THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE
BEFORE JUSTICE SIR RICHARD FIELD
IN THE MATTER OF AN APPEAL UNDER ARTICLE 37(1) OF DIFC LAW No. 1 of 2007 (THE DATA PROTECTION LAW) AND JUDICIAL REVIEW UNDER PART 42 OF THE COURT RULES

BETWEEN

THE DUBAI FINANCIAL SERVICES AUTHORITY

Appellant

and

THE COMMISSIONER OF DATA PROTECTION

Respondent

ANNA WATERHOUSE

Interested Party

JUDGMENT

Introduction

1. There are before the Court two sets of related proceedings. First, there is an appeal by the Dubai Financial Services Authority (the "**DFSA**") under Article 37 (1) of the Data Protection Law (Law No. 1 of 2007) (the "**DPL**") from the decision of the Commissioner of Data Protection (the "**Commissioner**") dated 20 June 2018 that the DFSA contravened Article 17 of the DPL by refusing to comply with a Subject Access Request (the "**SAR**") served on it by the Interested Party ("**Ms Waterhouse**"). Second, there is an application by the DFSA for judicial review of the direction the Director made in Ms Waterhouse's case as to the steps he ordered the DFSA to take in response to Ms Waterhouse's SAR.

The relevant background

2. The DFSA is established by Article 7 of the Regulatory Law and by Article 8 (3) thereof has as one of its major functions the prevention, detection and restraint through appropriate means including the imposition of sanctions of conduct that causes or may cause damage to the reputation of the DIFC or financial services industry in the DIFC. Under Articles 78 and 90 it has respectively the power to conduct investigations and impose sanctions and make directions.

3. Ms Waterhouse was Head of Legal & Compliance Middle East and North Africa for Deutsche Bank AG ("**DB**") from 1 October 2007 to 5 March 2014. She was authorised by the DFSA to perform the Licensed Functions of Compliance Officer, Money Laundering Reporting Officer and Senior Manager. DB was a DFSA Authorised Firm.

4. In 2012 the DFSA began an investigation into DB and certain individuals connected to it. In February 2014, this investigation was expanded to include suspected breaches dating back to 2011 of DFSA administered legislation and certain DB employees, including Ms Waterhouse.

5. In October 2014, the DFSA's enforcement arm produced a report setting out its investigatory findings so far and pursuant to a Decision Notice dated 29 March 2015 the DFSA took action against DB for contraventions of DFSA administered legislation and breaches of DFSA Rules.

6. On or about 29 April 2015, Ms Waterhouse was given a copy of the report setting out the findings of the investigation together with a copy of the materials referenced in the report. These materials comprised six lever arch files of documents ordered chronologically covering relevant events from 2011 to 2013 and copies of transcripts of all interviews undertaken by the DFSA referred to in the report. The chronological documents in the six files were compiled from a much larger number of documents that were gathered during the investigation. In total, there were approximately 300 lever arch files of documents and information produced to the DFSA during the course of the investigation.

7. On 10 January 2016, the DFSA's Decision Making Committee (the "**DMC**") served on Ms Waterhouse a notice setting out the decision it proposed to make in her case including its proposed findings of fact and sanction. Ms Waterhouse was also given a copy of the materials that the DMC had considered. Pursuant to her right to do so, over the ensuing 15 months Ms Waterhouse made a series of representations designed to persuade the DMC not to issue a final decision to take enforcement action against her. In addition, at the request of Ms Waterhouse's counsel, DFSA Enforcement provided further information up to the point at which it was felt that the information being sought was beyond the scope of the DFSA's investigation.

8. On 22 June 2017, the DMC served on Ms Waterhouse a Decision Notice stating that for the breaches of DFSA administered legislation identified in paragraph 10 below it was going to impose a financial penalty of US$100,000 and to restrain her from performing any functions in connection with the provision of financial services in or from the DIFC. The Decision Notice referred to the materials the DMC had considered copies of which had already been disclosed to Ms Waterhouse.

9. The background to the DFSA's Decision Notice was that DB and its employees within the Private Wealth Management ("**PWM**") team serving

the Middle East and Africa had breached regulatory requirements in providing the regulated financial services of Advising on Financial Products and Credit and Arranging Credit or Deals in Investments in a way which was undisclosed to the DFSA and which did not comply with the requirements set out in the DFSA Rulebook. Around 40% - 50% of the PWM employees' emails had involved Advising and/or Arranging and the failure to comply with the DFSA Rulebook extended to approximately 583 PWM clients over the period 1 January 2011 to 30 June 2013.

