Case No: D00BN516

IN THE COUNTY COURT
AT LEWES

182 High Street
Lewes, East Sussex
RG1 1HE

Date: 15th February 2019
Start Time: **1034** Finish Time: **1111**

Before:

DISTRICT JUDGE HENRY

- -

Between:

CATHERINE PARRIS **Claimant**

- and –

SHC CLEMSFOLD GROUP LIMITED **Defendants**
SHC RAPKYNS GROUP LIMITED

- -
- -

Ms Felicity McMahon appeared on behalf of the Claimant
Ms Iris Ferber appeared on behalf of the Defendants

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APPROVED JUDGMENT

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JUDGE HENRY:

1. By way of a preamble but by no means by way of an excuse, I have to say that I have found getting to grips with this case in the very short time I had available to me on Monday afternoon and Tuesday morning quite a task. I have done my best and I am very grateful to counsel for their helpful and detailed skeleton arguments and provision of the relevant legislation and authorities, all of which has helped me enormously. So thank you for that.

2. It is surprising that no time provision for reading had been made but, in any event, due to the fact that three of the Defendants' witnesses did not come to give evidence, we are on time.

3. So the first thing I had to deal with was the application for admission of a third witness statement by the Claimant, which I refused apart from acknowledging that paragraph 7 of that statement did provide an update to other proceedings involving this Claimant and the Defendants, another party and one of the Defendant's witnesses, none of which I was given any information about as it was agreed that it was not relevant to the decision that I have to make.

4. This is the trial of the Claimant's application for an order under Section 7 (9) Data Protection Act 1988, that the Defendants comply with subject access requests made by the Claimant dated 19th August 2016; 28th September 2016; 6th October 2016; 18th November 2016; and 30th November 2016.

5. The Data Protection Act 1988 was repealed with effect from 25th May 2018 but it continues to apply to requests made prior to that date and, therefore, it applies to this claim.

6. The information requested via those subject access requests is: (1) the Claimant's supervision forms prepared by and for the Defendants of which the Claimant is the data subject from three years from 19th August 2013; (2) investigation report prepared by the Defendants for the purposes of a disciplinary hearing against the Claimant held on 28th October 2016; (3) the Claimant's personnel file, to include her contractual information, performance reviews, all appraisals and all supervisions; (4) information relating to an incident and investigation at the Defendants' Woodhurst Care Home we will call that the Woodhurst investigation, of which the Claimant is the data subject from 20th July 2015 to date (5) information relating to an incident on 20th July 2016, at the Defendants' Sycamore Care Home this is called the Sycamore incident, of which the Claimant is the data subject from 20th July 2016 to date; (6) the Defendants' summary decision note of the disciplinary hearing on 28th October 2016 of which the Claimant is the data subject. The Defendants say they have complied with those subject access requests.

7. The background to this claim is that the Claimant is a physiotherapist. The Defendants run care homes for the elderly and adults with dementia, neurological conditions and physical and mental learning disabilities. The Claimant worked in the Defendants' care homes from 1998 in the role of a physiotherapist and then she was promoted to lead physiotherapist in March 2011 and held that position until her dismissal on 2nd November 2016. Her line manager was Mr Olanrewaju Ajayi. She is pursuing a claim in the employment tribunal for unfair dismissal. The Defendants are not party to the employment claim. Liability, I am told, has been admitted. The Claimant is also pursuing a claim for defamation and malicious falsehood against the Part 8 Defendants.

8. As I said, I have not been told any detail about these other proceedings as it was decided that that was irrelevant to the considerations of this claim.

9. These Part 8 proceedings commenced in May 2017. The Claimant has served two witness statements dated 18th May 2017 and 15th August 2017, setting out why she says the Defendants' response to the SARs was inadequate.

10. The Defendants served witness statements from five witnesses but three of those witnesses, former employees of the Defendants, are no longer in the employment of the Defendants and did not want to be involved. So their witness statements have been struck through and are not relied on and I have not read them.

11. Mr Ajayi, the Head Quality and Therapy Manager for the Defendants, filed a statement dated 27th June 2017.

12. There was a directions hearing in August 2017 and the matter was directed to be listed for hearing. The trial was listed for one day on 1st June 2018. This was an unrealistic time estimate.

