SHERIFF APPEAL COURT

[2019] SAC (CIV) 24
GRE-A63-17

Sheriff Principal M W Lewis
Appeal Sheriff A Cubie
Appeal Sheriff N Ross

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL M W LEWIS

in appeal by

IAN ALEXANDER McPHAIL GALT

Pursuer and Appellant

against

INVERCLYDE ADVICE AND EMPLOYMENTS RIGHTS CENTRE

Defender and Respondent

Pursuer and Appellant: Motion, solicitor advocate; BTO Solicitors LLP
Defender and Respondent: Middleton, advocate; Lyons Davidson Scotland LLP

15 March 2019

Introduction

[1] The principal issues which fall to be determined in the present case are:-

1. Whether the respondent breached its duties under the Data Protection Act 1998 ("the Act"); and
2. *If* the respondent did breach its duties under the Act, whether that breach caused the appellant to suffer any loss.

Background

[2] The appellant is a retired dentist. He was formerly a partner in a dental practice known as the Orangefield Dental Practice Limited ("the Practice") in Greenock. Ms Noida McLeod was employed as a dental nurse at the Practice and had worked there since 2005.

[3] Ms McLeod resigned on 17 April 2016 following an incident which had taken place during working hours within the Practice a few days earlier. An alarm attached to a chair in a consulting room began to malfunction by beeping loudly and continuously while the appellant was in the course of treating patients. Ms McLeod, who was assisting the appellant that day, attempted to switch off the alarm. This led to a confrontation during which Ms McLeod alleges that the appellant assaulted her by striking her arm and acting in a threatening and abusive manner towards her.

[4] Ms McLeod reported the matter to Police Scotland. Criminal proceedings against the appellant were commenced on summary complaint alleging a contravention of section 38 of the Criminal Justice and Licensing (Scotland) Act 2010, and an assault. The appellant pled not guilty and the case proceeded to trial.

[5] Following her resignation Ms McLeod made an application to the Employment Tribunal against the Practice claiming constructive dismissal arising from the conduct of the appellant including the behaviour which was the subject of the criminal proceedings. She was advised by and represented by Brian McLaughlin, who then worked for the respondent in the capacity of employment rights advisor.

[6] The appellant defended the claim. He lodged a form of response ("ET3") along with a letter dated 9 August 2016 (together "the documents"). The documents in combination contain a detailed response to Ms McLeod's allegations in the application, including an explanation for making contact with Ms McLeod which was to push her hand away from a

control unit following several instructions to her to desist to which she had not responded, and further information to the effect that he had subsequently been informed that Ms McLeod was hearing impaired. The Employment Tribunal sent the documents to the respondent as the legal representatives of Ms McLeod.

[7] This action arises from Mr McLaughlin's actions thereafter. Having discussed the content of the documents with Ms McLeod, Mr McLaughlin sent the documents to the Crown under cover of a letter dated 19 December 2016. He did not advise the appellant that he had done so. He considered the appellant's statement in the EAT proceedings was relevant to the criminal prosecution and might require to be investigated by the Crown. Mr McLaughlin's letter and the documents were received by the Crown prior to the trial which was scheduled to take place on 27 January 2017. The appellant submits that this act amounted to an unauthorised disclosure of personal data.

[8] The criminal proceedings commenced and proceeded independently of any information disclosed in the documents. The Crown did not disclose the documents to the defence in advance. During the trial the procurator fiscal depute referred to some of the content of the documents. The defence solicitor representing the appellant objected on the grounds of lack of disclosure. The documents were immediately disclosed by the fiscal. The defence solicitor considered that she required further time to consider the material and sought an adjournment of the trial. Her motion was granted. At the continued diet of trial on 27 March 2017 the fiscal placed no further reliance on the material. The content of the documents was therefore not relied upon during the remainder of the trial. At the conclusion of all evidence the sheriff found the appellant not guilty. The proceedings were reported in the local media.