10. The DFSA's case against Ms Waterhouse was that she gave false or misleading information to the DFSA on several occasions, with knowledge that it was false or misleading or with recklessness as to whether or not that was the case and she had failed over a substantial period to correct false or misleading information provided by herself or others, and in consequence she had: (i) failed to act with integrity, contrary to GEN Rule 4.4.1, Principle 1, Integrity; (ii) failed to exercise due care and skill, contrary to GEN Rule 4.4.2, Principle 2; (iii) failed to deal with the DFSA in an open and co-operative way and failed to disclose appropriate information, contrary to GEN Rule 4.4.4, Principle 4, Relations with the DFSA; and (iv) had contravened Article 66 of the Regulatory Law which prohibits provision of information which is false, misleading or deceptive to the DFSA.

11. On 23 July 2017, Ms Waterhouse referred the DFSA Decision Notice to the Financial Markets Tribunal (the "**FMT**"), a body established under the DIFC Regulatory Law that hears and determines references to review decisions of the DFSA. When conducting such references, the FMT conducts a de novo full merits review of the DFSA decision and can take into account any relevant new evidence that comes to light after the DFSA's original decision. In the ensuing FMT proceedings, Ms Waterhouse denied the factual allegations made against her and advanced the defence that the DFSA investigation was an abuse of process.

12. The FMT's decision was issued on 12 August 2019. It dismissed the abuse of process defence and found that Ms Waterhouse had failed to be frank and candid with the regulator about serious regulatory issues and was therefore in breach of GEN Rules 4.4.1, 4.4.2 and 4.4.4 as alleged by the DFSA. There was no finding of dishonesty against Ms Waterhouse, rather one of recklessness. Publication of the decision was restrained by an order of this Court until 12 December 2019 which came after the hearing of the instant proceedings. A number of the details that are given in this paragraph and paragraphs 9 to 11 above are derived from the FMT's decision.

13. By a letter dated 2 August 2017, Ms Waterhouse served the SAR under Article 17 DPL on the DFSA. Article 17 confers on a "Data Subject" the right, inter alia, to obtain from a "Data Controller" upon request: (a) confirmation whether or not "Personal Data" relating to him or her is being Processed and information at least as to the purposes of the Processing, the categories of Personal Data concerned, and the "Recipients" or categories of Recipients to whom the Personal Data are disclosed; (b) communication in an intelligible form of the Personal Data undergoing Processing and of any available information as to its source; and (c) as appropriate, the rectification, erasure or blocking of Personal Data the Processing of which does not comply with the provisions of the Law.

14. It is common ground that Ms Waterhouse was a Data Subject and the DFSA was a Data Controller.

15. In her letter of 2 August 2017, Ms Waterhouse requested in respect of the period 1 October 2011 to the "**present date**":

(a) Emails, reports, notes of meetings, letters or other documents that referred to her by my name in the content of subject heading which: (i) passed between employees of the DFSA (internal communications); or (ii) passed between the DFSA and any third parties (whether sent or received); or (iii) passed between the DFSA and witnesses interviewed by the DFSA in the course of their investigation into her concerning her role at Deutsche Bank.

(b) Emails, reports, notes of meetings, letters or other documents from which she can be readily identified, but which did not expressly refer to her by name in respect of each category of data set out at (i) - (iii) above.

She also stated that any deleted items should be restored and provided to her and requested that once personal data within the scope of the request had been identified she be provided with a hard or electronic copy of the information constituting personal data and (1) a description of the data; (2) an explanation of the purpose for which the data was processed; (3) identification of the source or sources of the data; and (4) identification of to whom the data had been sent or may be disclosed.

16. By letter dated 10 August 2017, the DFSA declined to provide the personal data sought by Ms Waterhouse1 citing Article 39 (2) DPL which disapplies Articles 11-13 and 17 if the application of those Articles would be likely to prejudice the proper discharge by the entities therein mentioned, including the DFSA, of their powers and functions under any laws they administer. In declining to provide the personal data sought by Ms Waterhouse the DFSA stated that her request for disclosure of information directly concerned the exercise by the DFSA of its powers in relation to her conduct during her former role as Compliance Officer, Money Laundering Reporting Officer and Senior Manager of Deutsche Bank in the DIFC. Accordingly, if the DFSA was to provide the information requested this would prejudice the proper discharge of its regulatory powers and functions.

17. Due to a problem with the email address DFSAdataprotection@dfsa.ae, Ms Waterhouse only received the DFSA's letter of 10 August 2017 on 24 September 2017.

18. On 14 November 2017, Ms Waterhouse lodged a complaint with the Commissioner citing the rejection of the SAR by the DFSA. As stated in paragraph 1 above, the Commissioner's decision that the DFSA had contravened Article 17 DPL by refusing to comply with Ms Waterhouse's SAR was issued on 20 June 2018.

