Morrisons in the Supreme Court: a welcome decision with a sting in the tail

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Summary

As mentioned in our blog post on The Lens, on Wednesday 1 April, the Supreme Court handed down its much anticipated judgement in WM Morrisons Supermarkets plc (Appellant) v Various Claimants (Respondent). In a decision that will clearly be welcomed by Morrisons and employers more generally, the Supreme Court concluded that, on the facts, Morrisons was not vicariously liable for the actions of a so-called 'rogue' employee. However, from a data privacy perspective, the decision is a more mixed result: the Supreme Court's view was that a data controller's compliance with its obligations under data protection law does not automatically exclude a claim for vicarious liability.

Background

In this case, the rogue employee, an internal IT auditor, had been given access to payroll data as part of his usual activities. Disgruntled as a result of a previous disciplinary issue against him, he then deliberately and maliciously copied payroll data onto a personal USB and later posted the personal details of almost 100,000 Morrisons employees on the internet, with the aim of causing harm to Morrisons. In separate proceedings, he was prosecuted and sentenced to 8 years in prison. This was only part of the story though, as Morrisons also had to contend with compensation claims from the affected employees for the distress that the unauthorised disclosure had caused them. It was in the context of those claims that the question of Morrisons' vicarious liability arose.

High Court and Court of Appeal decisions (2017 and 2018)

Morrisons was found to be vicariously liable for the rogue employee's actions, despite the High Court and Court of Appeal accepting that Morrisons had not itself breached its obligations under the Data Protection Act 1998 (DPA 1998).

This had left many employers concerned that they could be found vicariously liable for something over which they had very little control or means of mitigation. The Court of Appeal's answer to this problem – that employers should rely on insurance – did not provide much comfort or reassurance.

Supreme Court decision

The Supreme Court accepted Morrisons' appeal and concluded that on the facts of this case, Morrisons was not vicariously liable.

The employee's wrongful disclosure of the data, outside working hours and from his personal computer, was not so closely connected with his task - transmitting payroll data to auditors - that it could be regarded as made while acting in the ordinary course of his employment.

The Supreme Court went on to give clear and helpful guidance on the scope of vicarious liability, effectively lowering the risk for employers in relation to the actions of a rogue employee.

Scope of vicarious liability

Two factors were of particular importance:

- In assessing whether an employer is vicariously liable, it is highly material whether the employee was acting on his employer's business or for purely personal reasons. Although the employment in this case offered the opportunity for wrongdoing, the employee was not engaged in furthering his employer's business when he committed it. He was pursuing a personal vendetta, seeking vengeance for disciplinary proceedings brought against him some months earlier.

- The close connection in time, and/or the unbroken chain of causation linking the provision of the data to the employee to his disclosing it on the internet, were not, on their own, sufficient to satisfy the need for a "close connection" between his actions and his employment.

The sting in the tail

From a data privacy perspective however, the results are more mixed for controllers and employers. The Supreme Court's view was that the Data Protection Act 1998 is not an all-encompassing regime that excludes other forms of liability and claims. In particular, a data controller's compliance with its obligations does not automatically exclude a claim for vicarious liability.

It is worth noting here that, although Morrisons was decided under the DPA 1998, a court would most likely reach the same conclusion under the GDPR and the Data Protection Act 2018.

Whilst it is clear from the judgement that all cases in this area are particularly fact dependent, this judgement will reassure companies that they should not, in general, be held vicariously liable for data breaches caused by a rogue employee. Of course, the situation would be different were the employee simply negligent, rather than undertaking a personal act.

Whilst employers will breathe a sigh of relief on reading the judgement, they will still need to manage both their wider fault-based obligations under the GDPR and the Data Protection Act 2018 and strict vicarious liability under the common law or equity.

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