



# EMC HR Bulletin – In Deep with Darren

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## Darren's Insights on a Recent Data Protection Case

I often think that people worry too much about data protection. When you come across someone refusing to tell you something that you feel you have every right to know because of 'data protection' it can be frustrating. I have certainly found myself suspecting that data protection is being used as a cover by people who are just being unhelpful.

But the case of *Raine v JD Wetherspoon plc* is a corrective to that. The employee was employed in one of the employer's pubs and had a personnel file that was kept manually in a filing cabinet and marked 'strictly private and confidential'. As you might expect with such a file, it included her contact details and also details of an 'emergency contact'. For this she had given the mobile number of her mother.

Before leaving her employment, Ms Raine had told her employer that she was a victim of domestic abuse from her then partner. This issue had been discussed over three meetings with a manager which occurred because she had been off work with anxiety. Because these were formal meetings, records were kept

showing what the employer had been told. Eventually matters became so serious that her partner (now her former partner) was arrested and held on remand before eventually being convicted and sentenced to more than two years in prison.

Just before Christmas 2018, Ms Raine's ex partner obtained a mobile phone in the prison where he was being held and phoned the pub where she had worked asking for her contact details (for obvious reasons she had changed her own mobile number). Ms Raine was no longer employed by that time but her personnel file had been retained (quite properly) and the pub manager checked the file and passed on her mother's mobile number.

That seems an astonishing thing to do – but the manager genuinely thought she was being helpful. Ms Raine's former partner had posed as a police officer and claimed that he needed to contact her urgently. The manager thought that she was merely cooperating with a police inquiry. The ex-partner used the mobile phone number to contact Ms Raine on Christmas day and subjected her to verbal abuse and threats. It is easy to imagine how frightening and distressing this was for her.



She sued Wetherspoons in the county court alleging misuse of private information, breach of confidence, and a breach of the Data Protection Act. The county court upheld the first two claims but rejected the data protection claim. It found that the information given to her ex-partner was given orally over the telephone and that this did not count as the processing of personal data.

That finding did not affect the overall liability of Wetherspoons or the calculation of damages (she was awarded £4,500 for the distress caused). But Wetherspoons appealed to High Court on the issues that it had lost on and so she cross-appealed against the finding that there was no breach of the Data Protection Act. The High Court found in her favour on all three issues.

I want to concentrate on what the Court said about data protection because I think it makes an important point. The Data Protection Act is concerned with the processing of personal data – which means data stored electronically or in a manual filing system. It is not concerned with things that one individual might just know about another. If I happen to know something about you and mention that to someone else then I am not processing personal data. The knowledge in my head is not covered by the Act. This approach was confirmed by the High Court in the 2020 case of *Scott v LGBT Foundation Limited*.

In Ms Raine's case the county court judge relied on *Scott* in finding that the disclosure of information over the telephone could not breach the Data Protection Act. But as the High Court pointed out, that misses a crucial difference between *Scott*'s case and that of Ms Raine. In *Scott* the information was not kept electronically or in a manual filing system; it was just in the head of the person who disclosed it. In Ms Raine's case the person answering the telephone had gone to the filing cabinet, opened the file, noted down the relevant number and then read it out over the telephone. That disclosure of Ms Raine's personal data was a breach of the Data Protection Act.

It is impossible not have some sympathy for the employees who were tricked into disclosing Ms Raine's personal data in this way, thinking that they were doing the right thing. But in doing so they had acted in breach of the employer's own procedures.

Wetherspoons had provided training on 'pretexting' where someone seeks the disclosure of personal information on the pretext that they have a legitimate reason for doing so. The training highlighted that the perpetrator might impersonate an authority figure and claim that the information was needed urgently in order to obtain the information they were seeking. Employees were warned not to defer to perceived authority in such circumstances and not to accept at face value any claims of urgency. The correct procedure was to refer the matter to Head Office and they had not done so.

Their failure to follow the procedure was particularly serious because the employer knew that Ms Raine considered herself to be at risk from her former partner and had made her employer aware of this. The fact that at the time of the incident she was no longer an employee made no difference. Nor did it matter that the individuals who made the disclosure were not aware of the issue. They were acting on behalf of the employer and the employer was liable for their actions. Since the employer knew of the particular risks she was facing this meant that they should have been even more careful to ensure that her personal data could not be disclosed without the proper procedures being followed.

On reflection then, I should perhaps be more tolerant of those who make me jump through procedural hoops before giving me what I might think is straightforward information over the telephone. I should at least accept that it is appropriate for them to take steps to confirm my identity and that I am entitled to be given the information I am asking for.

