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EMPLOYMENT LAW BULLETIN

OCTOBER 2018

Welcome to our October employment law bulletin.

This month's cases include two important decisions about the vicarious liability of an employer for the actions of an employee. The Court of Appeal held in *Bellman v Northampton Recruitment Limited* that the employer was liable for its managing director's attack on a colleague at a post-Christmas party drinking session. In *Wm Morrison Supermarkets Plc v Various Claimants*, the Court of Appeal held that Morrisons was liable for damages to 5,000 employees whose personal data were deliberately placed on a publicly accessible internet site by a disgruntled employee. In both cases the court found that the wrongdoing was sufficiently closely connected to the individual's role for the employee to be acting in the course of their employment and for vicarious liability to arise.

There have been a number of important whistleblowing cases this year. In *Timis and another v Osipov*, the Court of Appeal has confirmed that individuals can be personally liable for dismissal-related losses where, because of whistleblowing, they have subjected a colleague to a detriment which led to dismissal.

Although a case about the provision of a service, the case of *Lee v Ashers Baking Company Limited* and others is one for employers to be aware of. This case, now decided by the Supreme Court, has confirmed that it was not discriminatory for a bakery to refuse to make a cake bearing the slogan: "Support Gay Marriage". The political message on the cake was the reason for the refusal and not the sexuality of the person ordering it.

Finally, may I remind you of our forthcoming events:

- **Northern Education Conference**
  A full day conference, Leeds, 27 November 2018
  For more information or to book

- **Employment Breakfast Briefing**
  What's new in Employment Law, Leeds, 4 December 2019
  For more information or to book

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Should employees have more time to bring sexual harassment claims?

A chance to have your say on this and other questions about the way employment tribunals work.

Did you know that employees cannot bring work-related personal injury claims to an employment tribunal? Or that employees cannot bring a breach of contract claim in the tribunal if they continue to be employed? Did you know that an employment tribunal cannot decide claims about breaches of confidentiality or restrictive covenants?
The Law Commission has published a consultation paper which considers these and other restrictions on the way in which employment tribunals work. As the law stands, employment tribunals have only limited jurisdiction to hear certain types of claims, even though employment tribunal judges may have considerable expertise in the area of law in question.

The consultation questions include:

- Whether time limits for employment tribunal claims should be increased from three to six months. The paper notes that commentators have particularly raised the perceived unfairness of requiring people to bring a claim within three months in cases of pregnancy / maternity discrimination and sexual harassment.

- Should some kinds of non-employment discrimination claims, for example relating to the provision of services, education, the management of premises or membership associations be heard in the employment tribunal rather than the county court?

- Should the current £25,000 cap on breach of contract awards in the employment tribunal be increased and, if so, to what amount?

- Whether the employment tribunal's jurisdiction to hear breach of contract claims should be extended, for example to cover cases where the employment relationship is continuing or where liability arises some time after termination.

  Should employment tribunals in future be able to hear claims relating to personal injury, living accommodation, restrictive covenants, intellectual property and breach of confidentiality?

- Are claims for negligence or breach of contract in relation to employee references better dealt with by an employment tribunal?

- As both employment tribunals and the civil courts can hear equal pay claims, should the time limit for equal pay claims in the tribunal be extended from six months from the date of termination to six years from the date of the breach?

Information about how you can respond to the consultation and the full consultation paper is available here.

Employer vicariously liable for managing director's attack at post-Christmas party drinks

In *Bellman v Northampton Recruitment Limited*, the Court of Appeal has overturned the decision of the High Court and held that a drunken attack by the managing director of a small business on an employee was in the course of employment. We reported on the High Court's decision in the December 2016 edition of this bulletin.

An employer will be vicariously liable for wrongdoing by an employee if that wrongdoing is "closely connected" with the employment. This was established in the case of Lister v Hesley Hall Ltd [2001] UKHL 22. The courts have applied a broad interpretation of this test. In the recent case of Mohamud v WM Morrison Supermarkets Plc [2016] UKSC 11, the Supreme Court held a supermarket vicariously liable for an employee's assault on a customer at one of its petrol stations. This was on the basis that there was a sufficiently close connection between the assault and the employee's job of attending to customers and the wrongdoing was a misuse of the employee's position as a petrol attendant.

In this case, Mr Major was the managing director of Northampton Recruitment Ltd. Mr Bellman was employed by the company as a sales manager. In 2011, the company organised a Christmas party for employees and their partners which took place at a golf club. After the party, a number of people who attended went on to have impromptu drinks in the bar of a hotel. The company paid for taxis to the hotel and for some of the impromptu drinks.

