SLAUGHTER AND MAY

Employment Bulletin

November 2018

Welcome to the November edition of our Employment Bulletin. This month, our headline item is the Court of Appeal's confirmation of an **employer's liability for a deliberate data breach by an employee**. We also report on another significant case on **vicarious liability** and analyse the Government's **consultation on ethnicity reporting**. We look at a **claim against co-workers for whistleblowing detriment**, before concluding with some **horizon scanning.**

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Court of Appeal confirms employer's vicarious liability for employee's deliberate data breach

Summary: The Court of Appeal has rejected Morrisons' appeal from last year's High Court decision that they were vicariously liable for the actions of an employee who disclosed the personal information of thousands of colleagues on the internet. Although the disclosure took place outside working hours and from the employee's personal computer, there was a sufficient connection between the employment and the wrongful conduct for the employer to be held liable (*WM Morrison Supermarkets PLC v Various Claimants*).

Key practice point: Given that there was little more the employer could have done to prevent the breach, the outcome appears harsh. However, despite the public interest, it is by no means certain that permission will be given for an appeal to the Supreme Court. In any event, employers will want to ensure that they have insurance policies in place - to cover both cyber breaches and losses caused by dishonest or malicious employees.

Facts: S, a senior IT internal auditor employed by Morrisons (M), was involved in assisting external auditors by providing payroll data. In July 2013 he was subject to disciplinary proceedings for an unrelated incident. Aggrieved at the disciplinary action, on 18 November, when at work, S copied payroll data onto a personal USB stick with a view to the later commission of a crime (the disclosure of data). On 12 January 2014, from his home computer, S posted a file containing the personal details of around 100,000 employees on a file sharing website, using the payroll data he had copied onto his USB stick. S was subsequently convicted of offences under the Computer Misuse Act 1990 and the Data Protection Act 1998 (DPA).

A group of 5,518 employees sought compensation from M for breach of statutory duty under the DPA, as well as non-statutory claims for breach of confidence and misuse of private information. The issue was whether M was liable, directly or vicariously, for S's actions.

The High Court held that M was not directly liable under the DPA; M was not the data controller when S disclosed the information on the internet. The Court did find that M had failed to discharge its duty under the DPA to take appropriate measures to guard against unlawful disclosure and/or data loss, but also that the failure neither caused nor contributed to S's misuse. The Court also found that M was not otherwise directly liable in respect of any breach of confidence or misuse of private information; S had acted criminally and without authority.

However, the High Court went on to hold that M was nonetheless vicariously liable for the misuse of its data. This was on the basis that S was "*acting in the course of his employment*" when he criminally disclosed the data online. M appealed to the Court of Appeal.

Decision: The appeal failed.

First, the Court of Appeal rejected an argument that vicarious liability of an employer for an employee's misuse of private information and breach of confidence was excluded by the DPA, either expressly or impliedly.

On vicarious liability, the issue was whether the test established by the Supreme Court in *Mohamud (*see our Bulletin dated 11 March 2016*)* was met; was there a sufficient connection between S's activities and his crime to make vicarious liability appropriate?

M argued that S was not acting in the course of his employment – what he did at work in November was past history by the time he distributed the data from home in January. But the Court of Appeal disagreed, pointing to the numerous cases where employers have been held vicariously liable for actions of employees committed away from the workplace. They agreed with the analysis in the *Bellman* case (see below), that it was not so much the temporal gap but any change in the nature of the relationship that was significant. The Court concluded that S's acts in sending the claimants' data to third parties were "*within the field of activities*" assigned to him by M and there was an "*unbroken chain of events*".

The novel aspect of the case was S's motive, which was to harm his employer, rather than to achieve a benefit for himself or to injure a third party. However, case law has established that motive is irrelevant and the Court said there is no exception to that principle where the employee's intention is to cause financial/reputational damage to the employer.

