

Legal advice privilege

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Curless v Shell International Ltd [2019] EWCA Civ 1710

The Claimant was employed as a Senior Legal Counsel by Shell until his dismissal, allegedly for redundancy, in January 2017. Whilst employed by Shell, he submitted a grievance and commenced an employment tribunal claim ("the First Claim") for disability discrimination. In March 2017, he commenced a second ET claim ("the Second Claim"). In broad terms, he alleged that Shell relied on a planned re-organisation of its in-house legal department as a pretext by which to terminate his employment by way of redundancy such that his dismissal was unfair, and that this was also unlawful discrimination and victimisation as a result of the First Claim and his grievance.

In support of the Second Claim, the Claimant made two key allegations in his Claim Form.

The first allegation was that in or around late May of 2016 he had been in a bar on Chancery Lane in London and overheard a conversation between two people, whom he believed to be lawyers from a well known solicitors' firm ("the Firm"). They had allegedly mentioned a senior lawyer at Shell who had commenced a disability discrimination claim in the Employment Tribunal and said that this individual's "*days are numbered*" because his managers had said that his Employment Tribunal claim was to be handled firmly, and because Shell planned to use the context of a redundancy exercise to terminate his employment purportedly by reason of redundancy. The Claimant believed that he was the individual to whom they were referring.

The second allegation concerned an email that was provided to the Claimant by an anonymous sender. It was an email headed "Legally Privileged and Confidential" which was sent in April 2016 by a lawyer employed by Shell who, at the time, retained high-level responsibility for giving legal advice in relation the Claimant. The recipient was an individual from the Firm who effectively had been seconded to Shell and had conduct of Shell's

defence in the First Claim. The email referred to a conversation with In-house General Counsel with Shell and then stated,

"It looks as though there are both opportunities for SVS conversations (as parts of the wider UK announcements and done consistently with others) and opportunities for potential compulsory redundancies. On a strictly confidential basis they are looking at reducing the overall number of senior C &P lawyer roles they have, both as part of the integration and generally. I told him this is their best opportunity to consider carefully how such processes could be applies [sic] across the board to the UK legal population including the individual. If done with appropriate safeguards and in the right circumstances, while there is always the risk he would argue unfairness/discrimination, there is at least a wider re-organisation and process at play that we could put this into the context of. I felt in the circumstances this is definitely worth considering even if there is the inevitable degree of legal risk which we would try to mitigate. Otherwise we risk impasse and proceedings with ongoing employment with no obvious resolution. Happy to discuss next week."

At a preliminary hearing Shell submitted that the email and the conversation in the bar (if it took place, which they denied) gave rise to legal advice privilege. The issue was whether they were nevertheless admissible because of the so-called "iniquity principle", that is to say that there is no confidence in an iniquity. The ET accepted Shell's submission that, for the iniquity exception to apply, there must be a strong prima facie case of iniquity and that such a case was not made out in respect of the email. The ET said *inter alia* that whilst of course protection against discrimination and victimisation is important, it is a tort, and to elevate it to the status required to disapply legal advice privilege, goes too far. The ET held that the conversation overheard in the bar was also protected by legal advice privilege, explaining that it was a repetition possibly third or fourth hand of something privileged, a discussion between solicitors, and that privilege was not waived because the privilege belonged to Shell and not to whoever allegedly had this conversation in public. At its highest it was an extremely indiscrete conversation by an unknown lawyer relaying a strategy clearly not with Shell's permission to do so and no doubt without the Firm's permission to do so. The extent to which this was the speaker's slant on the matter or legal advice given was not known, but again it simply referred to what at most was action relating to tortious claims and not excepted by the iniquity principle.

Slade J in the EAT held that the email was to be interpreted as recording legal advice that the genuine redundancy exercise could be used as a cloak to dismiss the Claimant to avoid his continuing complaints and difficulties with his employment which were said by him to be related to his disability and that a strong prima facie case of iniquity was established. Slade J

further stated, without giving more detailed reasons, that legal advice privilege could not be claimed in respect of the overheard conversation in the pub.

The Court of Appeal disagreed. In relation to the email, the Court of Appeal agreed with the ET that this was the sort of advice which employment lawyers give "day in, day out" in cases where an employer wishes to consider for redundancy an employee who (rightly or wrongly) is regarded by the employer as underperforming. The court of appeal did not agree that this was advice to act in an underhand or iniquitous way. It held that the email remained privileged and could not be relied on by the Claimant in support of his case. Counsel As for the overheard conversation in the pub, Counsel for the Claimant sought to rely on this only as an aid to interpreting the disputed email, and the Court of Appeal stated that it could not accept that the conversation could be used in this way as the email preceded the conversation by about two weeks, there was no evidence that the woman whose conversation the Claimant overheard had seen the email or what the source of her information was. The advice in the email could not be tainted by a conversation involving gossip from someone else after the event.

Comment: In view of the Court of Appeal's conclusion on the meaning of the disputed email the scope of the crime/fraud exception to legal advice privilege did not arise for decision. The Court therefore simply recorded the bare bones of the argument that counsel wished to advance, observing that this is an important argument, which will no doubt have to be decided one day; but not in this case. This whets the appetite for a future decision on the scope of the crime/fraud exception to legal advice privilege. There is an obvious argument that it is necessary that there be certainty at the time of consultation between client or lawyer as to whether or not legal professional privilege attaches, and that this should not depend on a retrospective evaluative judgment by the court whether the purpose of seeking advice is "sufficiently iniquitous" to prevent privilege from attaching to the communication. Whether in a future case where there are competing public policies, the balance will struck in favour of legal professional privilege, remains to be seen.



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