Appeal No. EA-2020-001089-JOJ (previously UKEAT/0016/21/JOJ)

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON EC4A 1NL

At the Tribunal
On 22 July 2021
Judgment handed down on 19 August 2021

Before

THE HONOURABLE MR JUSTICE BOURNE

(SITTING ALONE)

THE ABBEYFIELD (MAIDENHEAD) SOCIETY — APPELLANT

MR M HART — RESPONDENT

JUDGMENT

APPEAL AND CROSS-APPEAL

APPEARANCES

For the Appellant	MR RICHARD MORTON (Representative) Avensure Ltd 4th Floor South Central 11 Peter Street Manchester M2 5QR
For the Respondent	MS BIANCA VENKATA (of Counsel)

SUMMARY

PRACTICE AND PROCEDURE

UNFAIR DISMISSAL

Held (allowing the appeal and the cross-appeal)

1. An email which was prima facie covered by litigation privilege did not fall within the "iniquity" exception to privilege although it contained an indication by the employer of a determination to dismiss the employee come what may. The employer did not seek, and the adviser did not give, advice on how to act unlawfully. The indication was the sort of frank instruction that a party may feel able to give in a privileged communication.

2. The Employment Judge omitted to resolve an issue of whether litigation privilege over some further emails had been waived when they were disclosed in response to a Data Subject Access Request. That issue would be remitted.

THE HONOURABLE MR JUSTICE BOURNE

Introduction

1. This appeal and cross-appeal are directed against case management orders made by EJ Vowles ("the EJ") at a preliminary hearing on 24 January 2020. Written reasons were sent to the parties on 4 April 2020 (the "Reasons", from which I quote below).

2. I shall refer to the parties as they are in the Employment Tribunal ("ET") i.e. "Claimant" (Mr Hart) and "Respondent" (the employer).

3. The EJ allowed an application by the Claimant for disclosure of an email dated 19 January 2017, and the Respondent appeals against that decision. The EJ refused to order disclosure of a number of other documents, and the Claimant cross-appeals against one aspect of that decision.

4. By way of background, the Respondent is a charity which operates care homes and care services. The Claimant was employed by the Respondent from 21 November 2011 until 20 March 2017 when he was dismissed without notice for gross misconduct. This followed an incident at work on or around 9 December 2016 involving an altercation between him and a gardener, Mr Carrington. There were conversations about the incident on or around 9 and 10 January 2017, and the Claimant was suspended on 12 January 2017. There was a disciplinary hearing on 2 March 2017 which the Claimant did not attend. The decision to dismiss was communicated on 20 March 2017 and an appeal was rejected on 5 May 2017.

5. On 27 March 2017, the Claimant made a Data Subject Access Request ("SAR") to the Respondent to disclose personal data about him, under what was then the Data Protection Act

1998 ("DPA"). In response, on 3 May 2017, the Respondent provided him with 5 pages of emails with dates between 21 February and 9 March 2017 ("the SAR emails"). In the bundle prepared for the hearing before me, these pages in fact begin with part (but not the end) of an email dated 20 February, to which the next message is a reply.

6. On 16 June 2017 the Claimant submitted ET claims for unfair dismissal, wrongful dismissal, discrimination on grounds of age, race, sex and/or disability, harassment and victimisation. The Respondent contested all of the claims.

7. Following a dispute about disclosure, the ET on 7 October 2019 ordered the Respondent to send to the Claimant "all documents and electronic records (and transcriptions) of telephone calls, which relate to the incident between the Claimant and Mr Carrington (gardener) on 9 December 2016", and it also invited the Respondent to identify any basis on which any document might be inadmissible by reason of privilege or otherwise, and ordered that any such issue would be dealt with at the preliminary hearing on 24 January 2020.

8. The Respondent disclosed "the whole of its file on this case from 19 December 2016 onwards" (Reasons paragraph 3). It submitted that pages 1-78 of that file were inadmissible by reason of litigation privilege. These were communications with HR consultants consisting of requests for advice, and advice, on how to deal with the Claimant's disciplinary case and the possibility of dismissal. The Respondent submitted, and the ET found, that these documents were made in contemplation of litigation. Although the Claimant sought to contest that finding before me, there is no permission for that to be argued.

