WM Morrison Supermarkets plc v Various Claimants
[2020] UKSC 12

Barclays Bank plc v Various Claimants
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Summary

W M Morrison Supermarkets v *Various Claimants*

The claimants in this case were over 9,000 current or former employees of the Morrison supermarket company. Personal information in the form of payroll data relating to each of the claimants was wrongfully disclosed to various newspapers in breach of the Data Protection Act 1998 by Andrew Skelton, a Morrison employee. Skelton had been able to get his hands on this payroll data because he had been instructed to gather this data and supply it to Morrison's auditors, KPMG. Skelton took the chance to post this payroll date on the Internet and supply it to various newspapers (in the hope that they would find some damaging information in it) because he harboured a grudge against Morrison for subjecting him to a disciplinary procedure for minor misconduct. In case the disclosure came to light, he also planned to frame another Morrison employee who had been involved in the disciplinary procedure as having been responsible for the disclosure. As it happened, one of the newspapers that received the wrongfully disclosed payroll data informed Morrison of the data breach that had occurred, and Skelton was swiftly identified as having been responsible for the breach. He was sent to prison for eight years, and the claimant sued Morrison for compensation on the basis that they were vicariously liable for Skelton's wrongful disclosure.

At first instance and in the Court of Appeal, the claimants' claims were upheld on the basis of Lord Toulson's judgment in *Mohamud* v *W M Morrison Supermarkets plc* [2016] AC 677. In particular, the first instance judge read Lord Toulson's judgment as *Mohamud* as holding that an employee would be held to have committed a tort in the course of his employment if there existed a 'seamless and continuous sequence of events...an unbroken chain' between something that the employee was employed to do and the tort that was committed by the employee. The judge found that such a 'seamless and continuous sequence of events...an unbroken chain' existed between Skelton's acquiring the payroll data, which was something he was employed to do, and his making that data available on the Internet and to the newspapers. Morrison appealed to the UKSC.

The UKSC upheld Morrison's appeal, and undertook to 'address the misunderstandings' of its earlier decision in the *Mohamud* case that had led the first instance judge and the Court of Appeal astray in determining whether Skelton had been acting in the course of his employment. Lord Reed gave the judgment of the court, with the agreement of Lady Hale and Lords Kerr, Hodge and Lloyd-Jones. Lord Reed argued that Lord Toulson's judgment in *Mohamud* 'was not intended to effect a change in the law of vicarious liability: quite the opposite' ([17]).

Lord Reed held that the decision in *Mohamud* had not affected the general principle that determined whether or not an employee was acting in the course of his employment in committing a tort. This general principle was set out in para [23] of Lord Nicholls' judgment in *Dubai Aluminium Co Ltd* v *Salaam* [2003] 2 AC 366: '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' (also [23] in Lord Reed's judgment). Lord Reed went on to observe that this close connection test 'has been applied differently in cases concerned with the sexual abuse of children, which cannot be regarded as something done by the employee while acting in the ordinary course of his employment. Instead, the courts have emphasised the importance of criteria that are particularly relevant to that form of wrongdoing, such as the employer's conferral of authority on the employee over the victims, which he has abused' (ibid).

In his judgment in *Mohamud*, Lord Toulson 'was not suggesting any departure from the approach adopted in...*Dubai Aluminium*. His position was the exact opposite. Nor was he suggesting that all that was involved in determining whether an employer was vicariously liable was for the court to consider whether there was a temporal or causal connection between the employment and the wrongdoing' ([26]). Instead, when Lord Toulson observed that there was 'an unbroken sequence of events' between the employee in *Mohamud* telling the claimant to get lost and the same employee subsequently subjecting the claimant to a vicious racist assault, Lord Toulson was merely trying to explain that the employee was at *every* stage of this 'seamless episode' 'purporting to act about his employer's business' (ibid). So when the employee in *Mohamud* 'followed the [claimant] out of the kiosk and on to the forecourt, he was following up on what he had said to the motorist in the kiosk. He ordered the motorist to keep away from his employer's premises, and reinforced that order by committing the tort' (ibid).

It followed that *Mohamud* was actually authority *against* finding that Skelton was acting in the course of his employment in disclosing the payroll data on the Internet and to the newspapers. First of all, 'the disclosure of the data...did not form part of Skelton's functions or field of activities' ([31]), unlike the case in *Mohamud*, where the employee was authorised to deal with Morrison's customers. Second, unlike the sickening racial assault in *Mohamud* – which was, in Lord Toulson's words (approvingly quoted by Lord Reed at [28]), 'not...personal' – Skelton was 'not engaged in furthering his employer's business... On the contrary, he was pursuing a personal vendetta, seeking vengeance for the disciplinary proceedings some months earlier' ([47]). There was therefore no positive authority in favour of finding that the 'close connection' test was satisfied in this case; and much authority against finding that the test was satisfied here. For example, it was clear that 'the mere fact that Skelton's employment gave him the opportunity to commit the wrongful [disclosure] would not be sufficient to warrant the imposition of vicarious liability' [35].