The Court found M's arguments about the enormous burden of a finding of vicarious liability unconvincing. S's activities involved the data of a very large number of employees (although, the Court noted, none of them has suffered financial loss), but S could equally well have misused data to steal a large amount of money from one employee's account. If M's arguments were correct, this would leave the victim with no remedy except against S. The Court commented that the solution is to insure: "*The fact of a defendant being insured is not a reason for imposing liability, but the availability of insurance is a valid answer to the Doomsday or Armageddon arguments put forward …. on behalf of Morrisons.*"

Analysis/commentary: The GDPR and the Data Protection Act 2018 have now replaced the Data Protection Act 1998. However, the position on vicarious liability appears to be no different under the GDPR and, in addition, there is now an express right for individuals to be compensated for non-material damage (distress,

in other words), increasing the possibility of group actions against employers. In the light of the new GDPR regime, many employers will already have tightened up their data handling and security measures to attempt to protect themselves from this sort of liability. Organisations should already be ensuring that no employee, however trusted, has access to data beyond what is absolutely necessary for their role.

Company liable for director's assault on employee following work Christmas party

Summary: The Court of Appeal overturned the High Court's decision and found that an employer was vicariously liable for injury caused at an impromptu drinks session after an office party (*Bellman v Northampton Recruitment Ltd*).

Key practice point: The Court of Appeal emphasised that the combination of circumstances in this case will arise very rarely. It is clear, however, that vicarious liability is not confined to formal company-organised social events.

Facts: The Company's Christmas party was held for employees and partners at a golf club. Afterwards a number of the guests, including B and the managing director, M, went to a hotel and continued to drink. Whilst at the hotel, there was an argument between M and B about work matters and M assaulted B as a result of which B suffered brain damage. B brought a claim against the Company on the basis that it was vicariously liable for M's actions. The High Court held that the drinks did not occur in the "*course of employment*" and therefore the Company was not vicariously liable.

Decision: The Court of Appeal overturned the High Court decision. Applying the analysis in the Supreme Court case of *Mohamud (*see our Bulletin dated 11 March 2016*)*, two key matters had to be considered:

- What functions or "*field of activities*" were entrusted to M by the Company?
- Was there a sufficient connection between M's activities and the assault to make vicarious liability appropriate?

M's remit was wide. He was the managing director and directing mind of a relatively small company. He had responsibility for all management decisions, including discipline, and maintenance of his managerial authority was a central part of his role. The Company was a round the clock operation. Despite the time and place of the assault, M was purporting to act as managing director. When his managerial decision was challenged, he "*chose to wear his metaphorical managing director's hat and to deliver a lecture to his subordinates*". He then "*drove home his managerial authority with the use of blows*".

In addition, the drinks were not a purely social event happening to involve colleagues but a follow-on from an organised work event attended by most of the employees and largely paid for by the Company. In those circumstances, there was sufficient connection between M's wrongful conduct and his role to make the Company vicariously liable.

Analysis/commentary: Until recently, the "*course of employment*" test for vicarious liability was thought to mean that the employee's actions had to be authorised – the comparison was typically made with an employee on a "*frolic of their own*". In recent years, however, the test has changed to one of "*sufficient connection*". The development is significant and may explain why two aspects that influenced the High Court's decision in this case – the unscheduled and voluntary nature of the drinking session and the temporal gap between the party and the session – were not regarded as decisive factors by the Court of Appeal. The

Court concentrated instead on the nature of M's role. He had a wide managerial remit and the assault was carried out after the employee challenged a management decision.

Government consults on mandatory ethnicity reporting

On 11 October 2018, the Department of Business, Energy and Industrial Strategy, together with the Government's Race Disparity Unit, launched a consultation on ethnicity pay reporting. The consultation, which runs until 11 January 2019, recommends that the reporting should be mandatory.

The Government has changed its position on this over the last couple of years. The McGregor-Smith 2017 Report *Race in the Workplace* recommended mandatory reporting, but the Government responded that, although they were persuaded that the case had been made for ethnicity pay reporting, they preferred a voluntary approach. The Government did, however, say they would monitor progress and be ready to act if needed.