13. On 29th May 2018, the Defendant filed with the Court ten ring binders of documents. The Claimant did not know and still does not know what those ring binders contain.

14. Deputy District Judge Mills directed the Defendants to file and serve a witness statement setting out, in relation to the ten lever arch files, what those documents are, why they should not be shown to the Claimant, including any reliance upon Section 15 of the Data Protection Act 1988, who carried out the search, when the search was carried out, what search terms or other parameters were used, where exemptions to disclosure under the Data Protection Act 1988 were said to apply, an explanation as to what those exceptions are and why they are said to apply.

15. Permission was given to the Claimant to file and serve a witness statement in reply on the issue of the adequacy of the search and that reply is by Mr Henman, the Claimant's husband.

16. The matter was listed for trial for four days in a courtroom and that is where we are.

17. There was a delay in complying with these directions while the parties attempted mediation. My only previous involvement in this case was when I approved a consent

order for a stay in August 2018 at which point I had not read any of the papers in the case. Mediation failed so the matter proceeded.

18. The Defendants complied with the direction of Deputy District Judge Mills in that they filed a statement by Donna Bates who is the IT director employed by the Defendants since March 2018. Her statement is dated 18th October 2018 and, as I say, Richard Henman, the Claimant's husband, filed a statement in response, 30th November 2018. Ms Bates also provided responses to requests for further information.

19. It was agreed when the trial started on Tuesday that the Defendants' witnesses that is Mr Ajayi and Ms Bates would give evidence first. I heard oral evidence from Mr Ajayi and Ms Bates and, on behalf of the Claimant, I heard from Mr Henman.

20. The issues identified by counsel for the Claimant are: did the Defendants carry out adequate searches for the Claimant's personal data prior to the issue of proceedings; have the Defendants now carried out adequate searches for her personal data and included all remaining material that could constitute her personal data in the ten ring binders; if not, should the Court exercise its discretion to order the Defendants to comply with Section 7 of the Data Protection Act, conduct proper searches and provide the Claimant with the personal data requested in her subject access requests; whether or not the search that produced them was adequate, have the Defendants shown that the documents in the ten ring binders are exempt from disclosure?

21. Now, I am not going to read out the whole of the section that applies that I have had to consider but it is set out in the skeleton argument of both counsel and there is no disagreement obviously about what it says. I will just read out the definition of personal data because that is something that I have had to bear in mind in considering the evidence before me:

> Personal data means (a) data which relate to a living individual who can be identified 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 and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.

22. Section 7 of the Data Protection Act sets out the right of access to personal data and, as I say, I am not going to read that out. I think we all know what that says and I do not think there is any dispute about what personal data is.

23. The only witness for the Defendant in relation to the searches carried out prior to the issue of proceedings was Mr Ajayi. He told me he was not responsible for the search; that was Mr Gaylor in HR. No one other than Mr Ajayi has been put forward in relation to the search. I saw an exchange, a very brief exchange, of Emails between Mr Gaylor and Mr Ajayi. Mr Gaylor seemed to be expecting Mr Ajayi to do a search. He chased Mr Ajayi up about this. In response, Mr Ajayi asked his PA Dawn to look for Emails from Catherine, the Claimant's name being Catherine Parris. That was the

extent of the search that he did and we do not know what other searches were done at this stage. Mr Ajayi did not look through those Emails carefully. In fact, his evidence was that he treated it rather as peripheral to his job but he did send them on to Mr Gaylor.

24. Mr Ajayi's evidence resulted in my forming a view of the Defendants' organisation that, from a data protection point of view, was chaotic. The written policies were not enforced. The IT system was basic and not controlled by anybody. Each home had a standalone computer. The disclosure that Mr Gaylor did give, which was after the disciplinary hearing, did not include his briefing note, which I am satisfied was the investigation report and which was the subject of the SARs report. He knew about that note. It was given to the meeting but not to the Claimant. It is at F678 in the bundle and it was not disclosed as a SAR response but as part of a witness statement. I find that it was, in effect, the investigation report, albeit a very poor one, and should have been disclosed and it is an example of the inadequate response of the Defendants.

