[2024] JMSC Civ. 124

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU 2024 CV 02881

BETWEEN	**KASIE ANN MORRISON**	**CLAIMANT**
AND	**ELEPHANT GROUP LTD. (T/A CENTERFIELD JAMAICA)**	**1ST DEFENDANT**
AND	**AVC COMMUNICATIONS LTD.**	**2ND DEFENDANT**
AND	**A&A SERVICES SOLUTIONS CONSULTANTS (SSC) LTD.**	**3RD DEFENDANT**

IN CHAMBERS

Mr. Robert Moore, Attorney- at-Law for the Claimant

Mr. Stuart Stimpson instructed by Hart Muirhead Fatta for the 1st Defendant

Mr. Emile Leiba and Ms. Kymberly Hanniford instructed by DunnCox for the 2nd Defendant

Mr. Jerome Spencer, Attorney-at-Law for the 3rd Defendant

Interim Injunction–Section 22 and 23 of the Data Protection Act- Whether the Data Protection Act is Breached

September 13, 2024 and September 27, 2024

PALMER J,

Introduction

[1] This matter involves an application for an interim injunction barring the 1st, 2nd and 3rd Defendants and their agents from processing any data in respect of the

Claimant without her consent. The application is made pursuant to Sections 22 and 23 of the Data Protection Act **(DPA)**.

Background

[2] The Claimant/ Applicant, Ms. Kasie Ann Morrison was formerly employed to the 1st Defendant Company, Elephant Group Limited **(Centerfield)** from December 13, 2018 until the termination of her employment on June 24, 2020.Thereafter, Ms. Morrison contested the termination of her employment, which eventually led to proceedings before the Industrial Dispute Tribunal **(IDT).** Among the issues that arose for determination was the matter of compensation due to Ms. Morrison for the period of July 24, 2020 to December 25, 2023.

[3] In filing her claim before the IDT, the Claimant did not provide her employment history, and the 1st Defendant, in an effort to prepare its defence against the Claimant, engaged the 3rd Defendant, A & A Service Solutions Consultants (SSC) Limited **(SSCL)**, an agency that conducts private investigations and background checks, among other services. In engaging the services of SSCL, the 1st Defendant provided SSCL with the Claimant's, personal data, which included her full name, age, date of birth, current address and Taxpayer Registration Number **(TRN)**. SSCL then provided Centerfield with a Confidential Screening Report dated June 30, 2023 and an Injury Fraud Investigation Report dated February 13, 2024. The report revealed that the Claimant had been employed to the 2nd Defendant, AVC Communications Limited **(AVC)** since July 6, 2020, though she had maintained that she remained unemployed since the termination of her employment at Centerfield.

[4] On June 11, 2024, Centerfield wrote to AVC, requesting the employment history of Ms. Morrison, and supplied them with her name and TRN. Centerfield specifically requested information regarding the positions held by the Claimant during her tenure, her remuneration, her start date, whether she remained

employed and whether or not her employment had ended by resignation or termination. In justification of their request made, Centerfield stated:

> *"…it should be agreed that our processing of this data is lawful under Section 23 of the Data Protection as it meets the standards of advancing our respective company's legitimate interest in sharing such information to mitigate against this and similar risks from other employees who refusal to be forthright with such disclosure exposes them to unnecessary costs, time and resources"*

[5] On June 17, 2024, AVC responded to Centerfield providing the requested information, which confirmed that Ms. Morrison had been employed to the company from July 6, 2020 to May 1, 2024 when she was involuntarily separated. The letter also outlined the positions she held during her tenure and the compensation she received for each.