Given all this, there was no basis for finding that Skelton was acting in the course of his employment in wrongfully disclosing the payroll data relating to the claimants.

Barclays Bank plc* v *Various Claimants

The claimants in this case – all prospective employees of the defendant bank – were sexually abused by a now deceased doctor, Dr Gordon Bates, when they were sent by the defendant bank to Bates for him to give them a medical exam. The claimants argued that the defendant bank was vicariously liable in respect of Bates' torts because there existed a relationship 'akin to employment' between Bates and the bank.

The Court of Appeal agreed with the first instance judge that such a relationship existed, despite the fact that it was acknowledged that Bates was an independent contractor who had been hired by the defendant bank to examine the claimants. The defendant bank appealed, and the UKSC upheld the appeal.

Lady Hale gave the only judgment of the court (with which Lords Reed, Kerr, Hodge and Lloyd-Jones agreed). She held that there was nothing in the development of the law on

vicarious liability since the House of Lords' decision in *Lister* v *Hesley Hall Ltd* [2002] 1 AC 215 to warrant the conclusion that a defendant could be held vicariously liable in respect of a tort committed by an independent contractor that the defendant had hired to perform a particular task.

In particular, the five factors listed by Lord Phillips in para [35] of *Various Claimants* v *Catholic Child Welfare Society* [2013] 2 AC 1 as policy reasons why it would be fair, just and reasonable to hold an employer vicariously liable in respect of a tort committed by the employer's tort were not to be taken as 'principles which should guide the development of [vicarious] liability [in respect of] relationships which are not employment [relationships] but which are sufficiently akin to employment to make it fair and just to impose such liability' ([16]).

Admittedly, it 'is fair to say that Lord Reed did focus on the five policy factors identified by Lord Phillips' [20] in concluding that there existed a relationship 'akin to employment' between the prisoner and the prison authorities in *Cox* v *Ministry of Justice* [2016] AC 660, but in para [24] of his judgment in *Cox*, Lord Reed made it clear that a relationship 'akin to employment' existed 'where harm is wrongfully done by an individual who carries on activities as an integral part of the business activities carried on by a defendant and for its benefit (rather than his activities being entirely attributable to the conduct of a recognisably independent business of its own or of a third party)...'. There was therefore 'nothing in Lord Reed's judgment to cause doubt on the classic distinction between work done for an employer as part of the business of that employer and work done by an independent contractor as part of the business of that contractor' ([22]). Likewise, Lord Reed's finding in *Armes* v *Nottinghamshire County Council* [2018] AC 855 that there existed a relationship 'akin to employment' between the defendant council and the foster parents in that case was based on the fact that 'the foster parents were an integral part of the local authority's organisation of its childcare services' ([23]) and could not 'be regarded as carrying on an independent business of their own' (ibid, quoting *Armes*, para [59]).

It followed that the central issue in the *Barclays* case was whether the doctor was 'carrying on business on his own account or whether he [was] in a relationship akin to employment with the defendant' ([27]). While in 'doubtful cases, the five [factors] identified by Lord Phillips may be helpful in identifying a relationship which is sufficiently analogous to employment to make it fair, just and reasonable to impose vicarious liability' but where 'it is clear that the tortfeasor is carrying on his own independent businesses it is not necessary to consider the five' factors (ibid).

Barclays Bank was a clear case – the doctor was not 'anything close to an employee... He was in business on his own account as a medical practitioner with a portfolio of patients and clients' ([28]). As a result, there was no basis for finding the defendant bank vicariously liable for the sexual assaults committed by the doctor in this case.

Comments

Those of us who found the decisions of the UKSC in *Mohamud* (on the 'course of employment' issue) and *Armes* (on the 'akin to employment' issue) to be shockingly slapdash will obviously welcome the retreat and retrenchment represented by these latest two decisions of the UKSC. What is less welcome is the failure to acknowledge that the UKSC got it wrong in *Mohamud* and *Armes*, and the consequent denial that (i) *Mohamud* dangerously destabilised an emerging consensus on when the 'close connection' test would be satisfied in determining whether an employee's tort was committed in the course of their employment; and (ii) *Armes* opened the door to a defendant being held liable in respect of a tort committed

by an independent contractor who had been hired by the defendant to do a job for them. Instead, history is rewritten.