The present proceedings

[9] Subsequently the appellant brought an action for damages based on an alleged contravention by the respondent of the Act. He avers that Mr McLaughlin wrongfully disclosed the documents, which led to the trial being adjourned, which in turn led to the appellant incurring additional expense. The expense included additional legal fees and travel to return from South Africa. The appellant also claims he suffered additional distress and anxiety as a result of the delayed proceedings, and as a result of there being a delay between the media reporting of the case against him and the media reporting of the defence case and his acquittal, and that he felt unable to apply for locum work as a dentist for a period of two months.

The decision of the sheriff

[10] After a proof before answer, the sheriff gave an *ex tempore* decision and granted decree of absolvitor. His written note was issued after the Note of Appeal was lodged and we understand that it is an expansion of the *ex tempore* decision. The sheriff determined, among other things, that the respondent is a data controller, that the documents which the appellant submitted to the Employment Tribunal contained sensitive personal data, that the decision taken by Mr McLaughlin to disclose the documents to the Crown was for a purpose set out in section 29(1) of the Act, that the disclosure was exempt from the non-disclosure provisions of the Act, that the disclosure to the Crown was necessary for the administration of justice, and that there was no causal connection between the disclosure of the material by the respondent to the Crown and the losses incurred. The appellant appeals that decision.

[11] The appellant asserts that the sheriff decided the issue of "likely prejudice" in the absence of any evidence. He challenges the sheriff's finding that the exemption applied and criticises the sheriff's interpretative approach to the scope of the exemption in section 29(3) and in particular his interpretation of "likely prejudice". He complains that the sheriff did not address the question of whether the respondent would have been in breach of the first data protection principle but for the exemption provided for in section 29(3) of the Act. He also challenges the sheriff's approach to liability, causation and damages.

Decision

[12] As a preliminary matter, we note that the appellant sought to criticise some of the sheriff's findings and conclusions. An appellate court is only entitled to interfere with the sheriff's assessment and analysis of the factual material in question if it is able to conclude that the decision was "plainly wrong" (*Royal Bank of Scotland* v *Carlyle* 2015 SC (UKSC) 93). No transcript of evidence was made available and as a result we are confined to considering the sheriff's findings and his reasoning.

The Data Protection Act 1998

[13] It is a matter of agreement that the 1998 Act (and not its successor) apply to the events in this case. Various provisions in the Act are relevant to this litigation, in particular sections 1, 2, 4, 13, 27, 29, schedules 1, 2 and 3.

[14] Section 1 contains basic determinative provisions. The sheriff found that the respondent is a "data controller" within the meaning of section 1(1). That finding is not challenged. "Personal data" is defined as "data which relate to a living individual who can be identified (a) from those data, or (b) from those data and other information which is in

the possession of, or is likely to come into the possession of, the data controller."

"Processing" is defined as, among other things, "obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including …. (c) disclosure of the information or data by transmission, dissemination or otherwise making available ...". "Sensitive personal data" as defined in section 2 includes "personal data consisting of information as to … (g) the commission or alleged commission by him of any offence...". The sheriff found that "The ET3 response form and attached letter …. contained sensitive personal data within the meaning of section 2 of the Act". That finding was not challenged.

[15] Section 4(4) of the 1998 Act imposes a duty on a data controller to comply with the data protection principles listed at schedule 1 in relation to all personal data with respect to which he is the data controller.

[16] The first data protection principle ("the first principle") is that personal data shall be processed fairly and lawfully and in particular shall not be processed unless –

(a) at least one of the conditions in schedule 2 is met, and

(b) in the case of sensitive personal data at least one of the conditions in schedule 3 is also met.

The second data protection principle ("the second principle") is to the effect that personal data shall be obtained only for one or more specified and lawful purposes and shall not be further processed in any manner incompatible with that purpose, or those purposes.

[17] The appellant submitted that the first and second principles have been breached by the disclosure of the ET3 and accompanying documents. The respondent accepted both at first instance and before us that the disclosure amounted to processing in a manner which was incompatible with the purpose for which the personal data had been obtained by the

respondent and therefore that the disclosure amounted to a breach of the second principle. The respondent's position is, however, that the disclosure was exempt through the operation of Part IV of the Act.