At around 2am a work-related discussion began concerning the placement of a new recruit within the business. Mr Major became angry and lectured his employees about his freedom to make decisions as the owner of the company. Mr Bellman, who had known Mr Major since childhood, challenged Mr Major in a non-aggressive way. Mr Major then moved towards Mr Bellman saying: "I f***ing make the decisions in this company; it's my business. If I want him based in Northampton he will be f***king based there". He then punched Mr Bellman twice. Mr Bellman fell to the floor, fracturing his skull. He suffered severe brain damage.

Mr Bellman sued his employer for damages in the High Court. The High Court held that the company was not vicariously liable for the assault. It found the impromptu drinking session was separate from the Christmas party in time and place. It decided that there was insufficient connection between Mr Major's role as managing director and the assault and so the wrongdoing was not in the course of his employment.

Court of Appeal did not agree. It made clear that two questions must be considered: what are the functions or "field of activities" entrusted to the employee (or what is the nature of his job); and is 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?

Lady Justice Asplin gave the leading judgment and held that Mr Major had a very wide field of activities as managing director. She made clear that the question is not what the employee is expressly authorised to do. She noted that vicarious liability had been found in cases where an employee had misused their position in a way which injured someone else. She also held that there was sufficient connection between Mr Major's job and the assault. She decided that Mr Major had chosen to wear his "metaphorical managing director's hat" at the drinks session (even though it was separated from the work's Christmas do in terms of both time and location). She noted that the conversation had focused on work for around an hour before the attack. She held that the assault was an attempt to assert Mr Major's authority and arose out of

a misuse of the position entrusted to him as managing director. She held that those attending were doing so as subordinate staff members and managing director.

Lord Justice Irwin agreed with the judgment but wished to emphasise that "this combination of circumstances will arise very rarely. Liability will not arise merely because there is an argument about work matters between colleagues, which leads to an assault, even when one colleague is markedly more senior than another. This case is emphatically not authority for the proposition that employers become insurers for violent or other tortious acts by their employees."

This judgment is in line with that of the Supreme Court in Mohamud. It highlights the risk that an employer will be found vicariously liable for a wrongdoing where there is a close connection between the tortious act and the nature of the job carried out by the wrongdoer and in particular where the wrongdoing arises from a misuse of the position in which the wrongdoer is employed. Employers should be aware that vicarious liability can arise for acts carried out on or off work premises and both inside and outside working hours. The key question for the court will not be, did the act happen at work or at a work event, but rather, was the act closely connected with the wrongdoer's job.

Bakery did not discriminate when refusing to bake a cake bearing a slogan in support of gay marriage

In Lee v Ashers Baking Company Limited and others, the Supreme Court has overturned a decision of the Court of Appeal of Northern Ireland and held that a Christian-owned bakery had not directly discriminated on the ground of sexual orientation, religious belief or political opinion in refusing to prepare a cake with the slogan "Support Gay Marriage" for a gay customer.

Mr Lee, who is gay, ordered the cake for an event run by Queerspace, a Northern Irish organisation for lesbian, gay, bisexual and transgender people. The owners of Ashers oppose same-sex marriage and believe that marriage must be between a man and a woman. They cancelled the order and gave Mr Lee a refund. Mr Lee brought proceedings for direct discrimination on grounds of sexual orientation under the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006, and for direct discrimination on grounds of religious belief or political opinion under the Fair Employment and Treatment (Northern Ireland) Order 1998.

The county court found that the bakery had discriminated against Mr Lee on the ground of sexual orientation. It found that the bakers had not cancelled the order because Mr Lee was gay, but the court came to this decision on the basis that support for gay marriage is indissociable from homosexuality. The Northern Irish Court of Appeal did not agree with this, commenting that heterosexuals may support gay marriage and homosexuals may oppose it. The Court of Appeal did however uphold the finding of discrimination, holding that this was a case of discrimination by association: Mr Lee had been less favourably treated not because of his own sexuality, but because of his association with gay people.

The Supreme Court overturned this decision and held that there had been no discrimination. Lady Hale commented that it was not enough for the less favourable treatment to have "something to do with the sexual orientation of some people". For discrimination by association to occur, there must be a closer connection than that. The Supreme Court noted that the facts showed that the order had not been cancelled because Mr Lee is gay. Indeed, a heterosexual person who had placed the same order would also have been refused. The county court had heard evidence that gay people worked in and were customers of the bakery. The reason for the cancellation was an objection to same-sex marriage on religious grounds.

The Supreme Court held that obliging the bakers to prepare the cake could have been in contravention of the European Convention on Human Rights (ECHR) right to freedom of religion and belief as they would have had to manifest a belief which they did not hold. It would also have contravened the ECHR right to freedom of expression, which includes the right not to express an opinion.

