GDR NEWS

# Morrisons not liable for rogue employee data breach

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In a landmark ruling, the UK's highest court has cleared UK supermarket Morrisons of vicarious liability for the actions of a rogue employee – but claimants in other cases may still be able to hold data controllers indirectly liable.

Lord Robert Reed today ruled on behalf of a unanimous five-judge Supreme Court panel that the actions of former Morrisons IT employee Andrew Skelton were not closely connected enough to tasks he was authorised to carry out by the supermarket to make it liable for his conduct.

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The ruling reversed decisions made in trial court by Mr Justice Brian Langstaff and the **Court of Appeal**. Lord Reed said today that those decisions were based on "misunderstandings" of Supreme Court case law regarding vicarious liability for employers.

The case began after Skelton posted personal and bank details of Morrisons employees to a filesharing site and to newspapers following disciplinary action by Morrisons. He was later prosecuted and sentenced to eight years' imprisonment.

Morrisons said in a statement today that it is "pleased that the Supreme Court has agreed that [it] should not be held vicariously liable for [Skelton's] actions when he was acting alone, to his own criminal plan and has been found guilty of this crime and spent time in jail".

Nick McAleenan, a partner at JMW in Manchester and counsel to the claimants, told GDR that his clients are "hugely disappointed by the decision" and that it leaves the claimants in "the position of having no legal avenue remaining to challenge what happened to them".

However, he also noted that the court's decision on vicarious liability under UK data protection law "establishe[s] the legal principle that employers can now be legally responsible for data breaches caused by their employees."

"This is very significant because most data breaches are caused by human error. This ruling enhances the protection of data for millions of people in this country who are obliged to hand over their own information to businesses every single day. It will raise standards. Morrisons' staff have lost their claim, but through their legal action they have enhanced the data rights of everyone in the UK," he said.

**Vicarious liability**

The Supreme Court judges considered the issue of Morrisons' vicarious liability afresh after having found that the lower courts had wrongly applied tests created by case law.

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According to today's judgment, the lower courts, when considering Morrisons' liability, leaned on the "unbroken sequence of events" that started with Morrisons giving Skelton access to the data and then Skelton disseminating it. But to follow that approach, Lord Reed said, would "constitute a major change in the law".

The judgment on which the lower courts relied – *Mohamud* – was not intended to create a change in the law of vicarious liability, he said. Rather, the relevant question is about whether the employee acted in the "capacity of a representative of the employer" at the time of the wrongful act.

To answer that question, Lord Reed said, "the wrongful conduct must be so closely connected with acts the employee was authorised to do that, for the purposes of the liability of the employer to third parties, it may fairly and properly be regarded as done by the employee while acting in the ordinary course of his employment". This test of "close connection", the judgment said, is not "merely a question of timing or causation".

The court found – contrary to the view of the lower courts – that Skelton's acts did not meet this close connection test.

**Data Protection Act**

While the court cleared Morrisons of liability today, it ruled against the supermarket on its secondary argument. Morrisons had **argued** that the UK's pre-GDPR Data Protection Act 1998, which applied at the time of Skelton's misconduct, excluded vicarious liability for breaches of its rules or for breach of confidence and misuse of private information by employees acting as a data controller.
But Lord Reed said today that as the law – now replaced by the Data Protection Act 2018, which implements the GDPR – "neither expressly nor impliedly indicates otherwise", it does not exclude liability.

Lawyers told GDR today that the decision may keep the door open for data breach class actions against companies where employees are found to be acting on behalf of their employer, including under the new data protection regime.

**Reactions**

Observers said the decision will be a relief to employers, but urged caution given the court's secondary decision on vicarious liability under data protection law.

James Seadon, a partner at Fieldfisher in London, said the decision "will be welcomed by employers", but that businesses should "remain vigilant ... relying on legal argument alone will not address the menace of data breaches".

Seadon said that the court's secondary decision, which Morrisons lost, means that in cases where vicarious liability is made out – "where an insider is acting as an employee when unlawfully processing the personal data", data protection law is "unlikely to rescue the employer". However, vicarious liability will likely only apply in "relatively narrow circumstances," Seadon said.

Peter Church at Linklaters in London said: "This judgment will be a relief for UK businesses but is largely restricted to its facts and there are still a large number of other class actions for data breaches in progress. The threat of significant liability for data breaches remains."

Church argued that the "more interesting issue" was the level of compensation each employee would have received if Morrisons had been liable.

"Many employees would have struggled to show they had suffered any actual loss or harm suggesting their compensation should be minimal. This is relevant to the other outstanding class actions but following the dismissal of this claim, we may have to wait longer for the answer," he said.

Rohan Massey, a partner at Ropes & Gray in London, said that UK businesses will be relieved by the decision, but that it does not mean "employers are freed from liability obligations to affected individuals in all cases".

"The facts of this case are unusual … there are many other circumstances in which a personal data breach will lead to the unauthorised disclosure of large amounts of personal data and the potential class compensation claim that will follow," he said.

Despite this, Massey said, "today's decision will no doubt be well-received by HR departments and company boards many of whom are now considering the liability

from data processing and security risks arising from the sudden shift to a remote workforce as has been mandated by the response to the covid-19 pandemic."

Matthew Felwick, a partner at Hogan Lovells in London, said: "This decision will only be of limited comfort for companies that experience a data security breach. The court's reluctance to totally exclude vicarious liability gives another potential tool to claimant lawyers, further increasing the already considerable risks of data class actions in the UK that companies face."

Ashley Hurst, a partner at Osborne Clarke in London, said the decision is a "great result" for employers. "Whilst most data breaches are caused by attacks from outsiders or inadvertent acts from employees, deliberate leaks and theft of data by employees are quite common. And so this judgment will come as welcome relief to employers in light of the increased risks of data liability that they face post-GDPR," he said.

Steve Farmer, a partner at Pillsbury in London, said the decision "fires a warning shot toward the burgeoning class action culture developing in the UK, where data breaches may occur through no fault of the company suffering the breach, and doubtless brings considerable relief to companies across the UK".

However, he said, the "net result is that the door is still open for vicarious liability claims being brought in class action cases" where employees are found to be acting on behalf of their employers.

Covington & Burling partner Dan Cooper in London described the decision as "dual-edged" and said that "when coupled with the **Lloyd** Court of Appeal decision – which is currently **on appeal** – this would mean that where an accidental act impacts individuals, those individuals could sue the employer based on its vicarious liability".

Cooper said in that scenario, claimants could sue on a class basis under a representative action for loss of control of data, which could mean potentially greater liability for employers than individual group claims under a group litigation order, as was the case in the Morrisons dispute.

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David Wilkinson, a partner at Ashurst in London, said the ruling is a “common sense decision which firmly places liability for employees pursuing a personal vendetta where it belongs – on the employee, not their employer”.

Morrison & Foerster partner Annabel Gillham in London said that though the ruling is good news for businesses, the intentional disclosure of data as occurred in the Morrisons case is "rare". It is more often the case, she said, that there is "no clear intention on the part of an employee to commit a data breach" – meaning employers should have strict data access policies.

Victoria Hobbs, a partner at Bird & Bird in London, said the ruling "offers employers welcome protection from liability for the actions of rogue employees who seek to damage the company for their own personal reasons", but also said the secondary decision suggests employers could still be considered vicariously liable in other circumstances.

"Put together, the two parts of the Supreme Court's decision mean that while in principle employers can be vicariously liable for data breaches committed by their employees, the scope of this liability has been significantly decreased," she said.

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