



What's New

Vicarious Liability

In the recent case of *WM Morrison Supermarkets Plc v Various Claimants*, the Court of Appeal upheld the decision of the High Court that Morrisons was vicariously liable for an employee leaking the personal data of almost 100,000 employees.

Mr Skelton was employed by Morrisons as a senior IT internal auditor. He developed a grudge against Morrisons after being subject to disciplinary proceedings for using postal facilities for private purposes. A few months later, Morrisons' HR team gave Mr Skelton an encrypted USB stick which included the personal data of a number of employees that was needed for the purposes of an external audit. The data included employee names, addresses, gender, dates of birth, phone numbers, national insurance numbers, bank details and salary. Without authorisation from Morrisons, Mr Skelton copied the data to a personal USB stick and then posted it online (under the name of another employee, who he sought to frame). He also sent the data to several newspapers. Mr Skelton was subsequently jailed for fraud under the Computer Misuse Act 1990 and the Data Protection Act 1998 ('DPA').

Following the data breach committed by Mr Skelton, over 5,500 employees brought a group claim against Morrisons for a breach of duty under the DPA, misuse of private information and breach of confidence.

The Court of Appeal held that although Morrisons was not directly liable for the data breach, it was vicariously liable. The Court of Appeal confirmed that nothing in the DPA excluded the possibility of vicarious liability, or the scope for liability for misuse of private information or breach of confidence.

The key consideration for the Court of Appeal was therefore the nature of Mr Skelton's job and whether this had a sufficient connection with the wrongful act, making it right to hold Morrisons accountable. The Court found that Mr Skelton was entrusted with the data and his job was to handle

and disclose it to the auditors. The Court felt there was an unbroken chain of events and that there was a sufficient connection between Mr Skelton's role and the data breach to hold Morrisons accountable. This case is unusual because the employee's motive was not to achieve a personal benefit or to inflict injury to a third party, but to harm the employer. Morrisons argued that establishing vicarious liability would further Mr Skelton's criminal aims. However, the Court confirmed that motive is irrelevant to vicarious liability.

Discrimination

In the case of *Lee v Ashers Baking Company Limited*, the Supreme Court has ruled that a Christian bakery's refusal to bake a cake with a message supporting gay marriage was not direct discrimination.

Mr Lee, a gay man, asked Ashers, a business owned by a Christian family, to bake a cake decorated with Bert and Ernie of Sesame Street and the words "Support Gay Marriage". Ashers refused to make the cake due to the family's religious beliefs. Mr Lee had originally brought a successful discrimination claim in the Northern Irish courts, but the Supreme Court has since overturned this ruling.

The Supreme Court found that Ashers' objection to making the cake was not to Mr Lee's sexual orientation, but to the message on the cake. The Court was satisfied that Ashers would have refused to bake the same cake for a heterosexual customer and that the bakery would have baked Mr Lee a different cake, without the particular message requested. The Court found that there was no evidence that Ashers discriminated against gay people and it was not enough that the refusal to bake that particular cake had something to do with the sexual orientation of some people.

The Court also considered rights relating to freedom of religion and expression, which include a right not to be forced to express a political opinion you do not believe in. Whilst the Court agreed that Ashers would have committed an act of discrimination if it had refused to provide Mr Lee with goods or services because he was gay or supportive of gay marriage, this situation was different. Obliging Ashers to bake a cake bearing a message to which they deeply disagreed could not be justified. The Court therefore held that there was no direct, associative or perceived discrimination on the grounds of either sexual orientation, religious belief or political opinion.

Whistleblowing

In the case of *Timis v Osipov* the Court of Appeal has held that individual employees were liable for a whistleblowing dismissal.

Mr Osipov was CEO of International Petroleum Ltd ('IPL'). He disclosed wrongdoing relating to some of IPL's contracts. Although the disclosures were protected under whistleblowing laws, he was dismissed for making them. Mr Osipov issued proceedings and he successfully claimed whistleblowing detriment and unfair dismissal. The two directors who had played a key role in Mr Osipov's dismissal (Mr Timis and Mr Sage) were also held to be personally liable, alongside IPL. When IPL became insolvent, Mr Osipov pursued the directors to recover the full compensation that had been awarded to him. The Court of Appeal found that the directors were liable to compensate Mr Osipov for losses of over £2 million, which he suffered as result of his dismissal.

WHAT TO LOOK OUT FOR

Gender Pay Gap

A survey from the Equality and Human Rights Commission shows that almost two-thirds of women (61%) take an employer's gender pay gap into account when applying for a job. Over half of women say that a gender pay gap would reduce their motivation and commitment to the employer and that they would also be less likely to recommend the employer.

The findings suggest that businesses with larger pay gaps may lose out on recruiting and retaining employees if they do not take action, putting them at a competitive disadvantage and risking reputational damage. The Equality and Human Rights Commission therefore recommends employers produce pay gap figures, alongside action plans with targets and deadlines to close the gap.

Tipping

The government has announced plans to ensure that tips left for workers will go to them in full and not to their employer. New laws stating that tips must go to the workers providing the service are set to be introduced at the "earliest opportunity". This will tackle sectors where tips are not passed on to workers fully, or at all.

Law Commission Consultation

The Law Commission has published a consultation paper on 'Employment Law Hearing Structures' seeking views on 54 different questions and proposals. These include: the authority of employment tribunals and civil courts to hear certain types of claims; extending the time limit for bringing claims in employment tribunals from 3 months to 6 months; and increasing the damages cap of £25,000 for breach of contract claims in employment tribunals.

Anyone with strong views should respond to the consultation by 11 January 2019. More details can be found [here](#).

For more information about any of the topics covered in this update please contact Nicholas Hall by clicking [here](#).



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