EMPLOYMENT NEWSLETTER NOVEMBER - 2018

1. Employer was vicariously liable for data protection breach

The Court of Appeal has held that an employer was vicariously liable for an employee's deliberate disclosure of co-workers' personal data on the internet.

Background

This is the data protection claim against Morrisons Supermarkets which we reported on in our January 2018 newsletter, click here to view.

An article about this case can be viewed here: click here to view.

What does this mean?

The Court of Appeal dismissed the appeal by Morrisons and held that the common law remedy of vicarious liability for misuse of private information and breach of confidence was not excluded by the Data Protection Act 1998.

It did not matter that the data was posted on the internet at the employee's home as the co-workers' claims arose when the employee improperly downloaded their data onto his USB sick, which was done at work. The employee's actions at work and the disclosure on the internet was a seamless and continuous sequence of events. Accordingly, there was sufficient proximity to the workplace for Morrisons to be vicariously liable. In any event there were numerous cases in which an employer had been held vicariously liable for torts committed away from the workplace.

What should employers do?

This decision has serious implications for employers who may be vicariously liable for the misuse of employee personal data by a rogue employee even if they are otherwise compliant with data protection legislation. This is the case even if the wrongdoing was deliberately intended to harm the employer. The Court of Appeal in this case suggested that employers should insure themselves against such events.

It is also worth noting that damages in this case will be calculated under the old Data Protection Act 1998 and could have been much higher under the GDPR which became applicable in May 2018.

Morrisons has indicated that it intends to appeal to the Supreme Court given its liability in damages extends to over 5,500 individuals.

Case reference: Wm Morrison Supermarkets Plc v Various Claimants

2. Employer was vicariously liable for assault

The Court of Appeal (reversing the decision of the High Court) has held that a managing director's drunken assault on an employee was 'in the course of employment' meaning that the employer was vicariously liable.

Background

This is a case which we reported on in our January 2017 newsletter: click here to read.

What does this mean?

The Court of Appeal held that when considering whether something is 'in the course of employment', the employment should be viewed broadly and it is wrong to focus on what the employee is expressly authorised to do in their job.

The Court said that there were two questions that needed to be answered:

- Broadly speaking, what are the functions or field of activities entrusted to the employee?
- Was there sufficient connection between the position in which he was employed and the wrongful conduct to make it right for the employer to be held liable?

The Court held that the managing director who assaulted the employee was responsible for all management decisions and that his authority and remit were very wide. The Court said it is necessary to look at the field of activities assigned to the employee in a broad sense and look at the matter objectively, taking account of their position within the company.

Having determined that the nature of the managing director's job was wide, the Court of Appeal went on to consider whether there was a sufficient connection between that job and the assault. It held that there was a sufficient connection between the unscheduled drinking session during which the assault took place and a Christmas party which had taken place earlier in the evening. The drinks occurred on the same evening as the work event paid for and orchestrated by the managing director. Despite the time and place, the managing director chose to wear his 'metaphorical managing director's hat' (by delivering a lecture to staff about his rights as managing director). He was not merely one of a group of drunken revellers whose conversation had turned to work.

The attack arose out of a misuse of the position entrusted to him as managing director. He asserted his authority in the presence of around half of the company's staff and misused that authority. Overall his position of seniority was a significant factor. He was in a dominant position and had a supervisory role which enabled him to re-assert that authority when he thought it was necessary.

Taking all these factors into account, the Court held that there was sufficient connection between the managing director's job and the assault for his actions to be considered 'in the course of employment' and to render the company vicariously liable for his actions.

What should employers do?

The facts of this case were unusual and not every employer will be liable for the violent acts of their employees. Liability will not arise just because there is an argument about work matters between colleagues which leads to an assault. However, vicarious liability cases can be unpredictable as each case depends on its own facts.

Case reference: Bellman v Northampton Recruitment Limited

3. Gender pay gap determines women's choice of employer

A survey by the Equality and Human Rights Commission has revealed that 61% of women take an organisation's gender pay gap into consideration when applying for jobs.

The results of the survey, which was commissioned to help identify whether gender pay gap information has an impact on staff motivation and behaviour, suggest that companies with a smaller gender pay gap will benefit from a broader range of talent.

The poll also showed that 58% of women would be less likely to recommend an employer if it had a gender pay gap, indicating the reputational damage that companies could encounter as a result of failing to address gender pay issues.