[6] The Claimant now alleges that the 1st, 2nd and 3rd Defendants' disclosure and dissemination of her personal data was unlawful and in breach of the DPA. By way of Ex-Parte Notice of Application for Court Orders for Interim Injunction filed on July 15, 2024, the Claimant sought the following orders:

> 1. *An Interim injunction barring the 1st Defendant, 2nd Defendant and 3rd Defendant and also restraining the 1st Defendant, 2nd Defendant and 3rd Defendant either by them/ or their servants and /or their agents from processing the Claimants personal data until the conclusion of the matter herein.*
>
> 2. *Costs of this application to be costs in the claim.*
>
> 3. *Such further and other relief as this Honourable Court may deem fit in the circumstances.*

The Data Protection Act (DPA)

"Process"

[7] A useful starting point is as to the meaning of the term "process" in relation to information or personal data. It means the obtaining, recording or storing of information or personal data, or carrying out any operation or set of operations (whether or not by automated means) on the information or data, including—

> *(a) organisation, adaptation or alteration of the information or data;*

(b) retrieving, consulting or using the information or data;

(c) disclosing the information or data by transmitting, disseminating or otherwise making it available;

or (d) aligning, combining, blocking, erasing or destroying the information or data, or rendering the data anonymous;

[8] DPA Section 6:

6 (1)- The rights conferred by this section are subject to the exemptions set out in Part V, to the extent indicated in that Part, and a data controller shall determine in each case whether compliance with a request lawfully made under this section can be achieved without compromising the confidentiality of the exempt data, by severing the exempt data from any information required to be disclosed under this section.

….

[9] DPA Sections 22 and 23:

22.**— (***1) The first standard 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 set out in section 23 is met; and

(b) in the case of sensitive personal data, at least one of the conditions set out in section 24 is also met.

….

23.*—(1) The conditions referred to in sections 11(3)(a) and 22(1)(a) are that—*

(a) the data subject consents to the processing and has not withdrawn that consent;

(b) the processing is necessary—

(i) for the performance of a contract to which the data subject is a party; or

(ii) for the taking of steps at the request of the data subject with a view to entering into a contract;

(c) the processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract;

(d) the processing is necessary in order to protect the vital interests of the data subject;

(e) the processing is necessary—

(i) for the administration of justice;

(ii) for the exercise of any functions conferred by or under any enactment; or

(iii) for the exercise of any other functions of a public nature exercised in the public interest;

(f) the processing is necessary for the purposes of legitimate interests pursued by the data controller by any third party to whom the personal data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject;

(g) the data subject has published the personal data concerned.

(2) Regulations made under this Act may specify particular circumstances in which the condition set out in subsection (1)(f) is, or is not, to be taken to be satisfied.

[10] DPA Section 69:

69.— (1) An individual who suffers damage 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 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.

(3) In proceedings brought against a person by virtue of this section, it is a defence to prove that the person took all such care in all the circumstances as was reasonably required to comply with the requirement concerned.

Submissions

[11] There is a measure of agreement between the parties as to the rules to be applied when the court addresses its mind to the grant or refusal of an interim injunction. Mangatal J (as she then was) in the authority of **Michelle Smellie v Ivan Lewis, Icilda Lewis and National Commercial Bank of Jamaica** [1], offers guidance in

[1] [2013 JMCC Comm 1

relation to the principle of interim injunctions as follows as taken from the authorities **American Cynamid v. Ethicon Ltd. [1975] 1 All E.R. 504** and **NCB V. Olint [2009] J.C.P.C. 16**:

> *(a) There a serious issue to be tried? If there is a serious question to be tried, and the claim is neither frivolous nor vexatious, the court should then go on to consider the balance of convenience generally.*
>
> *(b) As part of that consideration, the court will contemplate whether damages are an adequate remedy for the Claimants, and if so, whether the Defendants are in a position to pay those damages.*
>
> *(c) If on the other hand, damages would not provide an adequate remedy for the Claimants, the court should then consider whether, if the injunction were to be granted, the Defendants would be adequately compensated by the Claimants' cross-undertaking in damages.*
>
> *(d) If there is doubt as to the adequacy of the respective remedies in damages, then other aspects of the balance of convenience should be considered.*
>
> *(e) Where other factors appear to be evenly balanced, it is a counsel of prudence to take such measures as are designed to preserve the status quo.*
>
> *(f) If the extent of the uncompensatable damages does not differ greatly, it may become appropriate to take into account the relative strength of each party's case. However, this should only be done where on the facts upon which there can be no reasonable or credible dispute, the strength of one party's case markedly outweighs that of the other party.*
>
> *(g) Further, where the case largely involves construction of legal documents or points of law, depending on their degree of difficulty or need for further exploration, the court may take into account the relative strength of the parties' case and their respective prospects of success. This is so even if all the court can form is a provisional view-see **NCB v. Olint,** and the well-known case **of Fellowes v. Fisher [1975] 2 All E.R. 829.** This is of course completely different from a case involving mainly issues of fact, or from deciding difficult points of law, since, as Lord Diplock points out at page 407 G-H of **American Cynamid**, "It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult points of law which call for detailed argument and mature considerations"*
>
> *(h) There may also be other special factors to be taken into account, depending on the particular facts and circumstances of the case.*

Submissions on behalf of the Claimant/ Applicant

[12] Despite the timing of the application for the injunction relative to the issue that arose in the IDT, Counsel contended that the Claimant is not seeking an order to exclude or veto evidence that is before the IDT. The purpose of the application, he

continued, is to prevent the further unlawful processing of the Claimants personal data in breach of the Act pending the determination of the matter, in order to mitigate against the risk of loss of employability and further negatively affect her employment prospects. Counsel contended that the claim for injunctive relief is to prevent the claimant from being blacklisted in an industry where she has managed to hone her skills.

[13] It was submitted that section 23(1)(f) makes it clear that the circumstances in which a Data Controller may be exempted from the first standard of processing data is if the processing is necessary for the purposes of legitimate interest pursued by the data controller or by any third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data. Counsel submitted that these are the key elements to a legitimate interest.

[14] Borrowing from the Data Protection Directive 95/46/EC and Article 6 (1) (f) of the General Data Protection Regulations **(GDPR)** counsel argued that the key elements are to be applied in a three-part test. He argues that there is a 'purpose test' which determines whether there is a legitimate interest behind the processing, a 'necessity test' which determines whether the processing is necessary for that purpose and a 'balancing test' that is the legitimate interest overridden by the individual's interests, right or freedoms.

[15] Counsel contends that the Defendants have failed to apply the test before processing the Claimant's information without her consent or without having informed her. He contended that the 1st Defendant failed to demonstrate that the processing of the data was necessary for the purposes of its legitimate interest. Counsel saw the manner in which the 1st Defendant sought to process the information as disproportionate to achieving its purpose as the information which they were seeking could have been achieved by other reasonable, less invasive means. Counsel argued that there is no evidence of any request for her to make

disclosure and also argued that the IDT has the regulatory powers to subpoena documents.

[16] Counsel submitted that the Defendants failed to perform a balancing test to justify any impact of the processing of the personal data on the Claimant including her employability and loss of employment prospects. It was contended that the Defendants have failed to take into account the Claimant's interest or fundamental rights and freedoms in determining whether or not her legitimate interest as the data subject would override the legitimate interests of the data controller or third party.

[17] Counsel submitted that when one speaks of an adequate remedy, one is speaking of the fairness in the value. Counsel argues that if the Defendants are not stopped by the granting of an injunction, the Claimant will be blacklisted as her former employer may disclose information to impact her job prospects. Counsel submitted that damages would not be an adequate remedy even if the Claimant is successful at trial.

[18] Counsel submitted that the balance of convenience favours the granting of this injunction, and conversely, there will be no prejudice to the Defendants if they are prevented from disclosing the Claimant's information to any third party or data controller without her knowledge and consent. Counsel argues that the only damage to the 3rd Defendant, if any, would be the nominal cost to carry out a background screening or investigation report. The Claimant on the other hand, on Counsel's submission stands to suffer greater prejudice if the Defendants are not constrained from processing the data.

