Litigation privilege and the iniquity principle

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Review of Abbeyfield (Maidenhead) Society v Hart UKEAT/0016/21

Legal Advice Privilege and Litigation Privilege

1. It is well known that communications between a party and his or her lawyer are privileged from disclosure and inspection provided they are confidential and written to or by the solicitor in his or her professional capacity for the purpose of giving or obtaining legal advice or assistance for the client (known as "legal professional privilege"). Notably, however, such a principle applies only to advice given by qualified lawyers. Similar communications with unqualified employment or HR consultants will not be covered under this rule. As a consequence, the unsuspecting client of these types of consultancies may find that unguarded written communications such as emails written to their (unqualified) advisers are disclosable for all to see regardless of how damaging the content might be.

2. That said, communications between parties and unqualified advisers may be privileged from disclosure and inspection if they fall under the principle of "litigation privileged". Litigation privilege applies to confidential communications between a client or lawyer and a third party where adversarial litigation is contemplated or commenced and the communication in question is made for the dominant purpose of that litigation. This means that, unlike legal advice privilege, litigation privilege in an employment context covers communications between parties and employment or HR consultants so long as the information provided is for the dominant purpose of adversarial litigation.

3. 'Adversarial litigation' covers court or tribunal proceedings and arbitrations but not inquisitorial or investigative proceedings (see *In re L (a minor)* [1997] AC 16, HL). Thus, in the employment context, internal grievance procedures would not be covered by the principle. To be regarded as being contemplated (i.e. reasonably in prospect) there must

be a real likelihood rather than a mere possibility of litigation, and the chance of litigation needs to be greater than 50 per cent.

4. As far back as 2010, the EAT held that an employer seeking advice from employment consultants working for its insurer on how to proceed with a disciplinary process in the aftermath of a workplace altercation was contemplating dismissal at that point and with it the possibility of litigation. As a result, the advice was protected by litigation privilege and did not fall to be disclosed to the claimant (*Scotthorne v Four Seasons Conservatories (UK) Ltd* UKEAT/0178/10).

The Iniquity Principle

5. Not all communications and documents covered by legal advice privilege or litigation privilege are exempt from disclosure. One specific public policy exception to the right to assert either of these privileges in order to prevent disclosure is where the document in question reveals conduct or advice that is in breach of the so-called 'iniquity principle'. 'Iniquity' in this context means legal advice sought or given with the purpose of effecting a crime or fraud, with 'fraud' being given a wide meaning in this context sufficient to extend to 'sharp practice' or engagement in something underhand in circumstances where good faith is required (see *Barclays Bank plc v Eustice* [1995] 1 WLR 1238, CA; and *BBGP Managing General Partner Ltd v Babcock and Brown Global Partners* [2011] CH 296, ChD).

6. In the recent case of *Abbeyfield (Maidenhead) Society v Hart* the EAT considered the extent to which the iniquity principle applied to litigation (and, presumably, legal advice) privilege.

Abbeyfield (Maidenhead) Society v Hart – the facts

7. On 20 March 2017 Mr Hart was informed by his employer, Abbeyfield, that he was being summarily dismissed for gross misconduct following an altercation between him and a gardener that occurred on 9 December 2016. Following his dismissal Mr Hart issued tribunal proceedings for various claims including unfair dismissal, wrongful dismissal, age, race, sex and disability discrimination. A dispute about disclosure of documents arose and the Employment Tribunal ordered Abbeyfield to send to Mr Hart "copies of all documents and electronic records (and transcriptions) of telephone calls, which related to the incident" between Mr Hart and the gardener on 9 December 2016. The ET invited the respondent to identify any basis for asserting that the documents might be inadmissible (including

privilege) and ordered that any such issue would be dealt with at a forthcoming Preliminary Hearing. Abbeyfield duly disclosed its entire file regarding the incident but submitted that circa 78 pages of the documents were inadmissible by reason of litigation privilege because they consisted of communications with HR consultants seeking advice on how to deal with Mr Hart's disciplinary case and the possibility of dismissal. Needless to say, Mr Hart sought to argue that litigation privilege did not apply to any of that material.

8. One of those documents was an email from a senior officer of Abbeyfield, Mr Cager, written and sent to Abbeyfield's HR adviser on 19 January 2017 (some two months before Mr Hart was dismissed). In it he said: "*Mr Hart's rudeness and gross insubordination has caused major problems to both Donna and Shirly and this cannot be allowed to continue any longer. He will not therefore be returning to Nicolas House under any circumstances.*" Significantly, Mr Cager was responsible for hearing Mr Hart's appeal against dismissal in May 2017.

9. Employment Judge Vowles sitting in Reading determined that all the material was covered by litigation privilege and was therefore not disclosable save for the email of 19 January 2017 on the basis that privilege should not apply due to the iniquity principle. EJ Vowles considered it would be iniquitous to allow Abbeyfield to continue to defend the unfair dismissal claim as a fair dismissal, at least insofar as it was claiming that the appeal aspect of the dismissal process was a fair appeal, when the appeal officer (Mr Cager) had expressed his view two months earlier that Mr Hart's employment would be terminated.

10. Abbeyfield appealed against that decision on the basis that the email did not involve anyone either requesting or giving advice of an illegal nature or in furtherance of an illegal purpose. Instead, the email was said to be a typical communication between an employer and employment adviser whereby the client was venting emotions in such communications. Advice could thereafter be given which may persuade the employer to modify its position. Abbeyfield further argued that lifting privilege over such a communication would be contrary to public policy because it would discourage employers from taking advice at all.

11. Mr Hart resisted the appeal on the basis that Mr Cager was not seeking advice but making a statement, the email showed a predetermined decision by Mr Cager to dismiss him and it was therefore inappropriate that Mr Cager went on to hear the appeal.

The decision of the EAT

12. The EAT noted that the iniquity principle was a matter of public policy. It applies where circumstances are such that the usual policy of non-disclosure must give way to reveal inappropriate conduct of the kind described above. That said, however, the EAT balanced this against the fact that the policy of non-disclosure is a strong one because legal professional privilege and litigation privilege enables parties to communicate frankly with their advisers about matters including strengths and weaknesses of their case, and the risks involved, knowing that such communications remain private.

13. The EAT accepted the submissions made on behalf of Abbeyfield and agreed that the email was not such as to engage the iniquity principle. Mr Cager's email was not seeking advice on how to act unlawfully and the consultants did not give any such advice. The indication that he did not wish for Mr Hart to return to work (following suspension) was the sort of frank instruction that a party may feel able to give in a privileged communication. The EAT acknowledged that there may be cases where instructions leave advisers professionally embarrassed such that it may not be ethical to continue to act but that did not apply in this situation. That might have arisen if the employer had told its advisers that it intended to embark on a sham appeal process but that is not what Mr Cager said. Notably the EAT further commented that even expressing such an intention is not the same as requesting advice as to how to act illegally so as to result in losing privilege.

Lessons to be learned

14. Despite the competing public policy considerations that exist between the need for litigation privilege on the one hand and the iniquity principle on the other, this case provides a useful indication of the high threshold that must be overcome to result in setting aside the important and cherished principle that communications between advisers about contemplated litigation should remain confidential. It provides a guide to those who are responsible for advising clients on material that is and is not to be disclosed. That said, it is a case that should only really be of potential use to the reactive and not the proactive adviser. Whether legally qualified or not, those involved in advising employers about proper process should have already cautioned the key players for whom they act against sending intemperate emails or texts so as to avoid ending up in the same uncomfortable situation faced by Abbeyfield.

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