25. Another example of the failure of the Defendants was the missing weekly reports and calendars from July to December 2016 when the Woodhurst incident occurred. There is no explanation as to why these documents are missing from the index provided by the Defendants subsequently.

26. The Defendants' response to the SARs request this is Mr Gaylor's response was to send three packs of copy documents, which appear to have been randomly put together, with no index. The Claimant and her husband had to index and collate the documents themselves in order to see what had been provided and whether they complied with the SARs. They were satisfied, and I am, that at that stage there was a failure to comply with the requests. No one it carried out a thorough search for the Claimant's personal data. Some of the documents requested did not exist: for example, the only supervision report was August 2016. The picture of disclosure that I got from Mr Ajayi, albeit that I accept that he was not responsible for the search, was chaotic and piecemeal and it is clear, as Ms McMahon said on behalf of the Claimant, that the Defendants had motivation not to comply despite what Mr Ajayi said in his evidence about his professional relationship with the Claimant: "There were some difficult days but, on the whole, we got on". I definitely formed the impression that Mr Ajayi and the Claimant did not get on.

27. The Defendants had a duty to preserve the Claimant's personal data. Mr Ajayi admitted that he deleted all the data on his laptop and his work phone was also given back in a vanilla state, i.e. no data was retrievable before he left the Defendant’s employment in 2018. He said he thought his laptop was backed up. I find it was not and he should have known it was not. I found him to be somewhat evasive and on almost all points relating to the data that he might have known about and I would say that his evidence was given with a view to protecting himself, which is perhaps not surprising given the other proceedings.

28. Ms Bates was employed in March 2018. The only word I can use to describe the organisation that she found in terms of IT was "a complete shambles". There was no adequate or enforceable IT policy in place. There was no data retention policy. She

was asked by the CEO, Ms Morgan Taylor, to do a search of Emails in the boxes of seven people listed their names are at page 380 and she was asked to search for Emails which contained the names Catherine, Catherine Parris or CP. She was not shown the SARs requests when she started her search. She was just obeying the requirement of the CEO as to what she was to search for. So the parameters of her search do not match those of the SARs requests. She says she did her best via the host server and by visiting each standalone computer in each of the homes.

29. She did not search any paper records because she was not asked to and this was not within her job as IT Controller. Her search was carried out over eight days in April 2018 and turned up the 4,161 documents in the ring binders filed at court. She did what she was asked and I do not criticise her for doing what she could in what, as I say, was a shambolic situation.

30. Later, in October 2018, she was asked to do two further searches against a Chris Trott's maiden name, Tinson and against two of Mr Ajayi's former PAs, which did produce some further relevant documents that were disclosed. It was almost by chance.

31. She was asked to do a statement, at which point she produced an index of the documents she had pulled up in April and found amongst them several which she thought should be disclosed because they did have personal data for CP, and these were pulled out and served on the Claimant. This was in October 2018.

32. With regard to the rest of the documents, she says that she went to the Defendants' solicitors' offices and during a morning and part of an afternoon, she looked through the documents with a pupil barrister and somebody employed by the solicitors and she marked up documents which she considered one of the Data Protection Act exemptions applied to. She did not have any further involvement other than one further request for information. She gave her replies via the solicitors and they are put into the responses to the further and further requests for information.

33. Her last remark in the witness box was: "I didn't have access to each client, nor was I convinced that data had not been tampered with", which I found an alarming statement which was not the responsibility of Ms Bates. I find that she conscientiously did what she had been asked to do and that she was picking up the tab from a situation that had arisen over years. So I do not blame her for the inadequacies of the search done by her and I do find it was inadequate; nor do I find her responsible for the responses she has given to further questions that have been highlighted in Mr Henman's evidence. The search she conducted was very selective, not directly working to the SARs requests in that it did not include electronic documents or any paper searches. It was purely relating to Emails with the Claimant's name or initials in relation to seven named individuals inboxes, and she explained the technical difficulties of retrieving even that information.

34. The Claimant worked for the Defendant for 18 years. There must be, or at least have been, a lot of information. The focus on Emails and, even more narrowly, Emails to or from the Claimant, is a feature of all the searches carried out by the Defendants.

This fundamentally misunderstands the definition of personal data and I find has resulted in inadequate searches.