The exemptions

[18] The scope of the exemptions may be found in sections 27, 29 and schedules 2 and 3. These provide:

> "27(1) References in any of the data protection principles or any provision of Parts II and III to personal data or to the processing of personal data do not include references to data or processing which by virtue of this Part are exempt from that principle or other provision.
>
> (3) In this Part "*the non-disclosure provisions*" means the provisions specified in subsection (4) to the extent to which they are inconsistent with the disclosure in question.
>
> (4) The provisions referred to in subsection (3) are—
>
> (a) the first data protection principle, except to the extent to which it requires compliance with the conditions in Schedules 2 and 3,
>
> (b) the second, third, fourth and fifth data protection principles, .."
>
> "29(1) Personal data processed for any of the following purposes—
>
> (a) the prevention or detection of crime,
>
> (b) the apprehension or prosecution of offenders, or
>
> (c) the assessment or collection of any tax or duty or of any imposition of a similar nature,
>
> are exempt from the first data protection principle (except to the extent to which it requires compliance with the conditions in Schedules 2 and 3) and section 7 in any case to the extent to which the application of those provisions to the data would be likely to prejudice any of the matters mentioned in this subsection.
>
> (3) Personal data are exempt from the non-disclosure provisions in any case in which—

> (a) the disclosure is for any of the purposes mentioned in subsection (1), and
>
> (b) the application of those provisions in relation to the disclosure would be likely to prejudice any of the matters mentioned in that subsection. .."

Schedule 2 at paragraph 5 provides – "The processing is necessary—

> (a) for the administration of justice, … or
>
> (d) for the exercise of any other functions of a public nature exercised in the public interest by any person.

Schedule 3 at paragraph 7 provides -

> (1) The processing is necessary—
>
> (a) for the administration of justice, .. or
>
> (c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department."

[19] The appellant submitted that the exemption in section 29(3) does not apply to the facts of the present proceedings because the disclosure was not for the purpose of preventing or detecting crime or the apprehension of offenders. At best section 29(1) may exempt a respondent from the first principle but not the second, and in any event based on the particular facts in the present proceedings the respondent had breached both principles.

[20] He drew support from the guidance issued by the Interim Orders Committee, a committee of the General Dental Council, in relation to crime and taxation exemptions on 15 June 2016 [Ref 20151506 Version 1] ("the IOC Guidance") which he submitted assists in determining questions of interpretation of the Act and explains how to apply the exemptions in section 29. The IOC Guidance contains duties which are incumbent upon a data controller such as the respondent. The respondent failed to have regard to the duties. There was no evidence before the sheriff that Mr McLaughlin had any regard to the IOC

Guidance or the Act or otherwise assessed whether the exemptions applied to the documents.

[21] The respondent submitted that failure to have regard to the IOC Guidance is not relevant to considering whether an exemption applies. The IOC Guidance is to assist in the implementation of the exemption in section 29(1). It has no application to an exemption under section 29(3). The sheriff's approach to the interpretation of the exemption provisions was correct.

[22] We agree with the sheriff's observation that section 29(1) serves two distinct functions – firstly it operates as a standalone exemption and secondly it provides a list of purposes to which the exemptions in section 29(1) and section 29(3) apply. For the exemption in section 29(3) to apply the respondent has to establish that the disclosure is for any purpose mentioned in subsection (1).

[23] The sheriff concluded that section 29(3) was relevant and that it provides exemption from the second principle and from the first principle to a limited extent and he commented upon the interpretative confusion which can arise due to the interaction between section 29(1) and 29(3) (paragraphs [42]-[46] of his note). We agree with his assessment. Section 29(1) is concerned with exemption from the first principle in relation to the processing of data whereas section 29(3) is focused on exemption from the "non-disclosure provisions" in relation to the disclosure of data. The "non-disclosure provisions" are defined in section 27(3) and (4) as including the first principle (subject to the limitation requiring compliance with the conditions in schedules 2 and 3) and the second principle. The sheriff was correct to find as a matter of fact and law that the disclosure was exempt from the first principle subject to the limitation and also to the second principle. In our view the terminology in the IOC Guidance is not relevant to considering whether a section 29(3) exemption applies.

