obligations to the employee, and adds it to his electronic records about the employee. The Directive would provide no protection to the individual at the initial stage of putting the information on the computer, which would process the information by automatic means.

Lady Justice Arden, however, considered these practical examples of limited use as aids to interpretation since they could be used to support either view. Accordingly, "the most important task for the court is the interpretation of the relevant legislation in the light of its provisions and the instruments and concepts to which it refers". What could be simpler?

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