No vicarious liability for a 'personal vendetta': WM Morrisons Supermarkets plc (Appellant) v Various Claimants (Respondents) – [2020] UKSC 12

By Grace Nicholls

Background

Morrisons, the Appellant by the time this case reached the Supreme Court, are, of course, a well-known national chain of supermarkets. The Respondents in this case were approximately 9,000 employees or former employees of Morrisons.

Andrew Skelton was a senior auditor in Morrisons internal audit team and, in July 2013 was subjected to disciplinary proceedings in respect of a misconduct issue. Having been given a verbal warning, he "harboured an irrational grudge" [3] against the Appellant.

In November 2013, Skelton was asked to collate and transmit payroll data as part of the annual external audit. He was given access to around 126,000 employee's data including names, addresses, bank account numbers and sort codes.

In October 2013, there appears to have been a finding that he searched for software called "Tor: which effectively masks the identity of a computer accessing the internet. In November 2013, Skelton purchased a "pay as you go" mobile phone.

In mid-November 2013, he was provided with the payroll data to carry out the task assigned to him. He then proceeded to copy the data from his work laptop onto a personal USB stick. Using the date of birth and name of a fellow employee, Skelton created a false email account to frame him. In January 2014, Skelton uploaded a file containing the data of almost 99,000 employees onto the internet. In March 2014, Skelton sent a file containing the data to three UK newspapers. This was done anonymously, attempting to imply that the sender (a member of the public) had been concerned about what had been found on the website. One of the three newspapers reported the file to Morrisons.

The Appellant promptly instigated a formal internal investigation, removed the data from the internet and notified the police. Skelton was arrested a few days later and was eventually convicted of a number of offences. He received an eight-year prison sentence.

The Respondents (employees and former employees) pursued claims against Morrisons for breach of statutory duty under section 4(4) DPA 2018, misuse of private information and breach of confidence. The claims were also pursued on the basis that Morrisons were vicariously liable for Skelton's actions (in respect of the three aforementioned causes of action).

Before the High Court, Morrisons were not found to be primarily liable in respect of the three causes of action, but Langstaff J did hold the company to be vicariously liable for Skelton's actions. One submission by Morrisons was that they were not liable for the actions of Mr Skelton as it was not "committed in the course of his employment".

Langstaff J rejected this contention and held that Morrisons had supplied him with the data in order to carry out the assigned task and that there was an unbroken chain between this and the tort. Following the Supreme Court authority of *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56, the High Court held that the five factors listed by Lord Philips were present. As a reminder, those five factors are:

1. The employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability;
2. The tort will have been committed as a result of activity being taken by the employee on behalf of the employer;
3. The employee's activity is likely to be part of the business activity of the employer;
4. The employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee;
5. The employee will, to a greater or lesser degree, have been under the control of the employer.

The Court of Appeal dismissed Morrisons appeal, in particular highlighting previous case law that motive was irrelevant, and upheld the first instance decision that Morrisons were vicariously liable for Skelton's actions.

The issues before the Supreme Court were as follows:

A. Whether Morrisons were vicariously liable for Skelton's conduct;

B. If so, whether the DPA excludes the imposition of vicarious liability for statutory torts committed by an employee data controller under the DPA and whether the DPA excludes the imposition of vicarious liability for misuse of private information and breach of confidence. [15]

Supreme Court Decision

Lord Reed gave the leading judgment, and referred to a series of authorities, including *Mohamud v WM Morrison Supermarkets plc* [2016] UKSC 11; [2016] AC 677, *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366 and *Lister v Hedley Hall Ltd* [2001] UKHL 22; [2002] 1 AC 215.

He held that the High Court and Court of Appel has "misunderstood the principles governing vicarious liability in a number of relevant respects" [31], in particular that the publishing of the data on the internet did not form part of Skelton's functions/employment activities and that the five factors referred to by Lord Phillips in *Catholic Child Welfare Society* were present was irrelevant because, in his view:

> "*those factors were not concerned with the question whether the wrongdoing in question was so connected with the employment that vicarious liability ought to be imposed, but with the distinct question whether, in the case of wrongdoing committed by someone who was not an employee, the relationship between the wrongdoer and the defendant was sufficiently akin to employment as to be one to which the doctrine of vicarious liability should apply*" [31]

Lord Reed further concluded that the motive of Skelton was not irrelevant (and the distinction between acting on his employer's business or for purely personal reasons was highly relevant). The Supreme Court concluded that the mere fact of employment giving someone an opportunity to do something is not sufficient to impose vicarious liability [35]. In concluding that Morrisons were not vicariously liable for Skelton's actions and allowing the appeal, Lord Reed stated that:

> *"it is abundantly clear that Skelton was not engaged in furthering his employer's business when he committed the wrongdoing in question. On the contrary, he was pursuing a personal vendetta, seeking vengeance for the disciplinary proceedings some months earlier"* [47]

Comment

This decision is likely to come as a relief to employers of all sizes, given its history through the lower courts.

Lord Reed's confirmation that the decision in the *Mohamud* case had not been to effect a major change in the law and a helpful restatement of the "close connection" approach in *Dubai Aluminium*, namely that: *"the wrongful conduct must be so closely connected with acts the partner or employee was authorised to do that, for the purpose of the liability of the firm or the employer to third parties, the wrongful conduct may fairly and properly be regarded as done by the partner while acting in the ordinary course of the firm's business or the employee's employment."*[22]

A different approach has clearly been taken to that close connection test, as noted in the *Catholic Child* case in 2013, in cases which involve the sexual abuse of children (where the conferral of authority on the employee over his victims was particularly relevant) ([23]), and that the general principles in *Dubai Aluminium* must be applied. All vicarious liability decisions are likely to be very fact specific, but this Supreme Court decision appears to settle some tensions that had been ignited by the decision in *Mohamud*.

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