Submissions on behalf of the 1st Defendant

[19] Counsel contended that when seeking an injunction; an equitable remedy, the principle of 'he who comes to equity must come with clean hands' applies (**See**

Marlie Technology Park Limited & Geotechvision Enterprises Limited v Sagicor Bank Jamaica Limited[2]. Counsel argued that the Claimant has come with unclean hands, as she has dishonestly maintained that she was unemployed for the disputed period, sought to withhold information relevant to the proceedings from the IDT, and is attempting to use the powers of the Court to supress the evidence of her employment to the 2nd Defendant.

[20] It is Counsel's submissions that in deciding whether there is a serious issue to be tried the court must satisfy itself that the issue raised by the Claimant has sufficiently plausible grounds for granting any final relief **(See Arleen McBean v Sheldon Gordon, Patrae Rowe and the Police Federations[3])** . Counsel argued that the issues raised by the Claimant do not provide sufficiently plausible grounds for granting any final relief. Among the factors that it was submitted weakens the Claimant's position in this application, is that the DPA did not come into effect until December 1, 2021, and pursuant to section 76, there was a two-year transition period for data controllers to ensure full compliance. This period did not expire until November 30, 2023, and on this basis it was contended that the 1st investigation report, delivered on June 30, 2023, could not have been done in breach of the Act, which was not operable.

[21] Counsel contended that the second investigation report and letter to the 2nd Defendant did not contravene the provisions of the DPA as the provisions of Sections 23(1)(e) and (f) are met. The contention is that the processing of the data was necessary for the administration of justice as the Claimant was seeking unfair compensation through the IDT (the final arbiters in industrial disputes[4]), for time that she was employed to AVC, while conveying an impression that she had been unemployed since being terminated from Centerfield. Counsel emphasized that

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[2] [2021] JMSC Civ 8 (Supreme Court, Jamaica Claim No. SU 2020 CV 04840 delivered on January 2021 at paragraph 9
[3] [2019] JMSC Civ 38 at paragraph 35
[4] See Industrial Disputes Tribunal v University of Technology and Another [2012] JMCA Civ 46

justice requires that she be compensated, if at all, only for her time out of work and that such matters be accurately and fulsomely put before the IDT to ensure a fair and just disposal of the matter. It was for that reason therefore that it was considered necessary for Centerfield to retrieve evidence from the 2nd Defendant and 3rd Defendant, and accordingly disclosure was necessary for the administration of justice and not solely on the ground of the 1st Defendant's legitimate interest as submitted by Counsel.

[22] Counsel submitted that Centerfield has a legitimate interest in defending the claim before the IDT, and to do so, it was prudent to provide the tribunal with the Claimant's employment records stored by it, her termination details and any other information that might assist its defence or mitigate any amount awarded. The process was not unwarranted as the disclosure confirmed the fact that the 2nd Defendant was employed despite her denials. Counsel submitted that there is no evidence of the need to use the processed information, except in furtherance of the matter before the IDT.

[23] Counsel referred to section 13 (3) (j) of The Charter of Fundamental Rights and Freedoms provides:

> *(j) The right of everyone to –*
>
> *(i) Protection form search of the person and property*
>
> *(ii) Respect for and protection of private and family life and privacy of the home; and*
>
> *(iii) Protection of privacy of other property and of communication.*

Counsel submits that the perpetrating of a fraud to the IDT cannot be considered a legitimate interest and therefore there has been no breach of the Claimants privacy rights.

[24] In reliance on the authority of **Anthony Dixon v North Bristol NHS Trust**[5], counsel's view is that Courts should engage in a purposive rather than mechanical reading of data protection legislation. In the decision, the court opined that the data protection legislation does not give a data subject a 'veto' on what can be disclosed, a position contended by Counsel in relation to the DPA. Counsel further argues that the Claimant's assertion that the contractual agreement, which provides that a breach of confidentiality amounts to gross misconduct, is a sanction that is to be imposed on the employee not the employer as such there is no breach.