Mohamud is recast as a case where even under the old Salmond test the employee would have been found to have been acting in the course of his employment: the employee in *Mohamud* was simply doing his job, albeit in an unauthorised way, by telling the claimant in that case to be on his way and never come back, firmly reinforcing that message by climbing into the claimant's car and punching 'the claimant in his left temple' and following that up by, when the claimant got out of his car to close the passenger door which the employee had left open when getting into the claimant's car, 'punch[ing] him in the head, knock[ing] him to the floor and subject[ing] him to a serious attack, involving punches and kicks, while the claimant lay curled up on the petrol station forecourt, trying to protect his head from the blows' (facts taken from para [5] of the *Mohamud* decision). The fact that in the similar case of *Warren* v *Henlys Ltd* [1948] 2 All ER 935, the first instance judge *refused* to find that an assault carried out by an enraged petrol station attendant was carried out in the course of the attendant's employment under the Salmond test should have shown that this attempt to reinterpret *Mohamud* was not going to work. But in a desperate attempt to portray *Mohamud* as perfectly orthodox, Lord Reed threw *Warren* under the bus in the *Morrison* case, observing at [43] that 'It is unconvincing to say that the assault [in *Warren*] "had no connection whatever" with the discharge of the attendant's duties. The attendant's function was to deal with his employer's customers. He committed the assault at his workplace, while at work, against a customer of his employer, as the culmination of a sequence of events [!] which began when the attendant was acting for the benefit of his employer.'

As for the *Barclays Bank* case, the particular bit of history that is rewritten in that case is the treatment of Lord Phillips' five factors in *Various Claimants* that make it fair and just to find an employer vicariously liable in respect of a tort committed by an employee. Well, shame on the rest of us who – along with Lord Reed in *Cox* and *Armes* – thought that those five factors were to be applied to determine whether a relationship between a business and a non-employee was sufficiently 'akin to employment' as to make it fair and just to find the business vicariously liable in respect of a tort committed by that non-employee. It turns out we were wrong: those five factors are not normally going to be relevant at all, and will definitely not be relevant where it is clear that the non-employee was 'carrying on business on his own account'. But what is this that Lord Reed says in the *Morrison* case? At para [31] he says that the five factors identified by Lord Phillips in *Various Claimants* 'were not concerned with the question whether the wrongdoing in question was so connected with the employment that vicarious liability ought to be imposed, but with the distinct question whether, in the case of wrongdoing committed by someone who was not an employee, the relationship between the wrongdoer and the defendant was sufficiently akin to employment as to be one to which the doctrine of vicarious liability should apply.' Well, that's not what Lady Hale says about *Various Claimants* in the *Barclays Bank* case. And yet she agreed with Lord Reed's judgment in the *Morrison* case, and he agreed with her judgment in the *Barclays Bank* case. You would have thought that between them they could get their stories straight. But that's what happens when you try to rewrite history – history doesn't like it, and resists the attempt.

It is unlikely that any good will come of all of this – only more litigation and more requests for clarifications and explanations of the sorry farrago of cases that are the legacy of the House of Lords' decision in *Lister*. We can highlight here two problems that are thrown up the decisions in the *Morrison* case and the *Barclays Bank* case that may be the subject of future litigation.

First, Lord Reed's attempt in the *Morrison* case to recast sexual abuse cases as special when it comes to the close connection test for determining whether an employee's tort was

committed in the course of his employment (when they are the whole reason why the close connection test was adopted) opens a huge can of worms. What other cases are special for the purpose of the close connection test? And how are those special case supposed to be resolved?

Second, Lady Hale's attempt to explain *Armes* on the basis that the foster parents in that case (i) were an integral part of the council's organisation of its childcare services, and (ii) could not be regarded as carrying on a business of their own, is going to create big problems in cases where a tortfeasor cannot be regarded as carrying on a business of their own because (like the foster parents in *Armes*) they weren't in business at all. In such a case, (ii) is always going to be satisfied, and as a result the only thing standing in the way of the claimant's being able to show that a relationship between the tortfeasor and some defendant was 'akin to employment' will be (i). If the claimant can show that the tortfeasor was an 'integral part' of some enterprise that the defendant had organised or had going on, then *Armes* – on Lady Hale's interpretation of it – would support a finding that there was a relationship 'akin to employment' between the defendant and the tortfeasor. So how about the case where a parent A regularly has another parent B pick A's children up from school, along with B's children, on a Monday and Wednesday when A cannot make it to school on time to pick their children up. Suppose B is driving their and A's children back to B's home when B carelessly crashes the car into C. Could C say that there is a relationship 'akin to employment' between A and B which would open the door to A's being held vicariously liable for B's negligence? B cannot be said to be in business on their own account as they are not in business at all. And why can't we say that B forms an 'integral part' of A's organisation of her childcare responsibilities? Of course, saying that there is a relationship 'akin to employment' between A and B where B is simply doing A a favour is ridiculous – but in shutting the door on vicarious liability for people who are in business on their own account, Lady Hale may have inadvertently opened the door to vicarious liability for people who are not in business at all.

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