

Unprivileged documents cannot acquire privilege retrospectively

By [Emma Greening](#)

Pupil, 3PB Barristers

University of Dundee v Mr Prasun Chakraborty [2022] EAT 150

Factual background

The Claimant worked as a Post-Doctoral Research Assistant for the University of Dundee. In November 2021 the Claimant raised a grievance in relation to alleged harassment, bullying, discrimination, and racial abuse. In line with the Respondent's own policy the Respondent appointed an independent member of staff to investigate the grievance.

That member of staff investigated with HR support and produced a report on 28 February 2022. The Claimant in the meantime had commenced his claim in the Employment Tribunal. In March the Respondent's legal advisers reviewed the report and suggested several amendments. The author of the report also made changes of her own before a final report was produced in June 2022.

The revised final report was included in the Employment Tribunal hearing bundle with an annotation making it apparent that it was a revised report following independent legal advice. The original report was not disclosed. The Claimant applied for the original report to be disclosed. His application was resisted by the Respondent who considered the original report to be protected by legal advice privilege and asserted that disclosing the original report would allow the Claimant to compare the original and amended report, drawing inferences as to what legal advice had been received.

The Employment Tribunal rejected the Respondent's argument and ordered them to disclose the original report. The Respondent appealed the decision.

The issues before the Employment Appeal Tribunal

The Respondent's case rested on two propositions. Firstly, the original report was protected by legal advice privilege. Legal advice privilege protects communications that are for the sole or dominant purpose of giving or receiving legal advice made between a client and a lawyer.

Secondly, that litigation privilege applied. Litigation privilege protects communications made or documents produced for the purpose of obtaining advice or information in connection with an existing or contemplated litigation. It applies between a client and a lawyer and between client or lawyer and a third party.

The Respondent did not argue that at the point the original report was produced either type of privilege applied. Rather the Respondent asserted that the original report retrospectively acquired legal advice and litigation privilege because comparing the original and the revised reports would allow conclusions to be drawn about the legal advice it had received.

The analysis

The Court noted that there is no significant difference between the Scottish and English approaches to legal advice privilege [Para 19].

The respondent had relied on the ratio of *Lyell v Kennedy (No 3) (1884) 27 Ch D 1* which concerned extracts from a public record gathered by a solicitor for the purpose of defending his client. The ratio as stated by Bingham LJ in *Ventouris v Mountain [1991] 1 WLR 607* (at page 615) was that where a selection of documents assembled by a solicitor betrays the trend of advice he is giving, the documents are privileged. The Respondent submitted that the principle can be applied to both branches of privilege. However, the Court stated that the ratio of *Ventouris* is not that privilege attached to the wider class of documents, and found that *Lyell* does not represent authority for such a proposition regarding either branch of privilege [27, 29]. The Court noted that, in *Lyell*, the other documents in the public record not selected by the solicitor did not become privileged [Para 27].

The Court illustrated with an example of a client who passes an unprivileged file to his solicitor: When the solicitor extracts certain documents for the purpose of defence privilege attaches to those documents but not to the documents left behind in the unprivileged client file. This remains true even if it may be possible to infer what the relevant issues in the case are, or what advice has been given, by comparing the more restricted inventory selected by the solicitor with the original file.

The Court considered that there are situations where legal advice is given and much later a document is created from which the nature of the prior legal advice can be deduced; in these cases privilege can be found to attach to the later document. The Court noted *Barr v. Biffa Waste Services Limited* [2009] EWHC 1033 and *Edwardian Group Limited*. However, the Court determined that these authorities do not support the proposition that an unprivileged original version of a document can acquire privilege retrospectively [Paras 30-31].

The original report was an investigative response to a grievance and not a document created in the contemplation of litigation or, even on the broadest of approaches, a communication between a client and a legal advisor. The Court found to conclude that a document that was not privileged acquires privilege simply because an amended version is created that is the subject of privilege would be contrary to Lord Denning's definition of privilege in *Buttes Gas and Oil Co v. Hammer (No. 3)* [1981] Q.B. 223 [Para 30]. The Court held the original un-amended document did not become privileged retrospectively even if a consequence of its disclosure was that comparison with the final revised version would allow inferences to be drawn between the two versions [Paras 31-32].

The Judge also noted that in this matter, it would be difficult to infer what advice was given as the investigating officer made her own amendments at around the same time as the revisions resulting from legal advice, and there would be no way to distinguish on what basis each amendment had been made.

Conclusion

A document that was not privileged does not acquire retrospective privilege simply because an amended version is created that is the subject of privilege [Para 31]

This document is not intended to constitute and should not be used as a substitute for legal advice on any specific matter. No liability for the accuracy of the content of this document, or the consequences of relying on it, is assumed by the author. If you seek further information, please contact the 3PB clerking team.

2 November 2022



Emma Greening

*Pupil Barrister
3PB Barristers*

01865 793 736
Emma.greening@3pb.co.uk
3pb.co.uk