[25] Counsel argued that Section 69 of the Act contemplated that damages would be an adequate remedy for the contravention of the Act. Counsel contended that the Claimant has not put forward an undertaking as to damages and damages would not be an adequate remedy for Centerfield, as no amount of money would be sufficient to compensate them for the loss of the information and the loss of its ability to defend itself.

[26] Counsel argued that in weighing the balance of convenience the court ought to take whichever course seems likely to cause the least irremediable prejudice to one party or the other. Counsel argued that if the injunction is granted regarding the processing of the Claimant's personal data, given the wide definition of the term 'processing', Centerfield would have to cease the storage of data and effectively permanently lose the data.

[27] It is submitted that the Claimant, has failed to present evidence to the court that there is a real likelihood of prejudice to her if the injunction is not granted and the claim that she will be blacklisted is an unsupported hypothetical fear. Relying on the authority of **Olint** counsel argues that if the injunction is likely to cause irremediable prejudice to the defendant a court may be reluctant to grant it unless

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[5] High Court Justice, Kings Bench Division, United Kingdom, Citation Number [2022] EWHC 3127 (KB) Case No. QB- 2022-0-2007

satisfied that the chances that it will turn out to have been wrongly granted are low. Counsel, contends that the granting of the injunction would cause irremediable prejudice to Centerfield leaving them defenceless against the Claimant's claim. In any event, the documents being subject of this claim are already in evidence before the IDT, as such, there is no evidence that the Claimant has suffered prejudice despite no injunction being in place.

Submissions on behalf of the 2nd Defendant

[28] The 2nd Defendant also submits that there is no serious issue to be tried and that AVC has not breached provisions of the DPA. Counsel argued that the processing of the Claimant's data falls within the exceptions of Section 23 (1) (e) and (f) of the DPA, and further maintains that the consent of the Claimant was not required in the circumstances prior to processing of her data. Furthermore, section 39 states:

> *"Personal data are exempt from 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"*

[29] Counsel argued that the nature of the processing falls under the exception of Section 23 (1) (e) as the data was processed in furtherance of a matter before the IDT which holds its status at the very least as a quasi-judicial body **(See The Industrial Disputes Tribunal v Caribbean Examinations Counsel and Gerard Phillip)**.[6] Counsel submitted that at the centre of the matter before the IDT is the extent of lost income by the Claimant, which is substantiated by confirming that she remained unemployed subsequent to the termination of her employment by

[6] [2024] JMCA Civ 5

the 1st Defendant. The provision of information of employment history was central to the matter before the IDT and relevant for the administration of justice. Furthermore, it is in the public interest that matters before the IDT are determined on correct facts. Counsel contended that the information provided by AVC was, at best, only corroborative, as SSCL had already provided Centerfield with the information that the Claimant was employed to them.

[30] Counsel highlighted Schedule Two Part one (a) and (b) of the DPA, which exempts personal data from Section 6 if they consist of references given or to be given in confidence by the data controller for the purposes of:

> ***(a)*** *The education, training or employment or prospective education, training or employment of the data subject;*
>
> ***(b)*** *The appointment, or prospective appointment of the data subject to any office.*

[31] Counsel's argument was that when one looks at the class of information provided it does not breach the Act, especially in the context of this matter. Counsel argued that the use of the Claimant's TRN in the letter of July 17, 2023 to Centerfield would not have been in contravention of the Act as the information would have already been known by the 2nd Defendant who was also a former employer of the Claimant. As it relates to the disclosure of her period of employment and her remuneration, Counsel argued that this class of information would have already been before the IDT as coming from Centerfield. Counsel's argument is that there has been no breach of the Claimant's constitutional rights and freedoms, nor would she be impaired by any future confirmation of her employment.

