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Higher Education Bulletin

July 2016

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Why distress alone is sufficient in DPA cases

Litigation against Google attracted a lot of media attention last year, in particular the ruling requiring the search engine to delete links to historic information on request. More relevant to the education sector was the case in the Court of Appeal in late March 2015, in which three individuals brought a claim against Google for collecting information on their internet usage via the Apple Safari browser without the individuals' knowledge or consent (Google v Vidal-Hall & Ors [2015] EWCA Civ 311). The information was used to market products and services based on a profile of those individuals' preferences derived from their previous internet use. Third parties were able to see the adverts, some of which related to sensitive personal data, and this was the primary source of the individuals' concerns. They claimed that the activity amounted to a misuse of their private information, breach of confidence and a breach of the Data Protection Act (DPA). It is the latter claim which this article now explores.

The individuals sought compensation under the DPA s13. No financial loss was claimed and hence compensation was sought for non-pecuniary damage and distress. The DPA provides that an individual who suffers damage as a result of breach of his/her data-protection rights is entitled to compensation for that damage. The wording of s13 also provides that an individual who suffers distress as a result of a breach is only entitled to compensation if that person also suffers damage, which until this case was presumed to mean pecuniary loss alone (s13(2)). The position adopted until the Court of Appeal case was that there was no free-standing right to compensation for distress unrelated to any financial loss. That provided many universities with a degree of comfort; it was clear that while aggrieved staff and students felt upset by unauthorised disclosures of their personal data, they could rarely establish any demonstrable financial loss as a result. That in turn minimised the potential for court claims for compensation.

The Court of Appeal ruled, however, that notwithstanding the drafting of the DPA, a claimant did not need to show any pecuniary loss in order to claim compensation for distress. The case was due to be heard by the Supreme Court but has, we understand, been withdrawn following an agreement between the parties. The decision of the Court of Appeal therefore represents the current law.

The Court of Appeal's view was that given the broad purpose of the EU Directive of protecting individuals' privacy rights rather than economic rights, on which the DPA was enacted, it would be strange if there was no possibility of compensation for emotional distress. It is the distressing invasion of privacy which must be taken to be the primary form of damage. Further, the enforcement of privacy rights under the European Convention on Human Rights has always permitted recovery of non-financial loss. The Directive did not distinguish between pecuniary and non-pecuniary damage, such as distress. The Court of Appeal therefore concluded that there was no linguistic reason to interpret the word "damage" in the Directive as restricted to financial loss, and to do so would substantially undermine the purpose of protecting the right to privacy of individuals in relation to processing their personal data. In the circumstances, the Court of Appeal was able to strike down the offending provision of the DPA on the basis that it conflicted with Articles 7 and 8 of the EU Charter of Fundamental Rights, which enshrines privacy and data protection rights.

The consequence was, and continues to be, that if staff, students or anyone else believes that universities have breached their data-protection rights, they can claim compensation for distress notwithstanding that no financial loss has been suffered as a result. The Information

Commissioner does not have the power to award damages and the ruling continues to have the potential to increase court claims. Where claims for damages have hitherto included distress, that element of the compensation awarded has usually, however, been relatively modest.

This decision highlights the need for universities to take data protection seriously, in particular to ensure transparency, proportionality and security in respect of the processing of personal data. Conducting an audit of personal data processed and the manner in which it is processed would be a very useful exercise not only to eliminate any bad practice, but to prepare universities for the new, more stringent, General Data Protection Regulation (GDPR) which is scheduled to be implemented in 2018. Notwithstanding the outcome of the referendum on EU membership, there is an expectation that the UK will need to sign up to the GDPR or its equivalent if it wishes to trade with EU member states. Under the GDPR, a data subject who is a victim of a breach can obtain compensation for any damage ("material and non-material"), which will be broadly interpreted and very likely to include a free-standing right to compensation for distress.

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Energy storage – a research opportunity for universities?

During the past few years the UK has witnessed a huge increase in the development and use of renewable energy projects to replace the traditional coal-plant method of electricity generation, as a result of the adoption of the Kyoto Protocol which set binding greenhouse gas ("GHG") emission reduction targets. These commitments were strengthened by the Paris Climate Change Agreement agreed in December 2015 and the EU "Third Package" Directive which sets the UK a target of 15% electricity generation from renewables, alongside GHG emission reduction and energy efficiency targets.

More recently however, renewable energy projects have received bad press with one of the criticisms being the intermittency of their ability to generate electricity and the difficulty this causes when trying to balance the electricity transmission system. This has resulted in the current government steering development away from renewables and focusing on fracking as an alternative source of energy. But, with the mounting pressure to ensure security of energy supply, has an opportunity been overlooked by the government to develop a solution for intermittent generation of renewables in the form of energy storage?

The challenge of developing industrial-scale energy storage has dogged the energy sector for many years. Energy efficiency storage is key to delivering and developing a flexible solution to meet consumers' changing energy needs. However, with the exception of pumped hydro, the energy storage industry is in its infancy, with the most significant breakthroughs in this technology being developed across the Atlantic Ocean.

