

11KBW

Information Law Update

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Looking at recent information law developments in relation to four broad themes

- Data breach: risks and consequences
- Facial recognition technology: applying privacy and data protection to emerging technologies
- Responsibility of multiple data controllers involved in the same processing: recent CJEU caselaw
- Procedural changes to how data protection claims are handled in High Court.

Data breach: the risks

- Data security standards set by GDPR: see Article 5(1)(f), Article 32
- Practical issues for data controllers: attack by outside bad actors; the rogue (senior) employee
- Key risks for data controllers: regulatory action; civil claims
- The fear of group litigation
- Potential for group litigation on a no win, no fee basis; involvement of litigation funders

Data breach and mass litigation

- Potential for group litigation opened up by availability of damages for distress
- See *Vidal-Hall v Google* case under old law: [2015] EWCA Civ 311
- Problems for litigation funders: what is quantum of each claim? What is the marginal cost of recruiting each individual claimant? Do the economics make sense?
- Can mass litigation work other than by way of a Group Litigation Order?

Morrisons case

- Issue: liability of employer in relation to rogue senior employee
- Claimants lost on direct liability but won on vicarious liability
- Morrison failed to overturn decision on appeal: [2018] EWCA Civ 2339
- Supreme Court will hear appeal on 6-7 November 2019
- Areas of uncertainty: what will quantum be? What is the position for non-claimants who were affected by the data breach?
- Would the result be the same under GDPR + DPA 2018?

- Context for claim: "the Safari Workaround"
- Difficulties of group litigation in a case such as this
- Proposed solution: the use of a representative action
- Decision of Warby J refusing permission for service out of jurisdiction: [2018] EWHC 2599 (QB)
- Now under appeal to Court of Appeal

- *R (Bridges) v Chief Constable of South Wales* [2019] EWHC 2341
- Considers pilot project for facial recognition
- What is the position of an individual who is not “matched” against a wanted list?
- Article 8(1) engaged; but interference was in accordance with law, and proportionate
- GDPR: this was processing of personal data, but permitted under law enforcement provisions of DPA 2018

Processing by multiple controllers

- *Fashion ID* case in CJEU: C-40/17
- Part of backlog of “old” DP cases in CJEU
- Embedding of social media plugin in online website
- Both Facebook and the retailer were data controllers
- Need to distinguish which processor is responsible for which type of processing

Boring but important?

- All data protection claims issued after 1 October 2019 will now have to be issued in Media and Communications List of the High Court.
- On that date, a new Part 53 of the CPR will take effect along with two new Practice Directions.
- Part 53 and the new mandatory List will cover all data protection claims, misuse of private information claims, defamation claims and claims of harassment by publication. It will not prevent data protection claims being issued in, or transferred to, the County Court.
- New Practice Directions: PD53A and PD53B.

What about FOIA?

- *Information Commissioner v Halpin* [2019] UKUT 29 (AAC)
- Judge Markus QC overturned an FTT decision which had held that personal data was not exempt under section 40(2) FOIA.
- FTT had erred in declining to have regard to the possibility of wider disclosure to the world beyond the requestor, and so had failed properly to balance the competing interests and effects of disclosure.
- *LO v Information Commissioner* [2019]UKUT 34 (AAC) - Judge Jacobs sceptical of reliance on FTT decisions as precedents.