[32] Section 69 of the DPA, makes provisions for the payment of compensation to an aggrieved individual from a data controller who is in contravention of the Act. Consequently, it was submitted that even if the Court were to determine that there was a breach, the Claimant's remedy would be in damages, and as such an injunction ought not to be granted.

<u>Submissions on behalf of the 3rd Defendant</u>

[33] Counsel argues that Centerfield and not SSCL is a data controller in respect of the Claimant, and therefore the statutory obligation to the Claimant lies with Centerfield. Nevertheless, it was submitted, the information was processed in accordance with Section 23 of the DPA as it was obtained to advance Centerfield's legal position in proceedings before the IDT.

[34] As for the 1st Defendant, it was submitted that the processing of data by SSCL in June 2023 is not actionable as the sections of the Act relied on by the Claimant in these proceedings did not take effect until December 1, 2023. It is asserted therefore for the 2nd Defendant that there is in general, no serious issue to be tried, nor any reasonable grounds on which to pursue the claim against SCCL. Counsel also highlighted that the Claimant has not challenged the purpose for which the 3rd Defendants services were engaged.

[35] As it relates to the issue of an undertaking as to damages, Counsel argued that while the Claimant has given an undertaking as to damages, she has provided no evidence as to her means to meet such an undertaking in accordance with the usual practise (**See TPL Limited v Thermo Plastics (Jamaica) Limited**[7]**)**. Counsel concluded that the application should therefore be refused with costs to SSCL.

Issues

1. Whether there is a serious issue to be tried;
2. Whether Damages would be an adequate remedy;
3. Whether the balance of convenience favours the granting or refusal of the injunction

[7] [2014] JMCA civ 50,

Analysis

Serious issue to be tried

[36] Counsel for the Claimant submitted that the Claimant does not seek to prevent the use of the processed data by the IDT in the proceedings before it, a position that it seems was not made clear when the injunction application was made. The processed data, particularly regarding her subsequent employment to the 2nd Defendant (the primary thrust of the Claimant's submissions), is that while the alleged processed data can be used in the IDT proceedings, it was unlawfully obtained and the injunctive relief sought is required to prevent it being shared with 3rd parties to the detriment of the Claimant. Lord Diplock in **American Cyanamid Co. v Ethicon Limited** states:

> *".. it is not part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either part may ultimately depend nor decide difficult question of law which call for detailed argument and mature considerations"*

[37] In submissions on behalf of the Claimant, it was alleged that the request for information was fraudulently obtained as the 1st Defendant passed off the request as a background check, being made with her consent, and that a signature at the foot of the document purports to be hers. The Court's attention was drawn to the affidavit evidence of Dr. Spencer stating that Centerfield completed the request and never claimed that it was from Claimant. When one considers the DPA and that it was the Claimant's failure to disclose her employment status in her claim before the IDT that prompted the 1st Defendant to embark on this process, it is clear that the consent of a data subject, while desirable, is not required in all instances to process data.

[38] A useful starting point is section **11(1)** of the **DPA**, which allows any individual to request, by notice in writing, that the data processor either cease or not start to process information, being personal data in respect of which the individual is the

data subject. Section **11(2)** outlines a number of bases on which such notice may be issued. As initially conceived, it seems the application was intended to stop any continued processing of information and, as has been the stronger thrust in the submissions for the Claimant, some feared future processing. Section **11(3)** states that there is no ground on which to issue such a notice if any of the circumstances of section **23(1)** applies, and the primary defence to this application is that section **23(1)(e)**; that the data processing is necessary for the administration of justice, is contended. The question is whether the processing and dissemination of the Claimant's personal data was necessary in the Administration of Justice.