A Review of the McGregor-Smith Report "one year on", the findings of which were also published on 11 October, shows that limited progress has been made on the McGregor-Smith recommendations. On ethnicity pay reporting, just 11% of employers reported that their organisations collect data on ethnicity pay. In response to these findings, the Government has decided to move to mandatory ethnicity pay reporting. As justification for this change of approach, the consultation paper notes that, in relation to gender pay gap reporting, even though 280 businesses signed up to a voluntary scheme to show commitment to gender equality, only five businesses went on to publish their data. Following the introduction of mandatory reporting, over 10,000 employers reported their gender pay gap.

The consultation questions include:

- What type of ethnicity pay information should be reported? The proposed options include one pay gap figure comparing average hourly earnings of ethnic minority employees as a percentage of white employees; several figures for different ethnic groups; and ethnicity pay information by £20,000 pay bands or by pay quartiles.

- What supporting or contextual information (such as geographical, age or gender variations) should be disclosed?

- Should a standardised approach to classifications of ethnicity be used? Standardisation would help consistency of reporting but, as the consultation recognises, there are also difficulties faced by individuals because they associate themselves with more than one, or none, of the categories.

- Should employers be required to publish an action plan for addressing any disparities identified?

- What size of employer should be within scope for mandatory ethnicity pay reporting? Although the McGregor-Smith Report recommended that it should apply to all employers with 50+ employees, the Government favours a threshold of 250 employees (mirroring gender pay gap reporting).

Alongside the consultation, the Government has announced the launch (with Business in the Community) of a new Race at Work Charter under which businesses can commit to a set of principles and actions designed to improve the recruitment and progression of ethnic minority employees.

Analysis/commentary: The Government recognises that a major difficulty would be collecting ethnicity pay data, given the lack of reporting obligations and the various potential methodologies. If the gender pay gap methodology is mirrored, the problems of the lack of meaningful data, currently an issue in the (comparatively few) workforces dominated by one sex, are likely to manifest themselves widely, given the relatively small numbers of ethnic minority employees in most organisations.

There is no discussion of enforcement in the consultation, nor any indication of a proposed timescale for the new legislation, although it is clear it would be a slower process than the gender pay gap reporting (where there was already an outline provision in the Equality Act 2010). The Government says it is considering a trial or phased approach to reporting, under which they would work with "early adopters" in the public and private sectors.

Court of Appeal holds that co-worker can be liable for whistleblowing dismissal

Summary: The Court of Appeal upheld the EAT's decision that two non-executive directors who were instrumental in the decision to dismiss a CEO unfairly, because of protected whistleblowing disclosures, were personally liable for detrimental treatment (*Timis v Osipov*).

Key practice point: This case confirms that a worker may bring a claim against a fellow worker for whistleblowing detriment even if it amounts to a dismissal (in other words, for being a party to the decision to dismiss). It will be unusual for an employee to want to pursue a claim against a fellow worker, rather than the employer, but it may be attractive against high value individuals (possibly with directors' liability insurance), or where the employing company is insolvent (as in this case) or does not have significant resources (a start-up, for example).

Background: The whistleblowing protections of the Employment Rights Act 1996 (ERA) are in two separate places – employees have the right, under Section 103A, to claim for automatic unfair dismissal if they have been dismissed because they have made a protected disclosure; and the wider category of workers have the right, under Section 47B, not to be subjected to detriment on the grounds they have made a protected disclosure. Section 47B applies to detriment by the employer and by the worker's colleagues (and, in the latter case, the employer will be vicariously liable, subject to a "reasonable steps" defence).

Facts: O was employed by IP, an oil and gas exploration company. In June 2014, O accepted the post of CEO offered to him by T, a non-executive director (NED) who was also the majority shareholder (and who regarded himself as entitled to exercise authority in the day-to-day running of IP). A second NED, S, also exercised what were effectively management functions. During his time as CEO, O made four protected disclosures relating to IP's business in Niger. Three days after the final disclosure, on 27 October 2014, S sent O an e-mail dismissing him with immediate effect.