[24] The appellant submitted that the evidence showed that the process under the Act and the IOC Guidance was ignored by the respondent, and that the sheriff had erred in finding justification for the respondent's actions after the event by drawing inferences from the evidence, which it was not open to him to do. He also submitted that Mr McLaughlin's evidence was lacking in material respects and in particular he did not apply his mind to the exemption before invoking it, did not assess whether the disclosure of the documents was necessary, and failed to consider the likely prejudicial effect of the disclosure. As a consequence the sheriff ought to have found, on the evidence, that Mr McLaughlin sent the documents to the Crown without considering the data protection implications.

[25] The respondent submitted that he required to prove two essential elements, namely that the disclosure was for a lawful purpose (section 29(1)) and that the non-disclosure provisions would have been likely to prejudice that purpose. The sheriff found, on the evidence, that the purpose was for the prosecution of offenders – the appellant. He then correctly directed himself as to how the matter of likely prejudice is to be determined (*R (on the application of Allan Lord v Secretary of State for the Home Department* [2003] EWHC 2073). The sheriff's conclusion, that failure to disclose the documents which contain highly relevant material would likely prejudice the prosecution, cannot be said to have been plainly wrong.

[26] Parties did not provide a transcript of evidence. We are constrained to the content of the sheriff's note. We note the sheriff made findings in fact in relation to the information disclosed by Mr McLaughlin, the method of disclosure and the reasons for the disclosure. He found in fact and law that the decision to disclose the ET3 was for the prosecution of the appellant, that the disclosure was necessary to ensure that the Crown was in possession of all relevant information to the prosecution and that the failure to make the disclosure would have been likely to prejudice the prosecution. The sheriff's findings in our view are

supported by the evidence which he accepted. He accepted the evidence of Mr McLaughlin as credible as to how he approached his decision to disclose the information, that the documents were relevant to a particular prosecution and required further investigation. The sheriff concluded that Mr McLaughlin took the matter seriously and that his actions "were nothing other than an attempt to draw to the attention of the Crown information which he had assessed as being relevant and material to an ongoing prosecution."

[27] The sheriff considered the matter of likely prejudice in paragraphs [48] to [60] of his note. Being mindful of the observation of Mr Justice Munby in *Lord* v *Secretary of State* at paragraph 87 that "the question for the court… …is to be decided in light of, and by a process of judicial evaluation of, all the circumstances of the case", the sheriff correctly assessed likely prejudice by having "regard to the context in which the decision in this case required to be taken by the respondent". He considered and explained the context. It is self-evident that had Mr McLaughlin failed to disclose the ET3 the prejudice would or would have been likely to have resulted from the public prosecutor being deprived of the opportunity to assess the information in question and to take such action in the public interest as that assessment required. The appellant's submission fails to recognise that when the ET3 and accompanying letter reached the Crown, it was for the Crown to then determine whether to further investigate or otherwise use the information, if at all. It is correct that Mr McLaughlin did not consider these nuances. However, he was not responsible for the conduct of the prosecution which was already under way.

[28] It was accepted by parties that any disclosure must be fair and lawful (first principle) and that it must be obtained for lawful purposes (second principle). It was also accepted that the processing of the ET3 must meet at least one of the conditions in schedule 2 and schedule 3 of the Act. The respondent relies upon condition 5(a) of schedule 2 and condition 7(1)(a) of

schedule 3 namely that the processing was necessary for the administration of justice. The appellant submitted that necessity imports the test of proportionality, that there has to be a pressing social need (*Stone v South East Coast Strategic Health Authority* [2006] EWHC 1668 (admin)), and that the sheriff erred in finding that conditions 5(a) and 7(1)(a) had been satisfied. The respondent had failed to aver and to lead any evidence as to why the disclosure was necessary for the administration of justice. The sheriff had jumped to conclusions rather than applying the test.

[29] We do not agree. The sheriff explained his reasoning under reference to the evidence and the statutory provisions. It is plain that the sheriff did fairly balance the competing interests of the privacy of the appellant against a pressing social need "to ensure that people who hold information which they consider to be material to a criminal prosecution are free to prove that information to the authorities safe in the knowledge that in so doing they will not breach the requirements of the data protection regime". He also reflected upon the proportionality test (*Stone)* and applied it appropriately. We detect no error in the sheriff's approach. It is instructive to consider the question from a different angle: on what responsible basis could Mr McLaughlin have decided that he should not make disclosure? On what basis could he responsibly decide that the documents were not necessary for the administration of justice, or to the exercise of a public function by the Crown? Those questions alone serve to illustrate that the criticism of the sheriff's decision falls far short of satisfying the "plainly wrong" test.