9. The 78 pages included all but one of the SAR emails. They did not include an email sent by David Cager of the Respondent to his colleagues Shirley Fairley and David Yates (but not to their advisers) on 9 March 2017. As a result, the disclosability or admissibility of that email has not been considered by the ET.

10. The assertion of privilege over the 78 pages was considered by the ET at the hearing on 24 January 2020. The EJ correctly directed himself as follows:

> "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 the parties or their lawyers and third parties such as consultants so long as the information provided is for the dominant purpose of adversarial litigation. Litigation will be regarded as being contemplated when there is a real likelihood rather than a mere possibility of litigation, although the chance of litigation needs to be greater than 50%."

11. The EJ ruled that all 78 pages were covered by litigation privilege. However, at paragraph 13 of the Reasons he went on to consider the "iniquity principle", whereby communications which would otherwise be privileged must nevertheless be disclosed, e.g. where they contain "legal advice sought or given with the purpose of effecting a 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".

12. At paragraph 14 the EJ gave the example of *X v Y* (2018) EAT (unreported), in which an email was held to be disclosable because it was "giving advice on how to cloak what would otherwise be a disability discrimination dismissal as a dismissal for redundancy".

13. The Claimant had contended that a number of documents engaged the iniquity principle. The EJ ruled that one document was disclosable for that reason and that the others were not. All of his relevant reasoning is as follows:

> "17. Nothing, however, in my view, crosses the line into iniquity except one communication dated 19 January 2017 at pages 63 and 64. It is an email from Mr Cager who was the senior officer of the Respondent. He was the appeal officer. He heard the Claimant's appeal after the dismissal on 20 March 2017. In the email, Mr Cager says:
> *"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 Nicholas House under any circumstances."*
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> 18. It is clear from Mr Cager's email that as at 19 January 2017, he had decided that the Claimant's employment would be terminated. Yet he heard the Claimant's appeal, despite the Claimant having complained about him acting as the appeal officer. Mr Cager continued in that role knowing that he had in fact already pre-determined the termination of the Claimant's employment and he had confirmed that in the email on 19 January 2017.
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> 19. I find that the email of 19 January 2017 is relevant and, although covered by litigation privilege, is disclosable and admissible under the iniquity principle. It would be iniquitous to allow the Respondent to continue to defend the unfair dismissal claim as a fair dismissal, at least insofar as it is claiming that the appeal aspect of the dismissal process was a fair appeal, when the appeal officer had clearly expressed his view in writing some two months before the dismissal that the Claimant's employment would be terminated."

14. The Respondent put forward two grounds of appeal: (1) the ET was wrong to rely on *X v Y* because it had been overturned on appeal (reported as *Curless v Shell International* [2020] EWCA Civ 1710, [2020] ICR 431) and (2) the ET was wrong to find that the iniquity principle was applicable to the email of 17 January 2017, and erred by focusing on the tone and content of the request for advice rather than on the actual advice given and the rationale behind it.

15. Both grounds have been allowed to proceed, although the judge conducting the sift pointed out that the appeal in *X v Y* turned on the interpretation of the document under consideration and not on any ruling of law relating to the iniquity principle.

16. On the Claimant's cross appeal, one ground has been allowed to proceed. This is a contention that the EJ erred in ruling that the SAR emails are privileged, and should have found that the Respondent waived privilege by voluntarily providing those documents to him in response to the SAR.

17. The cross-appeal gives rise to two preliminary points.

18. First, it was only during the hearing before me that the parties noticed that the last in time of the SAR emails was not included in the EJ's ruling (see paragraph 9 above). The consequence is that the cross-appeal must fail in respect of that document.

19. Second, because the EJ's judgment does not mention the waiver point, I asked the parties whether the Claimant had raised it at the hearing on 24 January 2020. Surprisingly they were unable to tell me. I gave them some time to make enquiries and check their files.

20. It first emerged that in preparing for that hearing, Mrs Hart – who represented her husband at the time – had been assisted by a solicitor, Ms Corr, who in an email to her on the afternoon of 23 January 2020 expressed the view that because the SAR emails were voluntarily disclosed, they "are no longer confidential (so no privilege can attach) and/or the Respondent has waived any privilege".

