

Supreme Court clarifies employer's vicarious liability

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The Supreme Court clarifies the scope of an employer's vicarious liability for the conduct of its employees

In the recent case [WM Morrison Supermarkets v Various Claimants](#) the Supreme Court held that Morrisons was not liable for the criminal acts of an employee, who bore a grudge against its business and published the personal data of its entire workforce online.

In its judgment, the Supreme Court clarified the extent of an employer's vicarious liability regarding the Data Protection Act 1998 ([DPA 1998](#)), which was the law in force at the time of the publication.

What is vicarious liability?

Vicarious liability is the common law principle of strict, no-fault liability for wrongs committed by another person. In an employment relationship the employer is held liable for wrongs committed by an employee if it can be shown that those acts were carried out during their employment. It does not matter that the employer itself committed no wrongdoing or may not have known what the employee was up to.

What is the DPA 1998?

The DPA 1998 was the data protection law in force at the time Morrisons' employee published the personal data. The DPA 1998 imposed broad obligations on those who collect personal data (data controllers) and gives rights to individuals about whom data is collected (data subjects).

Background

Andrew Skelton, a senior IT auditor and employee of Morrisons, was given access to its entire payroll data to carry out his role in its annual audit. Consequently,

Skelton published the personal data of 100,000 of Morrisons' current and former employees online, which consisted of names, addresses, gender information, dates of birth, phone numbers, national insurance numbers, bank details and salaries.

Skelton harboured an irrational grudge against the company dating back to 2013. It was this grudge that motivated him to publish the personal data in the hope of damaging Morrisons' reputation.

Under the false pretence of being a concerned member of the public, Skelton anonymously disclosed the existence of these files to three newspapers. Morrisons were fortunately alerted to the breach by one of the newspapers. Morrisons took swift action, spending more than £2.6 million to have the information taken down, protect the identities of its employees, and quickly informed the police. The information was removed from the internet and Skelton was prosecuted and sentenced to eight years' imprisonment.

Just over 9,000 claimants brought a group action against Morrisons under two limbs: principle liability and vicarious liability for Skelton's conduct (based on claims of a breach of statutory duty created by the DPA 1998, misuse of private information and breach of confidence). The claimants sought damages for distress, anxiety and upset.

The High Court

The High Court held that Morrisons was not principally liable as they were not the data controller at the time of the breach, Skelton was, and Morrisons had provided adequate safeguard controls. It did, though, find that Morrisons were vicariously liable because Skelton's conduct was committed during his employment.

The Court of Appeal

Morrisons appealed to the Court of Appeal submitting that it could not be vicariously liable for Skelton's wrongful acts because they did not occur during his employment and there could be no vicarious liability for breach of statutory duty created by the DPA 1998. The appeal was dismissed on both grounds and Morrisons appealed to the Supreme Court.

The Supreme Court

The Supreme Court, the final court of appeal in the UK, upheld the appeal in favour of Morrisons, stating that the lower courts had misinterpreted the principles governing vicarious liability and in particular the "close connection test" set out in the case of [Dubai Aluminium](#).

The close connection test

"...the wrongful conduct had to be so closely connected with acts the employee was authorised to do that, for the purposes of the liability of the employer to third parties, it might fairly and properly be regarded as done by the employee while acting in the ordinary course of their employment."

The Supreme Court found that the close connection test was not satisfied because (in summary) when Skelton transmitted the data, it was not connected to the task he was asked to do; the fact that he was given the opportunity to commit a wrongful act does not necessitate the imposition of vicarious liability; and Skelton was not advancing Morrisons' business, but was instead pursuing a personal grudge designed specifically to harm the company.

The Supreme Court held that the lower courts had misunderstood previous case law and decided incorrectly that motive wasn't relevant: whether Skelton was engaged in furthering his employer's business or pursuing a personal vendetta, when committing the wrongdoing, was highly material.

Did the DPA 1998 exclude the imposition of vicarious liability?

Given the findings, the Supreme Court was not required to consider this question but opted to do so. Morrisons' argument that the DPA 1998 excluded vicarious liability was rejected. If, during their employment, an employee acts, and such acts breach obligations imposed by the DPA 1998, then the employer may be vicariously liable.

Lessons learned

Employers should be pleased with this decision as it confirms they should not be vicariously liable for the conduct of rogue employees. However, employers should remain vigilant, as the court did not entirely exclude the possibility of vicarious liability in circumstances where an employee satisfies the close connection test.

A practical question for employers: "On the job or not?"

Answer: When an employee commits wrongdoing, you must ask yourself whether the employee was going about your business, was acting in their employed capacity or in a purely personal capacity; or was exercising their authority as an employee.

The DPA 1998 has since been replaced by the [GDPR](#) and the [Data Protection Act 2018](#). Both make compliance far more onerous for employers. Employers run the risk of astronomical fines and compensation claims if they do not safeguard their data. Putting in place suitable data protection policies and procedures can protect them from the acts of rogue employees

For all your employment and data protection needs, contact Karen Cole today.

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