[30] The appellant briefly presented an argument based on a lack of candour in the respondent's pleadings. He sought to draw conclusions from the pleadings which would impact on the assessment of evidence. Such an argument could only be relevant at first instance, and even then is likely to be weak. Pleadings are intended to guide and focus

factual evidence, not to determine questions of credibility and reliability. They cannot perform such a function on appeal and we reject this submission. For all of the foregoing reasons we consider that the sheriff was correct to conclude that the respondent did not breach its duties under the Act. The appeal must be refused.

Causation

[31] The appellant avers that the unlawful disclosure of the appellant's sensitive personal data led to a series of unfortunate events, each of which caused the appellant distress: the appellant lost control of his personal data; the depute did not disclose the documents until after commencement of the trial; the defence solicitor had to seek an adjournment for the purpose of examining the documents; the sheriff granted the adjournment. It was reasonably foreseeable that the documents would not be disclosed to the defence prior to the trial date, and that any such late disclosure to the defence would result in an adjournment. The adjournment was a natural and probable consequence of the respondent's wrong from which flows the distress and the losses.

[32] Relying upon section 13 of the 1998 Act, the appellant seeks to recover the additional solicitor's fees caused by the adjournment; the cost of rescheduling of travel arrangements and from South Africa to accommodate the additional day of trial; compensation for reputational damage caused by the original negative media coverage and a further round of media coverage after the second day of trial.

[33] Section 13 of the Act provides that:-

> "(1) An individual who suffers damage by reason of any contravention … is entitled to compensation from the data controller for that damage;

> (2) An individual who suffers distress by reason of any contravention by a data controller of any of the requirements of this Act is entitled to compensation from the data controller for that distress if-
>
> (a) the individual also suffers damage by reason of the contravention, or
>
> (b) the contravention relates to the processing of personal data for the special purposes."

The appellant's submission appeared to suggest that this involves strict liability and leads automatically to an award of damages. In our view that approach is misconceived. Section 13 does not provide a right to compensation without having regard to the not insignificant issue of causation.

[34] The appellant submitted that the sheriff failed to address the appellant's claim for damages arising from the loss of control of his personal data, and that the sheriff conflated loss of control with the nature of the party to whom disclosure was made. We do not agree. The sheriff made a careful assessment of that head of claim. He methodically analysed the pleadings and the evidence and concluded that the trial being adjourned was not the natural and probable consequence of the disclosure of the documents by Mr McLaughlin to the Crown.

[35] The disclosure by Mr McLaughlin did not lead to the criminal prosecution, which was already underway. The disclosure did not lead to a trial being fixed, because it had already been scheduled. The disclosure did not cause the media interest – the press regularly attend court to report on the daily business. On receipt of the documents, it was for the Crown to then determine to what use, if any, it would put the documents. As the sheriff observed, the Crown is under a continuing duty to assess new information received and to make timeous disclosure to the defence: the documents were received by the Crown well in advance of the trial and inexplicably it failed to timeously disclose these. That failure is not,

in our view, a natural and probable consequence of the original disclosure. It amounts to a failure by a third party beyond Mr McLaughlin's control. The defence motion to adjourn was not a natural and probable consequence of the original disclosure: rather it flows from the failure of the Crown to timeously disclose. The sheriff's decision to grant the adjournment was based on the information before him that day and cannot be said to be a natural and probable consequence of the original disclosure. The decision of the media to follow the criminal proceedings arose from the criminal proceedings themselves, which were already underway independently of Mr McLaughlin's actions. The media coverage was not caused by, or a natural and probable consequence of, the original disclosure.

[36] In our view, there is no causal connection between the disclosure and the consequences identified by the appellant, however remote. We refuse the appeal for that reason also.

Expenses

[37] Parties agreed that expenses should follow success. Consequently, the appeal having failed, the respondent is entitled to the expenses occasioned by it. We have also certified the appeal as suitable for the employment of junior counsel.