The ET found that O's dismissal by IP was automatically unfair by reason of his protected disclosures. The ET also found that T and S were "workers", as they effectively managed O, and were responsible for dismissing him. It made the NEDs jointly and severally liable with IP for the award of compensation, which totalled over £1.7m.

The EAT dismissed IP's appeal. T and S appealed to the Court of Appeal.

Decision: The Court of Appeal dismissed the appeal, confirming that an individual worker who is a party to a decision to dismiss unfairly for whistleblowing can be liable for detrimental treatment under Section 47B of the ERA. This is despite the fact that Section 47B says it does not apply where the detriment is a dismissal

under the unfair dismissal provisions of the ERA – all that this wording excludes is a claim for detriment against the *employer*, in circumstances where an identical remedy is available under the unfair dismissal provisions.

S had claimed that he was not liable because it was T who gave the instruction and S had merely communicated the decision. The Court of Appeal rejected this; T had been the prime mover in the dismissal decision but he had discussed it with S, who expressly agreed. S did not deny responsibility in his evidence. On that basis, the Employment Tribunal had been entitled to find that he was a party to the decision and shared T's motivation.

Analysis/commentary: The Court of Appeal confirmed that a worker can bring a claim against an individual co-worker for detriment in being a party to the decision to dismiss, as well as bringing a claim of vicarious liability for the co-worker's actions. What the worker cannot do is claim against the employer directly for detriment – the individual (who would have to be an employee) would have to make an unfair dismissal claim. Detriment claims have advantages over unfair dismissal claims (for the claimant). Not only do they not have to be employees, there is a less restrictive causation test – the whistleblowing only has to be a significant part of the motivation, rather than the principal reason (for the dismissal).

The Court of Appeal accepted that its approach did not produce a particularly elegant result. This is largely because the whistleblowing legislation is based on discrimination legislation and does not sit very easily in the employment protection provisions of the ERA.

Horizon scanning

What key developments in employment should be on your radar?

1st January 2019	Revised UK Corporate Governance Code due to take effect Associated legislation due to come into force – including to require listed companies to report annually the ratio of CEO pay to the average pay of their UK workforce
29th March 2019	European Union (Withdrawal) Act 2018 due to take full effect
4th April 2019	Gender pay gap reporting deadline
6th April 2019	Workers entitled to written statements of terms and itemised pay slips
April 2019	Annual updates to employment rates and limits
Mid to late 2019	Planned extension of the SMCR to all FSMA-authorised persons
6th April 2020	All termination payments above £30,000 threshold will be subject to employer class 1A NICs

We are also expecting important case law developments in the following key areas during the coming months:

- **Employment status**: *Uber v Aslam* (Court of Appeal)

- **Discrimination / equal pay**: *ASDA Stores v Brierley* and *Sainsbury's Supermarkets v Ahmed* (Court of Appeal: equal pay); *Hextall v Chief Constable of Leicestershire Police* (Court of Appeal: indirect discrimination and shared parental pay); *The Trustees of Swansea University Pensions & Assurance Scheme v Williams* (Supreme Court: discrimination arising from a disability and the meaning of unfavourable treatment)

- **Holiday pay**: *The Sash Window Workshop td v King* (Court of Appeal: carry over of entitlement)

- **Whistleblowing**: *Royal Mail v Jhuti* (Supreme Court: awareness of protected disclosure)

- **Trade unions**: *IWGB v UK* (ECtHR: challenge to recognition rules); *IWGB v CAC* (High Court: recognition by 'de facto' employer in outsourcing): *Kostal v Dunckley* (Court of Appeal: inducements); *Jet2.com v Denby* (Court of Appeal: refusal of employment)

- **Restrictive covenants**: *Tillman v Egon Zehnder* (Supreme Court: non-competes and minority shareholdings)

- **Collective consultation**: *Seahorse Maritime Ltd v Nautilus International* (Court of Appeal: territorial scope of employer's obligations)

- **Employer's liability**: *Lungowe v Vedanta Resources Plc* (Supreme Court: parent company duty of care for subsidiary operations).

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