In the March 2016 budget, on the back of recommendations from the National Infrastructure Commission George Osborne announced that the government will allocate at least £50 million, over the next 5 years, to help innovation in the energy storage industry, demand side response ("DSR") and other smart technologies. However, given the fallout from the recent EU Referendum and the creation of the new Department for Business, Energy and Industrial Strategy, it is unclear whether the proposed investment in energy storage, DSR and other smart technologies will be fulfilled.

Investment aside, there are still fundamental issues which need to be considered. Firstly, storage has the potential to take a variety of forms and so storage companies will need to decide what their primary product is and who will be their primary market. Issues also inevitably surround the questions of who should own the asset and where, on the current energy system, storage devices are to be located. Another potential issue is how storage is to be treated – i.e. should storage be treated as generation, which can be turned on and off when instructed by the system operator? Or should it be owned (or potentially leased) by the system operator and treated as part of the transmission network?

A number of UK universities have already recognised the importance of energy storage as a solution to ensuring security of supply and its potential to play a vital role in managing the electricity generated by renewable technologies, thus ensuring the UK can achieve, and possibly exceed, its current climate change commitments and targets. If you haven't already, now is the time to get involved.

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Minor works leads the suite reform

The 2016 editions of the JCT suite of contracts will gradually be released throughout the remainder of the year to reflect the various legislative amendments and market initiatives introduced since the 2011 publications. This reform was launched by the release of the Minor Works contracts in June with some significant and noteworthy changes:

- **Legislative amendments**

  Provisions have been introduced to incorporate the requirements of the Freedom of Information Act 2000 (FOIA) and the Public Contracts Regulations 2015 where the employer is a local or public authority or the contract in question is subject to the FOIA. With this, new termination events are introduced into section 6.

  Reference is made to the Construction (Design and Management) Regulations 2015 and the contractor is prevented from including the cost of or time spent complying with the same in any application for an extension of time.

- **Payment**

  The payment provisions have been simplified by the introduction of "Interim Valuation Dates" which trigger the operation of the payment mechanism, the alignment of interim applications (whether prior to or post practical completion) to one month, revised fluctuation provisions and consolidation of the notice requirements.

  Further, section 4 now reflects the expectations of the Fair Payment principles. Whilst previously the architect/contract administrator was solely responsible for submitting payment notices, the contractor is now vested with a right to submit applications for payment.

- **Insurance**

  Flexibility surrounding the insurance of the works and existing structures is enhanced, as there is now an option to specify that such shall be insured by "other means". This would better accommodate a scenario whereby the employer is a tenant of an existing structure (as frequently the case where Minor Works contracts are used) and the insurance is being maintained by the landlord.

We now await the next instalment of the suite reform due at the end of the summer which promises to be more user-friendly and provide greater flexibility for the parties.

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Brexit: what are the immediate HR implications for universities?

Major economic changes always create uncertainty, stress and anxiety. Many people within universities will be thinking very seriously about the potential implications of Brexit and how it will affect their university and its staff.

A crucial implication for universities is that a substantial proportion of their involvement in research projects and research funding derives from EU sources.

Communication is key

University leaders will be looking to their HR colleagues to help them to assess the various options available and the associated employee engagement consequences of any action that might need to be taken.

HR teams need to work with the university's senior management to devise a clear strategy and communications plan. Employee communications are vitally important in these times of uncertainty to build trust between the university and its staff. It is imperative that managers at all levels are equipped with the right information and skills to deliver the right messages.

Employment issues

Whilst many schools, faculties and departments will not have a clear idea of the consequences of an exit yet, there are inevitably employment and HR issues and concerns that need to be addressed with staff at this early stage. These could include:

- All workers, irrespective of nationality, may worry about department closures and redundancies. They should feel informed about how the university is responding to Brexit and any potential changes to their contract of employment.
- There could be a risk of conflict in the workplace due to the extremely close result. Universities may need to take steps to remove conflict at work by bringing all staff back on track to focus on a collective culture. UK workers may need support and guidance in understanding how to talk about Brexit with their EU colleagues.
- There have been reports of higher levels of abuse of immigrants since the vote. Staff may need to be reminded of equal opportunities policies, policies relating to workplace bullying and harassment, and the grievance and disciplinary procedures that should be used if any incidents occur within the workplace.

So, what about the law?

A significant part of UK employment law derives from the EU. It is too early to say exactly how, if at all, EU-derived employment law will change. It will very much depend upon the outcome of the UK's exit negotiations. Any trade agreements that would allow the UK continued access to the single market, or joining the European Economic Area, are likely to require the UK to accept the majority of EU employment laws and regulations. If this were to happen, we suspect that very little would change.

The biggest immediate challenge regarding the law is likely to be reassuring staff that any significant changes to their employment rights, and rights to work in the UK, are highly unlikely to happen in the short to medium term.

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