21. It then emerged that some written submissions drafted by Ms Corr were handed up to the EJ on 24 January 2020. They included this paragraph:

> "Should the Tribunal find that the documents are subject to litigation privilege then I submit that the email dated x [at page y of the bundle] is not privileged as it was sent to the Claimant by Shirley Fairley of the Respondent in response to his Data Subject Access Request. As such the document is no longer confidential and so no legal privilege can attach to it. Alternatively, I submit that the Respondent has waived any privilege that may have attached to that document."

22. The copy of this document on the file of Mr Morton, who appeared for the Respondent below and before me, had manuscript annotations by which the reference to the email now said "the email dated 20/12/17". That is the date of the incomplete message referred to at paragraph 5 above, but is not the date of any of what I was told were the SAR emails as such.

23. I conclude that the point was before the EJ, at least in writing although it may not have been developed orally. The written submission was at best inexact in identifying the material to which it applied, but there was enough there to be followed up by the EJ, especially in a case presented by a spouse acting as a lay representative.

The Respondent's submissions

24. On the appeal, I suggested to Mr Morton that ground 1 does not really add anything to ground 2, because the crucial question is whether the email of 19 January 2017 did or did not fall within the iniquity principle as a matter of law. He did not seek to persuade me otherwise.

25. On ground 2, Mr Morton submits that the email of 19 January 2017 did not involve anyone either requesting or giving advice of an illegal nature or in furtherance of an illegal purpose. Rather, this was a typical communication between an employer and an employment adviser. It is not unusual for clients to vent emotions in such communications. Advice can then be given which

A may persuade the client to modify its position. To lift privilege over such a communication would be contrary to policy, Mr Morton contends, because it would discourage clients from taking advice.

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26. Mr Morton also submitted that the email of 19 January 2017 should be judged at the time when it was sent, i.e. well before any dismissal, let alone any appeal. But hindsight is needed to illuminate the point made by the Claimant, i.e. that Mr Cager was exhibiting an attitude which made it wrong for him to deal with the appeal some weeks later.

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27. On the cross-appeal, Mr Morton referred to advice given by his colleague Rebecca Young to the Respondent in an email on 7 April 2017. On the question of what should be disclosed in response to the SAR, she said:

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> "… he is entitled to see all documentation whether in paper format or electronic, where he is the data subject i.e. the document is about him. This does not include emails between Avensure and Abbeyfield, these must not be given to him."

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28. That reflects the exception contained in paragraph 7 of schedule 10 to the Data Protection Act 1998 (which was then in force), whereby the right to personal data did not extend to privileged material.

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29. On that basis Mr Morton invited me to conclude that the disclosure in the SAR response of communications between the Respondent and his firm must have been a mistake, and it would have been obvious to any reasonable solicitor receiving the information that it was a mistake. In those circumstances the ET should have ruled that privilege had not been waived.

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30. Mr Morton did not suggest that this issue could not be raised because it was not argued below. However, he did submit that the EAT should not depart from the EJ's ruling in the absence of any evidence on the question of mistake and on the overall justice of the case. That was not least because, if the appeal were allowed, the ET would have to hear evidence and submissions. This could derail the final hearing which is listed to start on 20 September 2021 for 5 days to decide liability, including the issue of disability. If the point were dealt with at the start of the hearing, and if the EJ decided to exclude the evidence, that EJ would then be in a difficult position having to conduct the hearing without regard to that evidence.

31. In his skeleton argument, Mr Morton also raised an argument that disclosure under the DPA is not voluntary. However, given the exception for privileged material to which I have referred, he sensibly did not press that point.

The Claimant's submissions

32. Late in the day, the Claimant obtained representation from Ms Venkata of counsel. She submitted a replacement skeleton argument, and I have focused on the Claimant's case as advanced by her.

33. The Respondent's appeal is opposed on the basis that the EJ was right to find that the email of 19 January 2017 reached the bar of iniquity. In the Claimant's submission:

a. Mr Cager was not seeking legal advice but was making a statement.

b. The email showed that Mr Cager had decided that the Claimant would be dismissed.

c. This predetermined the disciplinary hearing which had not yet happened.

d. It also showed that Mr Cager was an inappropriate person to hear the appeal, contrary to his response on 7 April 2017 to a request by the Claimant that another Trustee hear the appeal.

e. This was not the kind of everyday seeking and giving of employment advice as seen in *Curless*.