35. The numbers of documents pulled out by Ms Bates is not a substitute for a properly conducted focussed search. I find it implausible that there is no substantial documentation about the Woodhurst and Sycamore investigations that contain the Claimant's personal data. Documents about these incidents are bound to include information about the Claimant, such as what she did, what she said to other individuals and what others have said about her. It is bound to include biographical information, such as where the Claimant was at a particular time. This is all the Claimant's personal data. The fact that they may also contain the personal data of others, including the service users in question, does not negate this. Care homes are obliged by law to keep records relating to patients and relating to staff. This is the Health and Social Care Act 2008 and, indeed, I heard from Mr Ajayi about the paper records that were kept.

36. It is not feasible that either of these two serious incidents were not treated as safeguarding matters and referred and investigated accordingly, and in particular relation to the list of the SARs requests I have set out at the beginning of this judgment, I find that the requests in relation to these two incidents has not been dealt with adequately.

37. Ms Bates has been clear that the Defendants' IT system, when she joined the Defendants, was very poor. She said it was at a domestic level. There was no control over data or records management. She agrees that data has been deleted either because the standalone computers were moved around or has been deleted deliberately, as in the case of Mr Ajayi's work laptop, which was returned after he had deleted everything on it, and his work mobile telephone, which also had nothing on it.

38. Ms Bates also commented that she was not convinced that data had not been tampered with.

39. Bad record keeping is not an excuse for failing to comply with the Data Protection Act. The Defendants have an obligation to preserve relevant documents. They have a vicarious liability for the actions of their employees. The protection of personal data is a fundamental right under the Data Protection Act and Article 8 of the EU Charter of Fundamental Rights.

40. In summary, I find, having considered the evidence, that the Defendants are in breach of Section 7 of the Data Protection Act and, in particular, have failed to comply with the Claimant's request for information in contravention of those provisions.

41. So I then have to go on to consider the question of whether I should exercise my discretion under Section 7 (9) of the Data Protection Act to order the Defendants to comply with a request, having found that the Defendants are in breach. I do have to have regard to the principle and proportionality and to strike a balance between the prima facie right of the data subject to have access to their personal data on the one hand and the interests of the data controller on the other.

42. The two cases that I have been referred to that I think are particularly relevant here are *DawsonDamer v Taylor Wessing* LLP [2017] EWCA Civ 74 in which the Court of Appeal confirmed that:

> Reference to proportionality in Section 8 (2) of the Data Protection Act means it will be a question for evaluation in each particular case whether disproportionate effort will be involved in finding and supplying the information as against the benefit it might bring to the subject data.

43. In this case, I find that the Claimant is, after 18 years of employment and unfair dismissal which has been admitted is not someone that I find to be pursuing this to be awkward or difficult. I think she wants to know what other people have said about her and what information there is that could be available to other people, and the significance to her, I find, has to be set against the effort that is going to be involved in finding and supplying the information. I weigh the balance and I find in favour of the Claimant, and I will go on to what I consider needs to be done in a moment.

44. The other case I have considered is *Ittihadieh v 511 Cheyne Gardens RTM Company Ltd* [2017] EWCA Civ 121 where the Court of Appeal stated a number of principles that have to be considered:

> The Data Protection Act imposes an obligation on a data controller to carry out a reasonable and proportionate search for personal data in response to a SAR. A search is not inadequate merely because it has not retrieved every item of personal data relating to an individual.

45. I am satisfied in this case that the data controller has failed to comply with the requests; in particular, in relation to the Woodhurst and Sycamore incidents and in relation to the request for the contents of the personnel file. This may be the result of the failures of the data controllers, as highlighted by Ms Bates, but I do not consider that an adequate search has been done because of the focus on Emails only, and I am also concerned about the suspicious gap in the documents in the index she has produced of weekly calendars and reports between July and December 2016 when the Woodhurst investigation was underway.

46. Taking into account the factors that are relevant to the exercise of that discretion are set out in that case that I have just mentioned. They are:

> Whether there is a more appropriate route to obtaining requested information; the nature and gravity of the breach; the reason for having made the subject access request; whether the request is an abuse of rights; whether the real request was for documents rather than personal data; whether the personal data were of no real value to the data subject; whether the data subject has already received the requested data.

