

UK supermarket loses appeal against data breach vicarious liability

Tom Webb
22 October 2018



iStock.com/susandaniels

The Court of Appeal of England and Wales has held supermarket Morrisons liable for a rogue employee's leak of thousands of individuals' personal data – despite arguments that pointed to the enormous burden it would create for innocent employers.

The judgment follows a 2017 trial ruling that absolved Morrisons of primary liability under the UK's pre-GDPR data protection legislation for the leak by former employee Andrew Skelton – but nonetheless held the company liable for a common law breach of confidence as Skelton's employer.

Morrisons IT manager Skelton had downloaded data from a pen drive containing HR data relating to almost 100,000 of the company's employees, posted the data to a filesharing website, and sent it to three newspapers. 5,518 employees started group litigation against the company; in 2015, Skelton received an eight-year prison sentence for his actions.

The supermarket appealed against the High Court ruling, arguing that the specialist Data Protection Act was intended to cover all situations where employers could be liable for illegal processing by their staff. High Court judge Mr Justice Brian Langstaff had granted Morrisons permission to appeal against the ruling, saying he was concerned by the supermarket's argument that his conclusion on vicarious liability made the court an accessory to criminal conduct aimed at Morrisons.

But today, a three-judge panel held that the High Court judge had been right to find the company liable.

Vicarious liability

"We consider it is clear ... [that] the vicarious liability of an employer for misuse of private information by an employee and for breach of confidence by an employee has not been excluded by the DPA [Data Protection Act]," the appeal judges unanimously ruled.

The judges rejected Morrisons' argument that the UK parliament had planned to exclude such vicarious liability by passing the DPA. They said that if that were the case, the legislature "might have been expected to say so expressly".

What's more, the judges said Morrisons counsel Anya Proops QC had initially suggested that the DPA excluded all liability for misuse of private information and breach of confidence in relation to personal data processing – but then went on to say the DPA only excluded vicarious liability for those torts.

They said this was a "necessary facet" of the claimants' position that Skelton was primarily liable for the DPA breach, and the common law torts – but that Proops' shift was "nevertheless an important concession".

They said Morrisons' acceptance that other causes of action do exist alongside the DPA for primary liability relating to wrongful processing, while also saying that the legislation excludes secondary liability, appears to be "a difficult line to tread".

"The difficulty of treading that line becomes insuperable on the facts of the present case," they said, as the DPA says "nothing at all" about employers' liability for employees' DPA breaches.

The Court of Appeal also dismissed Morrisons' arguments that Skelton's conduct was insufficiently closely connected for the supermarket to be held liable: the employee had carried out the leak at home on his own computer, weeks after he had taken the data from Morrisons' systems.

Proops had said that online disclosure caused the harm, rather than the act of copying the data – and that all elements of torts need to be carried out within the scope of employment for vicarious liability to apply. She said employers would only be liable if they were "on the job" or acting in a representative function when torts took place.

But the court said Skelton's tortious acts "were in our view within the field of activities assigned to him by Morrisons".

The judges said there was one novel feature to the case: that the employee's motive was to harm the employer, rather than to achieve some other form of benefit or harm a third party. Proops had argued that imposing vicarious liability on Morrisons in those circumstances would make the court an accessory to furthering Skelton's criminal aims; the appeal court noted that this troubled the trial judge and may have persuaded him to allow Morrisons to appeal against his ruling immediately.

The court said English case law has long held employers vicariously liable for employees' deliberate wrongdoing, regardless of their motive: "[W]e do not accept that there is an exception to the irrelevance of motive where the motive is, by causing harm to a third party, to cause financial or reputational damage to the employer."

Insuring against doomsday

The judges noted Proops' argument that a finding of vicarious liability would place a huge burden on employers.

"As it happens Mr Skelton's nefarious activities involved the data of a very large number of employees although, so far as we are aware none of them has suffered financial loss," the judges said. "But suppose he had mislaid the data so as to steal a large sum of money from one employee's bank account. If Morrisons' arguments are correct, then (save for any possible claim against the bank) such a victim would have no remedy except against Mr Skelton personally."

The judges ended the ruling by pointing to the large number of reported data breaches in recent years, and the "potentially ruinous" claims that breached companies could face. They said insurance is the solution.

"We have not been told what the insurance position is in the present case, and of course it cannot affect the result," they said. "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 by Ms Proops on behalf of Morrisons."

Mishcon de Reya data protection adviser Jon Baines said that subject to further appeals, "we now know that even if an employer has taken all reasonable steps to secure personal data in line with its obligations under data protection law, and has nonetheless still been a victim of data theft instigated by one of its employees, it may still be vulnerable to being sued on vicarious liability grounds by individuals who have suffered damage as a result."

Baines added that it remains to be seen whether the position would be different under the GDPR. He said UK employers should "certainly be even more on their guard to try and prevent and detect the data crimes of their own staff. And as the insurance market will no doubt respond accordingly, the effects could be costly for individual companies, but also for the economy generally."

Covington & Burling partner Daniel Cooper said the Court of Appeal judgment “reinforces the lower court view that in these circumstances, the employer should bear the ‘enterprise risk’ and assume liability for the actions of its employees breaching data protection laws, even where the employer does not condone and may even sanction the employee for those breaches, so long as they are performed in the course of their employment.”

Cooper said this may appear “harsh” considering the High Court’s conclusion that the supermarket’s security measures were reasonable and appropriate, and that the company itself had not breached data protection law.

“[T]his result is likely to incentivise employers to try and reduce their exposure – for instance, by shifting the risk to third-party insurers, engaging in more extensive oversight and monitoring of staff handling personal data, as well as other measures,” he said.

Ropes & Gray London partner Rohan Massey said: “The Court of Appeal’s suggestion that data controllers mitigate against the ‘potentially ruinous’ costs of data breach claims by taking out insurance may come as little comfort to businesses for whom the reputational costs and organisational disruption of such incidents can be just as costly.”

A Morrisons spokesperson said the company plans to appeal against the judgment to the UK’s Supreme Court.

“Morrisons has not been blamed by the courts for the way it protected colleagues’ data, but they have found that we are responsible for the actions of that former employee, even though his criminal actions were targeted at the company and our colleagues.”

Counsel to WM Morrison

11KBW

Anya Proops QC and Rupert Paines in London

DWF

Counsel to the claimants

5RB

Jonathan Barnes and Victoria Jolliffe in London

JMW

Partner Nick McAleenan in Manchester