34. On the cross-appeal, Ms Venkata referred to *Al-Fayed v Commissioner of Police* [2002] EWCA Civ 780, in which the Court of Appeal set out relevant principles. In particular:

a. if a party allows another to inspect privileged documents by mistake, it will usually then be too late for him to claim privilege;

b. a court can however grant an injunction to prevent the use of such documents if justice requires e.g. if inspection was procured by fraud;

c. the court may restrain the use of the document if it was disclosed as a result of an obvious mistake, i.e. if it would be obvious to a reasonable solicitor in the position of the recipient that a mistake had been made, and there are no other circumstances making it unjust or inequitable to grant relief;

d. since the jurisdiction to grant an injunction is equitable, there are no rigid rules.

35. Applying these principles by analogy to the decision which the EJ had to make on the waiver point, Ms Venkata submits that even if disclosure of the SAR emails by the Respondent was a mistake, this was not a mistake that would be obvious to a solicitor. None of the emails was marked as being privileged. The applicability of litigation privilege itself was not obvious, the SAR response being sent before the Claimant had even notified ACAS of a dispute and the emails concerning dismissal, not litigation as such. The Respondent has greater resources than

A the Claimant, including expert advice, and could be expected to make proper decisions about disclosure.

B 36. Ms Venkata submits that it is for the Respondent to establish both that there was a mistake and that it was sufficiently obvious, and it has failed to do so. She contends that this issue should be remitted to the ET and can be dealt with at the start of the 5 day hearing in September. If that means that an EJ will have to put a document out of his/her mind, that is not unusual, and indeed the contents of the SAR emails are not such as to make that task unduly difficult.

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Discussion

D Appeal ground 1

37. The EJ cited *X v Y* as an example of the iniquity principle applying to "an email, giving advice on how to cloak what would otherwise be a disability discrimination dismissal as a dismissal for redundancy".

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38. In *Curless* the Court of Appeal decided that the EAT had misinterpreted the email. In its view there was nothing sinister in legal advice being given on how an underperforming employee, who had already brought a claim for disability discrimination, might be either offered voluntary severance or dismissed for redundancy "with appropriate safeguards and in the right circumstances". It was legitimate for the author of the email to consider the risks that, on the one hand, selection for redundancy would lead to unfair dismissal and discrimination claims, and on the other, if he was left in post then the original discrimination claim would continue and there might be an impasse. The email contained mundane legal advice, and not advice to act in an underhand or iniquitous way.

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39. However, the Court of Appeal did not say that the iniquity principle would not have been applicable if the EAT's interpretation of the email had been correct. Indeed, it expressly made no ruling on the scope of the iniquity principle.

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40. *Curless* therefore does not impact on the EJ's indication, by way of example, that advice on how to cloak a discriminatory dismissal as a redundancy would engage the iniquity principle.

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41. Ground 1 of the Respondent's appeal therefore fails.

Appeal ground 2

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42. Legal professional privilege applies generally to communications between a party and his lawyer, seeking or giving legal advice.

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43. Legal professional privilege does not apply when the document in question comes into existence as a step in a criminal or illegal proceeding, e.g. when a solicitor is consulted on how to do an illegal act. See *Bullivant v Attorney General of Victoria* [1901] AC 196 at 201 per Lord Halsbury and 206 per Lord Lindley. A strong prima facie case of some fraud or illegality or some other "iniquity" must be shown: *BBGP Managing General Partner Ltd v Babcock & Brown Global Partner*s [2011] Ch 296.

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44. Litigation privilege arises when a document is produced or brought into existence and, at that time, the dominant purpose of its author (or the person under whose direction it is produced or brought into existence) is that it or its contents will be used to obtain legal advice, or to conduct or aid in the conduct of litigation which is in reasonable contemplation at that time. See *Waugh v British Railways Board* [1980] AC 521 HL.

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45. The iniquity principle also applies to litigation privilege: *Kuwait Airways Corp v Iraqi Airways Co (No. 6)* [2005] EWCA Civ 286, [2005] 1 WLR 2734.

46. Like privilege itself, the iniquity principle exists for reasons of public policy. It will apply where the circumstances are such that the usual policy in favour of non-disclosure must give way. The policy in favour of non-disclosure is a strong one, because legal professional privilege enables parties to communicate frankly with their legal advisers (and litigation privilege enables parties to communicate frankly with other advisers), e.g. about the strengths and weaknesses, and the risks, of their case, knowing that the communications will remain private.