This is a case concerning potential discrimination in the provision of goods and services based on laws which apply in Northern Ireland. Lady Hale's comments on discrimination by association are perhaps the most interesting aspect of this judgment for employers. She deliberately avoided defining how close the association must be for discrimination by association to occur, but makes clear that in this case, there was not sufficient connection between the treatment and the protected characteristic of sexual orientation. In this case, it was the message on the cake which lay behind the less favourable treatment and not the sexuality of the person who ordered it or anyone associated with him.

Could an employer be liable for a malicious data breach by an employee?

A recent Court of Appeal decision highlights the risk that data controllers will be found liable for damages due to the data breach of a rogue employee.

In Wm Morrison Supermarkets Plc v Various Claimants, the Court of Appeal upheld the decision of the High Court that Morrisons was vicariously liable for the deliberate disclosure of the personal data of thousands of employees on the internet.

Mr Skelton was a senior IT internal auditor employed by Morrisons. He became disgruntled after receiving a formal verbal warning for a disciplinary issue. As part of his job, he had access to Morrisons' payroll data. He copied this data onto a personal USB stick, planning to disclose the data in order to harm his employer.

In January 2014, he posted the personal details of nearly 100,000 employees of Morrisons on a file sharing website. The data consisted of the names, addresses, gender, dates of birth, phone numbers, national insurance numbers, bank sort codes, bank account numbers and details of salary. Two months later, he sent a CD containing a copy of the data to three newspapers, pretending to be a concerned person who had discovered that this data was available on the internet.

The newspapers informed Morrisons which took steps to ensure that the website was taken down and informed the police. Mr Skelton faced criminal proceedings and was sentenced to eight years in prison.

Over 5,000 employees brought a class action for damages from Morrisons in the High Court on the basis of the misuse of private information, breach of confidence, and breach of Morrisons' statutory duty to comply with the data protection principles under the Data Protection Act 1998.

The High Court found that Morrisons had taken proper measures to protect the employees' data (save for some failings in its data deletion practices which would not have prevented the data breach) and could not have known that Mr Skelton was not to be trusted. It therefore found that Morrisons was not directly liable under data protection law. However, it found that there was sufficient closeness between the wrongdoing of Mr Skelton and the tasks he was employed to

do, to hold Morrisons vicariously liable for his actions.

The Court of Appeal agreed. It agreed that there was an unbroken chain of planned events linking Mr Skelton's wrongdoing to his employment.

The high level of fines under the General Data Protection Regulation have been much publicised. This case highlights the additional risk that deliberate disclosure of personal data by a disgruntled employee could lead to significant civil damages for vicarious liability, even where an employer has complied with data protection law. The Court of Appeal commented that insurance could be the answer for data controllers, although there are likely to be limits on the extent to which any such public liability or cyber insurance policy would cover legal costs and/or damages awards.

We understand that Morrisons intends to appeal to the Supreme Court.

Can an individual be personally liable for dismissing someone because of whistleblowing?

In Timis and another v Osipov, the Court of Appeal held that two directors of a company were personally liable for dismissal-related losses for actions which led to the claimant's dismissal.

Mr Osipov was CEO of International Petroleum. He raised concerns about corporate governance at the company and compliance with Nigerien law. Mr Osipov was instructed by the directors not to visit Niger. Such visits should have been a significant part of his role. Mr Timis, a director of the company, then instructed Mr Sage, another director, to dismiss Mr Osipov.

Mr Osipov brought whistle-blowing detriment and automatic unfair dismissal claims against his employer and detriment claims against Mr Timis and Mr Sage. An employment tribunal upheld his claims and awarded him £1,745,000 with the company and the two directors being jointly and severally liable. In this case, the company was insolvent and the two directors benefitted from directors' and officers' liability insurance. The EAT agreed with the tribunal's decision.

The Court of Appeal has now also upheld the decision of the tribunal.

Under whistleblowing legislation, an employee cannot bring a detriment claim against his or her employer where the detriment amounts to dismissal under Part X of the Employment Rights Act 1996 (although a worker can bring such a claim). An employee can of course bring a claim relating to unfair dismissal on the ground of whistleblowing. This claim can only be brought against the employer and not against individuals.

However, this case makes clear that an employee can bring a detriment claim against one or more work colleagues, even where the detriment amounts to dismissal, and those colleagues can be individually liable for losses that follow, including loss of earnings. In this case, the directors were party to the decision to dismiss and their actions in dismissing were motivated by the claimant's protected disclosures. There were therefore personally liable along with the employer for Mr Osipov's substantial losses due to the dismissal.

It is important that employees and officers of an organisation are aware that whistleblowing detriment claims can be brought against them personally. Those responsible for dismissal decisions may be found to have personal liability for losses relating to that dismissal. This is similar to discrimination claims, where individuals can find themselves named as individual respondents.

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