Legal advice on the proposed redundancy of a disabled employee was not a cloak for discrimination and was legally privileged

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Legal advice on the proposed redundancy of a disabled employee

was not a cloak for discrimination and was legally privileged

In the case of *Curless v Shell International Ltd*, the Court of Appeal considered whether advice on the proposed redundancy of a disabled employee amounted to advice on how to cloak discrimination. If it did, the next question would be whether legal privilege over that advice was lost, making it disclosable in the employee's disability discrimination claim.

What does the law say?

Legal advice privilege arises in respect of confidential communications between a client and a lawyer (including in-house lawyers) where the dominant purpose of the communication is the giving or obtaining of legal advice on the client's rights, liabilities and options. If legal advice privilege applies then the communication does not have to be disclosed to an opponent (or to a Court or Tribunal) in the course of a relevant legal dispute.

However, it's possible for privilege to be lost in certain circumstances. Under the "iniquity principle" privilege will not apply to communications created as part of a dishonest plan to conceal or further a crime, fraud or equivalent conduct. This means that such material will be disclosable in a relevant legal dispute.

If a claim before an Employment Tribunal refers to material which is privileged the Tribunal is entitled to strike out all or part of that claim. In this case, the Tribunal was asked to strike out part of a claim on this basis, which prompted an examination of whether the communications were, in fact, privileged.

What happened in this case?

Mr Curless was disabled and worked as a lawyer for Shell International Ltd (Shell). Shell was concerned with his performance and took various steps to address the issue. Mr

Curless was unhappy with this and in 2015 he brought a disability discrimination claim against them. In early 2016 he also raised a grievance alleging disability discrimination. Later in 2016, Shell commenced a group wide reorganisation under which Mr Curless was ultimately made redundant. He went on to bring claims against Shell, including for disability discrimination and victimisation.

He sought to rely on a copy of an email that had been sent to him anonymously. The email was from an in-house lawyer at Shell to another lawyer who had been seconded to the business. Mr Curless said the email contained advice on how the reorganisation could be used as a pretext for his dismissal and, as such, was advice on how to commit victimisation. He said this interpretation of the email was supported by the fact that, at around the same time, he had overheard a conversation in a City of London pub in which a professional-looking woman had said she was dealing with a matter concerning a senior lawyer at Shell who had brought a disability discrimination complaint and that there was now a chance to manage him out in the context of a reorganisation.

Shell applied to strike out the parts of the claims relating to the pub conversation and the email on the grounds that these communications were privileged.

What was decided?

The Employment Tribunal agreed with Shell and struck out the parts of the claim concerning the pub conversation and the email on the grounds that both were privileged. However, this decision was overturned by the EAT. In the EAT's view, the email went further than simply warning of the risk of claims arising out of making a disabled employee redundant. Instead, it set out advice on how to discriminate unlawfully and how to hide that discrimination under the cloak of the redundancy exercise. As such, there was a strong case to say the advice was iniquitous and, therefore, not privileged. They also

decided that no legal advice privilege attached to the pub conversation. Shell appealed to the Court of Appeal.

The Court of Appeal agreed with Shell and said that the email *was* legally privileged. The Court viewed the email as recording legal advice on whether, and how, Mr Curless could be made redundant (on either a voluntary or compulsory basis) within the reorganisation and the associated risks. It highlighted the risk that he might argue that his redundancy was unfair and discriminatory and also the risk of an impasse if he remained employed. The Court regarded this as the kind of conventional advice that lawyers give to their clients *"day in, day out"* where redundancy is considered for an underperforming employee. It was not advice to act in an underhand way.

Nor was the Court prepared to view the email through the prism of the pub conversation. Not only did the date of the email precede the pub conversation, there was no evidence that the woman in the pub had even seen the email or of the basis on which she made the alleged statements. The Court concluded that the content of the email could not be tainted *"by a conversation involving gossip from someone else after the event"*.

What are the learning points?

This case was unusual in that the legal advice in question had mysteriously fallen into the hands of the claimant. Of course, this will be rare, but legal advisers (including in-house lawyers) should take great care with both the substance and form of their advice, particularly where discrimination is in play.

Even if the Court in *Curless* had found that the advice had been designed to cloak discrimination, it is not clear whether they would have agreed with the EAT and found that it fell within the iniquity exception. The Court declined to rule on

this point, noting that it was an important argument but would have to be decided in another case. Therefore, the risk remains that advice of that nature *would* be viewed as iniquitous and the “smoking gun” would be disclosable.

Curless v Shell International Ltd

If you would like to discuss any of the issues raised in this article, please contact Amanda Steadman or your usual BDBF contact.

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