47. With great respect to the EJ, I agree with the Respondent that the email of 19 January 2017, read by itself or with the rest of the email exchange of which it was part, was not such as to engage the iniquity principle.

48. The Respondent did not seek advice on how to act unlawfully, and the consultants did not give such advice. They were advising on how to take forward a disciplinary process and on the risk of that process leading to litigation. The indication by Mr Cager that he did not wish the Claimant to return to work was the sort of frank instruction that a party may feel able to give in a privileged communication. So was the agent's response, that she had to "ensure that if my clients wish to proceed against my advice that they do so by making an informed decision".

49. Of course there are cases when such instructions may leave advisers professionally embarrassed, and the advisers have to decide whether it is ethical for them to continue to act for their client. I do not say that that situation arose here, though it could arise if an employer told its advisers that it intended to embark on an appeal process which was a sham. That is not what the

email of 19 January 2017 said. And even an indication of that kind is not the same as a request for advice on how to act illegally, and would not necessarily cause privilege to fall away.

50. I therefore agree that the EJ erred at this point by not focusing on the nature of the communication in question. Despite Mr Cager's intentions as at 19 January 2017 and the fact that he went on to hear and reject the Claimant's appeal, I do not consider that the email of 19 January was part of any iniquitous conduct involving him and the consultants.

51. That does not mean that Mr Cager, when giving evidence on oath, cannot be cross-examined about his intentions and his conduct of the appeal. But it does mean that the email is inadmissible.

52. The appeal is therefore allowed.

53. My conclusion also means that it is not appropriate to remit this question. The only possible finding is that the communication was not "iniquitous".

Cross-appeal

54. As I have said, the EJ's ruling did not cover Mr Cager's email dated 9 March 2017. Therefore the cross-appeal cannot succeed in relation to that document, and any issue about its admissibility remains open.

55. In the other 4 pages, the material of potential significance may consist of some passages in an email from Ms Young to the Respondent at 12.04 on 22 February 2017, referring to Mr Cager's actual or potential intention to dismiss the Claimant. The Claimant wishes to deploy this

A evidence to show that the disciplinary and appeal processes were not conducted with an open mind. It is difficult to see the importance of any of the other messages.

B 56. This waiver issue was before the EJ but was not dealt with. It may be that Mrs Hart, doing her best as a lay representative, did not press the point in oral submissions and that may explain the omission. Nevertheless, with some reluctance, I conclude that it was an omission. I now consider whether this Tribunal can decide the issue itself.

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57. A waiver of privilege can occur where a party acts in way which is inconsistent with the underlying confidentiality which characterises privileged communications, e.g. by relying on the

D privileged material in court or providing voluntary disclosure of it.

58. It is common ground that a party can waive privilege by disclosing the material in

E response to a SAR.

59. It is also clear that the *Al-Fayed* principles apply when such disclosure occurs by mistake.

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60. The application of those principles is case-specific, fact-specific and not rigid.

61. It is therefore not possible for me to conclude that the EJ was bound to decide the question

G in favour of one party rather than the other. Had the matter been pressed before him, he would have needed to consider whether he needed to hear evidence, for example about whether there had been a mistake. Since it seems that the point was raised for the first and only time in the

H written submissions which were handed up on the morning of 24 January 2020, he might have

A decided that it was too late for the point to be taken. Alternatively he might have given time for evidence to be adduced. Alternatively he might have been able to explore the facts at the hearing.

B 62. The cross appeal is therefore allowed, and the issue of whether privilege in the emails beginning on pages 28, 51 and 52 of the material before the EJ has been waived will be remitted to the ET.

C 63. It is not for this Tribunal to engage in case management of ET proceedings, but it would seem sensible for the parties to seek an urgent telephone preliminary hearing at which the ET can decide how to accommodate this issue without jeopardising the listing of the final hearing on 20 D September 2021. It can be for the ET to decide which EJ will decide the remitted issue; this Tribunal makes no order in that regard. It would not be ideal for the EJ who conducts that final hearing to decide this issue as well. However, if that cannot be avoided without losing the E September listing for the final hearing, it may be the lesser of two evils.

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