19. It is common ground that the DFSA's appeal to this Court against the Commissioner's decision is in the nature of a de novo hearing. It is therefore unnecessary to rehearse the Commissioner's reasons for his decision beyond the summary that follows below.

20. At the time the Commissioner's decision was issued on 20 June 2018, the FMT proceedings were well under way, there having by then been a CMC on 8 January 2018 and three days of hearings in the period 28 - 30 April 2018. The Commissioner held that the DFSA had failed to establish it would suffer real and substantial prejudice within Article 39(2) if it had to comply with the SAR. The prejudice relied on - diversion of time away from enforcement duties; the potential for creating the impression that the DFSA could be tied up with duties under the DPL and

discouraging third parties to give full and frank disclosure -- did not amount to real or actual prejudice because: (a) no details of prejudice were provided when the DFSA responded to the SAR; (b) the appearance was given that the DFSA prioritised its duties under the Regulatory Law over those it had under the DPL; and (c) discouragement of full and frank disclosure was not a problem because confidential information from third parties could be redacted. The DFSA had wrongly assumed that for the public good it should not be bogged down with the tedious details of dealing with SARs when it was trying to protect the public from wrongdoers. The specific interest inherent in Article 17 to serve a SAR outweighed the public interest relied on by the DFSA. With regard to the issue of proportionality that arose from the words "without excessive delay or expense" in Article 17, the cost, time and effort for the DFSA to disseminate the data requested was not a sufficient reason to do no search at all. Proportionality was only relevant to how far the search should go to provide relevant information. If there were any possibility (as was the case here) that the DFSA came to enforcement decisions during the DMC process based on misleading, partial or inaccurate data that may not have been brought to light by disclosure in the DMC or FMT proceedings, the requirement to respond properly to the SAR overrides the time, cost and effort that may be required on the part of the DFSA. This is because Ms Waterhouse faced serious lifelong and professional consequences as a consequence of negative enforcement findings against her. The DFSA should have designed its systems to search and produce information requested by data subjects. Further and in any event, the DFSA not having raised the question of proportionality when it responded to the SAR, it could not raise this issue now retrospectively.

21. The Commissioner directed that the DFSA did not have to disclose information disclosed in the DMC and FMT proceedings or deleted emails or search the physical hard drives of the devices of employees or deal with potential future disclosure to recipients or categories of recipients.

22. In regard to the DFSA's contention that the information it held in Lever Arch Files did not constitute "Personal Data" because it was not held in a "Relevant Filing System," the Commissioner held that if the DFSA wished to persist with this contention it should do so when responding to the SAR and in this regard should have regard to the ICO Guidance on what constitutes a relevant filing system and Recital 26 of the European Directive 95/46.

23. On 4 July 2018, the DFSA applied to the Commissioner under Article 33 (6) of the DPL, requesting him to review the direction he made in his decision and to review the 300 odd lever arch files of documents assembled during the DFSA's investigation which included DB and certain individuals including Ms Waterhouse to form a view whether they constituted a "relevant filing system".

24. On 8 October 2018, the Commissioner issued his decision on the DFSA's review application declining to conduct the requested review. In the Commissioner's opinion, the grounds for review were more suited for an appeal or judicial review proceedings and he noted the grounds for review advanced by the DFSA "had also been largely replicated in [the DFSA's] Grounds of Appeal."

The legal framework

25. The DPL was closely modelled on the UK Data Protection Act 1998 (the "DPA") which was enacted to give effect to the European Directive 95/46 ("the European Directive"). The definitions of particular terms are set out in Schedule 1 of the DPL. The DPA was amended by ss. 69 - 72 and Schedule 6 of the UK Freedom of Information Act 2000, these provisions coming into force on 1 January 2015.

26. The DPA was replaced by the UK Data Protection Act 2018 which gave effect to the European General Data Protection Regulation.

27. The provisions contained in the DPL that are of particular relevance to these proceedings are:

(a) Article 8 (obligation on data controllers2 to process personal data3 "in accordance with the Data Subject's Rights");

(b) Article 17 (right of data subject to request access to personal data held by a data controller);

(c) Articles 22 and 26 (the establishment of the office of Data Commissioner and the Commissioner's powers, functions and objectives);

(d) Article 33(1) (power of the Commissioner to issue a direction to a data controller who has contravened the DPL by refusing to comply with a SAR in breach of Article 17);

(e) Article 34 (right of a data subject to complain to the Controller of a contravention of the DPL);

(f) Article 37 (right of a data controller who is found to contravene the DPL or a direction of the Commissioner to appeal to the DIFC Court);

(g) Article 39(2) (disapplication of Articles 11, 12, 13, 14 and 17 to the DFSA and other DIFC bodies).