47. Well, as I have said, I do find that in three out of the SARs requests, I do not consider that she has had an adequate response. I consider that the documents are very important to the Claimant. At the time she made the request, she was facing a disciplinary hearing. In relation to her personnel file, in the first instance, the Claimant simply made the requests and it was the Defendants who treated them as subject access requests and, having delayed in responding to them, did not provide the documents requested before the Claimant's disciplinary hearing.

48. It is obviously important for the Claimant to have sight of these documents and to understand what information the Defendants have been processing about her and whether her personal data is accurately recorded but the Defendants have failed to comply with their statutory obligations for so long that proceedings are now on foot is not an answer. The importance of the Claimant of having access to her personal data is, I consider, given the ongoing parallel proceedings, important to her.

49. I find that in this case, having considered the principles in those two cases, that the discretion should be exercised in favour of the data subject. As I say, I do not accept the Defendants' argument she has already received the requested data, nor that the requests are an abuse of rights. I do consider that the response to the request for information on the personnel file has not been dealt with adequately and I am going to order that the Defendants carry out a search of their paper documents and, in particular, in the HR Department. A full search needs to be carried out, and also in relation to any paper documents about the Sycamore and Woodhurst incidents.

50. The 4,000 plus documents from Ms Bates' search appear to have come out of the system because they contain the Claimant's personal data. When Ms Bates explained the search criteria she used, the criteria were the Claimant's name and nothing else. So in considering Ms Bates' evidence, I am not satisfied that the exemptions listed in her detailed evidence of what is in those bundles mean that the material is exempt. I consider that the Defendants have failed to show that any material actually falls within the scope, for example, of the management forecasts, et cetera, exemption, and I also find that the Defendants have failed to show the provision of the Claimant's personal data contained therein would be likely to prejudice the conduct of their business.

51. With regard to the other exemption which Ms Bates described and which, I have to say, I think she was in some difficulty in justifying in her oral evidence in relation to third party or mixed personal data, I think that it has not been properly considered because information about the Claimant can be separated from other people's personal data. Where it is mixed with other people's data, her personal data should still be provided to her and I was shown the policy document at 981 and 1006 of the Defendants in relation to information and that document says: if the third party is one of the Defendants' employees or former employees, they consented to their personal data being provided in response to SARs when they agreed to the Defendants' ICT policy. Unfortunately, the policy document is there but does not appear to have been observed. In this case, it is something that the employees signed up to and so this exemption, I find, has been used in circumstances where I think a more accurate and higher bar should have been applied to the data. In any event, I find it is reasonable in all the circumstances of the three SARs requests I have pinpointed for the Defendants

to provide the personal data. Problems in providing this could be dealt with, for example, by redaction in those documents.

52. I do not think Ms Bates' evidence on the reason she thought the material was exempt was convincing. I am not sure that she had properly considered the standard to be applied, in my view, and I know Ms Ferber said, well, the guidance was only guidance; it was not case law, but in looking at the case law, I find that decisions have to be made. My view is that the case law shows that the decisions in balancing the interests of the data controllers against the interests of the person making the request is that decisions should be in favour of the person making the request unless there is a very good reason. Ms Bates did not convince me of the reasons for the blanket exemptions that were applied to the vast majority of the documents in those ring binders, none of which I have looked at, and, indeed, not all of which she has looked, at on her evidence to me.

53. So I am going to order, taking into account my findings about the inadequacies of the search that has been done, that the Defendants, do a paper search in relation to the matters I have set out and that, in relation to the 4,000 odd documents in my chambers, that they do need to be gone through properly and in detail and by somebody who is well aware of the guidance about exemptions and the case law and to decide whether or not they should be disclosed.

54. I know it has been suggested that one remedy would be for me to go through those 4,000 documents. I am not prepared to do so. The Defendants need to provide a much more detailed analysis of what the documents contain, and I do refer to Mr Henman's careful statement because the starting point for these particular documents is that they came out because of the way the search was conducted, i.e. because of the name of the Claimant appearing in them, otherwise they would not have shown up in the search, and that there has to be a very good reason why any personal data should not be provided to the Claimant. That is my decision.

This Judgment has been approved by the Judge.

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