4. Use of NDAs in employment disputes

The Government has announced that it will bring forward a planned consultation on the use of Non-Disclosure Agreements in employment disputes.

It intends to improve the regulation around such agreements and make it explicit to employees when a Non-Disclosure Agreement does not apply and cannot be enforced.

This announcement follows a Court of Appeal decision to stop a newspaper from naming a British businessman accused of the sexual and racial harassment of staff.

5. Executive pay ratio reporting requirements

Regulations on executive pay ratio reporting requirements for certain companies are to be introduced on 1 January 2019.

Quoted companies with more than 250 UK employees will be required to include certain pay ratios for the relevant financial year in the directors' remuneration report. The pay ratios compare the total annual remuneration of the CEO to UK employees whose pay and benefits are on the 25th, 50th and 75th percentiles.

Quoted companies will also be required to include in the directors' remuneration report how share price changes impact on shares receivable by directors under long-term incentive schemes during the relevant financial year.

Large companies will be required to provide a statement as part of their directors' report, and on their website, as to which corporate governance code or the corporate governance arrangements they applied in the financial year.

Companies with more than 250 UK employees will be required to include a statement as part of their directors' report on how the directors have engaged with employees and had regard to their interests when making business decisions.

Large companies will be required to include a statement as part of their strategic report stating how directors have had regard to the duty to promote the success of the business. The statement will need to be made available on their website. Large companies will also be required to include a statement as part of their directors' report on how they have had regard to the duty to promote the success of the company in their business relationships with customers, suppliers and others.

The reporting requirements will apply in respect of financial years beginning on or after 1 January 2019. Therefore, the first reports will have to be made in 2020.

Reference: The Companies (Miscellaneous Reporting) Regulations 2018.

6. Causation test in disability discrimination cases must not be applied too strictly

The Employment Appeal Tribunal (EAT) has held that the causation test for discrimination arising from a disability must not be applied too strictly.

Background

In this case, a University Professor, Professor Sheikholeslami suffered from depression and anxiety. She requested to be transferred to another department on account of what she perceived to be hostility from her colleagues. This did not happen and she remained on sick leave until she was dismissed.

What does this mean?

The EAT held that there were two distinct causative issues in a discrimination arising from disability case:

- Whether the employer had treated the Professor unfavourably because of an (identified) something; and
- Whether that something had arisen in consequence of her disability.

In this case the "something" was the Professor's ongoing absence from her existing post and/or her failure to return to it. The critical question in this case was whether her refusal to return to work had arisen in "consequence of" (rather than being caused by) her disability. It did not matter than there may have been other reasons for her not wishing to return to work. The Tribunal had therefore applied a causation test that was too strict and the appeal was allowed.

What should employers do?

This case continues the trend of loosening the causal link between the disability and the "something" that arises in consequence of it in discrimination arising from disability cases. Employers should assess whether an employee's actions or behaviour are connected to their disability in any way before taking action.

Case reference: Sheikholeslami v University of Edinburgh

7. ICO takes action for failure to pay new data protection fee

The Information Commissioner's Office (ICO) has commenced formal enforcement action against 34 organisations that have failed to pay the new data protection fee. It has stated that more notices are in the drafting stage and will be issued shortly. The organisations have 21 days to

respond to the notices. If they pay the relevant fee, no further enforcement action will be taken.

All organisations that process personal data must pay a fee to the ICO unless they are exempt.

A failure to respond to an enforcement notice or refusal to pay could result in a fine, the amount of which will depend on the size and turnover of the organisation. Aggravating factors may lead to an increase in the fine.

8. Workers to get tips in full

The Government has announced that it intends to introduce legislation to ensure that tips left for workers will go to them in full. The new legislation will be introduced "at the earliest opportunity" and will set out that tips must go to the workers providing the service.

9. Change in DBS email address

The Disclosure and Barring Service (DBS) has changed its email address to @dbs.gov.uk. Any emails sent to their previous address of @dbs.gsi.gov.uk will be diverted to the new address until March 2019. The DBS is urging people to update contact lists as soon as possible.

10. Mental health guidance

CIPD and Mind have published mental health guidance for employers: click here to view.

The guidance is aimed at helping managers improve their response to issues of poor mental health in employees. It aims to help managers identify warning signs early on as currently only 42% of employees feel their manager would be able to spot them. The guidance includes information, resources and tools to enable managers to support struggling employees effectively.

Find out more

Please contact us to discuss your requirements or to find out more.

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