[39] Section 39(2) also states that the prohibition against the non-disclosure of personal data where necessary for legal proceedings or to obtain legal advice as follows:

> *(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.*

[40] There are similarities between the provisions of the DPA and paragraphs 5(3) (a) and (c) of the Second Schedule of the UK Data Protection Act, 2018, the latter interpretation of which the Court discussed in **Courtney Timoney Riley v The Student Housing Company (OPS) Limited** [2023] SC DNF 8. The claimant employee was terminated by the defendant and contended that the defendant Corporation breached **Article 5(1)(a) and 5(1)(b)** of the **UK GDPR** while processing his personal data, to defend itself in employment tribunal proceedings brought by another former employee. Sections 5(1) (b) and 5 (1) (a) of the UK Regulations reads thus:

> *Personal data shall be:*
>
> *i. processed lawfully, fairly and in a transparent manner in relation to the data subject ('lawfulness, fairness and transparency');*
>
> *ii. 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');*

[41] The former employer was successful in the claim, and an article was published in which the Claimant was referenced on six occasions. The Claimant argued that the defendant should have told him about the tribunal proceedings, provided him with copies of the tribunal bundle, asked him to comment on the allegations that had been made against him and asked him and invited him to provide a witness statement to be put to the employment tribunal. The Defendant however contended that it complied with these provisions by virtue of paragraphs 5 (3) (a) and 5 (3) c of the Second Schedule of the Data Protection Act ,2018 which outline that:

> *"3) 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."*

[42] The issue before the court centred around the interpretation of the provisions and extent to which the application of those provisions would prevent the controller from making the disclosure. The court had the following to say with regards to the 'exemption' in the UK Act:

> *"The rationale for the exemption contained in paragraph 5(3) of the 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."*[8]
>
> *…*
>
> *"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 rights to a fair trial."*[9]

[43] The court also commented on the claimant's submission that the claimant should have invited him to comment on the allegations. The court stated:

> *"The problem with requiring the defender to take these steps is that it would 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…"*[10]

[44] A key distinguishing feature between the case at bar and **Riley**, is that the Claimant in **Riley** was not a party to the tribunal proceedings, but demonstrates that the exemption is in pursuance of upholding a party's right to a fair trial. In response to the assertion of deception or subterfuge in the request for the information, there was a letter referred to during the application by "Letter from Centerfield to Advantage Communication, dated June 11, 2024", which stated:

> *"… this request is made in furtherance of our defence of IDT 5/2024 - claim for unjustifiable dismissal against the company by Ms. Morrison regarding her termination from the Company on 24 June 2020- IDT 5/ 2024, Which commenced on April 30, 2024."*

[45] The 'without prejudice' correspondence from counsel on behalf of the Claimant indicating a salary from July 24, 2020 to March 07, 2024 of $13,661,000.00, supports the contention that the Claimant did not disclose to the IDT that she had been employed since her employment with the 1st Defendant ended. Counsel even acknowledged that the burden rested on the 1st Defendant to disprove the Claimant's claim before the tribunal. The submission for the 1st Defendant,

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[8] Paragraph 43
[9] Paragraph 55
[10] Paragraph 48

supported in the submissions of the other defendants, is that had it not sought the background check, it would not have been unable to mount a defence. The Claimant submitted through her counsel that she did not intend to prevent the use of the personal data before the IDT, an acknowledgment it seems of the fact that to use it in that fashion would be permissible under the DPA.

[46] Applying the purpose approach employed in **Dixon**, is there an indication from the evidence before the court, that the purpose for which the data was processed, is purpose that the DPA allows for? As noted in the preceding paragraph, if for the purpose of or in connection with legal proceedings, then it is a purpose provided for under the DPA. The Claimant contends however that the concern is disclosure to third parties, with the risk that it could adversely affect her future job prospects, to summarize her concerns. It seems her concern is in part the confidentiality of the fact that her employment to the 1st Defendant was terminated and that a subsequent dispute at the IDT ensued. Similar to the issue raised in **Dixon** the court in its discussion on the issue of the breach of confidentiality stated:

> *"it must be resolved by balancing the competing interests whether the confidentiality is outweighed by other considerations. This requires an assessment of the nature and extent of the interference that the proposed disclosure would represent to the confidentiality/ privacy interests of the claimant measures against the countervailing interests of the Defendant."*

[47] A balancing act must therefore be performed; between the interests of the Claimant in preventing the processing of the data and that of the Defendant in restraining it. Schedule 2 (1) of the DPA states that personal data are exempt from Section 6 if they consist of a references given or to be given in confidence by the data controller for the purposes of:

> ***a.*** *The education, training or employment or prospective education, training or employment of the data subject;*
>
> ***b.*** *The appointment, or prospective appointment of the data subject to any office.*

[48] It would appear from a reading of this section that it is contemplated that personal data might be processed for the purposes of confidential prospective employment references, for example. There does not appear to be either the evidential basis to

fear that the Defendants would breach the DPA in regards to any future processing and if done as a confidential background check - as a future prospective employer might commission - it may be permissible. This conclusion is further supported by the fact that when one considers that the letter of request clearly outlines the purpose for which the data would be used, and there is no evidence to suggest that the Defendants have or may process it contrary to what has been indicated.

[49] The court had also considered that the processed data has remained confidential and has only been accessed by the parties who have an interest in the matter. It is clear that the processing of the information by the 1st Defendant was in an effort to build their defence, and the 2nd and 3rd Defendants only provided information in relation to the preparation of its defence, at the 1st Defendant's request. There is no evidence to suggest that the information which was garnered by the 1st Defendant would be processed outside the ambit of the IDT matter.

[50] In **Dixon**, the court at Paragraph 95 stated that fear of onward transmission of the proposed disclosure is not a sufficient reason to prevent proposed disclosure. In weighing the confidentiality/ privacy interests of the Claimant against the countervailing interests of the Defendants, in particular the 1st Defendant, in having the data processed to prepare to defend the IDT claim, I find that the scale weighs in favour of the 1st Defendant being permitted to process the data. The 2nd Defendants and 3rd Defendant would therefore have served a legitimate interest, as the class of information processed would be in keeping with Schedule 2(1) of the Act.

[51] Based on Counsel for the Claimant's argument, this application does not relate to the evidence already before the IDT, but to the future employability of the Claimant. I find considering the above that there is no merit in this argument. The original stated ground for the processing of the data was a legitimate and permissible one under the DPA. There is no evidence to support the Claimant's fear that the processing of her data to third parties to her detriment is likely, but processing it in circumstances of a background check by a prospective employer is permissible

under the DPA. I have found no evidence of any risk of an unlawful processing of her data that needs to be restrained and as such I find that there is not a serious issue to be tried.

Whether Damages would be an adequate remedy?

[52] My discussion under each of the required heads, must consider the nature of the proceedings and the surrounding circumstances. Section 69 of the Act makes provisions for the award of damages in the event of a breach of the Act. Having found that the application is made on the foundation of inequity, an award of damages to the Claimant would not be justified. Notwithstanding the view expressed above regarding a lack of evidence to support a real risk of unlawful processing of her data, if at trial the court is to find differently, damages will be an adequate remedy for the Claimant. The authority of **American Cyanamid** outlines that if damages will be an adequate remedy for the Claimant the court should not interfere with the Defendants' freedom.

Whether the balance of convenience favours the grant of the injunction

[53] The court in authority of **American Cyanamid** states:

> *" The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiffs undertaking in damage if the uncertainty were resolved in the defendants favour at the trial. The court must weigh one need against another and determine where the balance of convenience lies".*
>
> *…*
>
> *"So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.*

In light of the object of the granting or refusal of an interlocutory injunction, taken together with the discussions above, I find it unnecessary for the court to embark on a discussion of the issue of the balance of convenience.

Orders:

1.The Application is refused

2.Costs in the Application awarded to the Defendants, to be costs in the Claim.