Neutral Citation Number: [2022] EAT 150

Case No: EA-2022-SCO-000066-JP

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street
Edinburgh EH3 7HF

Date: 23 September 2022

Before :

THE HONOURABLE LORD FAIRLEY

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Between :

UNIVERSITY OF DUNDEE **Appellant**

- and –

MR PRASUN CHAKRABORTY **Respondent**

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- -

Mr Brian Napier KC (instructed by CMS Cameron McKenna Nabarro Olswang LLP) for the **Appellant**
Mr Prasun Chakraborty the **Respondent**

Hearing date: 2 September 2022

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE; case management order for production of a document; legal professional privilege

The Claimant raised a grievance under the Appellant's Dignity at Work and Study policy. The Appellant appointed an independent member of academic staff to investigate the grievance and report. She did so on 28 February 2022. Thereafter, the Appellant's external legal advisors suggested that a number of changes be made to the report. The author of the report also made changes to it of her own before a final version of the report was lodged by the Appellant with the Employment Tribunal shortly before an evidential hearing on the Claimant's complaints. It was clear from an annotation on the lodged version that it had been revised following legal advice. The Claimant made an application for a documents order for production of the original un-amended version of the report. The Appellant resisted that application on the basis that comparison of the original with the amended version would tend to show the nature of legal advice received such that the original version of the document was subject to legal advice privilege. The Employment Judge rejected that argument and made the order. On appeal, the Appellant contended that whilst the original version of the document was not privileged at the point when it was created, it retrospectively acquired legal advice and litigation privilege once the amended version of it was lodged because comparison of the two versions could allow conclusions to be drawn about the terms of the legal advice received by the Appellant.

Held: (1) Whilst both the terms of any advice given by the solicitor about the original document and any amended version of the original document created for the purpose of the litigation would plainly be privileged, the original un-amended document would not; nor would it retrospectively become privileged even if an incidental consequence of its disclosure and comparison with the disclosed final version might be to allow inferences to be drawn about why the two versions were different.

(2) In any event, it was difficult to understand how it could be said that it would be possible to infer what legal advice was given simply from a comparison of the 28 February 2022 document with the version ultimately lodged by the Appellant. It was it is clear from the Chronology produced by the

Appellant for this appeal that the author of the 28 February 2022 report had made amendments of her own to it. It was not explained how it would be possible to distinguish between changes to the report made following legal advice and changes made by its author which were unconnected to legal advice.

THE HONOURABLE LORD FAIRLEY:

Introduction

1. This is an appeal by The University of Dundee against a case management order made by Employment Judge McFatridge under Rule 31 of the ET Rules on 4 July 2022. The order was for the production by the Appellant of a document.

2. The respondent to the appeal is Mr Prasun Chakraborty. He is the Claimant in an ongoing claim before the Employment Tribunal. For ease of reference, I will refer to Mr Chakraborty as "the Claimant".

Chronology of relevant facts and procedural history

3. The Claimant commenced employment with the Appellant on 28 January 2013 as a Post-Doctoral Research Assistant. On 10 November 2021 he sent an e mail to representatives of the Appellant in which he raised a grievance against his line manager. The grievance included allegations of harassment and bullying, discrimination, and racial abuse. It also contained a suggestion that the line manager had made a false accusation of fraud against the Claimant.

4. On 30 November 2021, the Appellant's Head of Equality and Diversity contacted Professor Niamh Nic Daeid of the Appellant's School of Science and Engineering to ask her to investigate the grievance under the Appellant's Dignity at Work and Study policy. Professor Nic Daeid agreed to do so and was thereafter provided with assistance and support from a member of the Appellant's Human Resources department. Professor Nic Daeid carried out interviews with witnesses and ingathered documents which she considered to have a bearing upon the grievance.

5. The Claimant presented his claim form to the Employment Tribunal on 21 December 2021.

6. On 28 February 2022, Professor Nic Daeid produced her report. On 1 March 2022, external solicitors were asked by the Appellant to review the report. They duly did so and, on 21 March 2022,

intimated proposed amendments to it. The proposed amendments were discussed with and approved by Professor Nic Daeid on 23 June 2022 at a meeting with representatives of the Appellant's in-house legal team. Another amendment to the report was then made by the external legal advisers on 23 June 2022. On the same date, Professor Nic Daeid made some further amendments of her own to the report.

7. The revised version of the report was added by the Appellant to the Joint Bundle for the Employment Tribunal in advance of an evidential hearing to determine the Claimant's allegations of racial discrimination and harassment. That hearing was due to commence on 4 July 2022. On 27 June 2022 the final version of the report was sent to the Claimant.

8. The original version of the report was not provided by the Appellant to the Claimant or to the Employment Judge, nor was it shown to me in the course of this appeal. For the purpose of the appeal, however, I was provided with a copy of the amended report as at 26 June 2022 that was lodged by the Appellant for the evidential hearing. That version consists of a 5 page narrative and analysis of the grievance by Professor Nic Daeid and a further 43 pages of Appendices comprising the documentary evidence ingathered in the course of her investigation. The revised version of the report is annotated on its first page:

> "**Note: This report was amended and reissued on 23.06.2022 following independent legal advice.**"

9. Although the annotation uses the word "reissued" I was advised that neither the report dated 28 February 2022 nor any subsequent version of it was released by the Appellant to anyone apart from its external legal advisors prior to the disclosure of the amended version dated 26 June 2022.

10. On the first day of the evidential hearing, the Claimant made an oral application to the Employment Tribunal for a documents order requiring the Appellant to produce the original un-amended version of the report. That application was resisted by the Appellant on the ground that the original version of the report was protected by legal advice privilege. In particular, it was submitted

that production of the un-amended version of the report would permit a comparison to be made between the two versions which could then enable inferences to be drawn about the legal advice that had been given to the Appellant by its solicitors. The Employment Tribunal did not accept that submission and made a Rule 31 order as requested by the Claimant for the Appellant to produce the original version of the report dated 28 February 2022.

Submissions

Appellant

11. Mr Napier submitted that the Employment Judge had erred in law in rejecting the submission that the original version of the report was subject to legal advice privilege (Ground of Appeal 1). Whilst acknowledging that no argument of litigation (otherwise, "*post litem motam*") privilege had been advanced before the Employment Judge, Mr Napier also submitted that the report was, in any event, confidential on the basis of that alternative branch of the law relating to legal professional privilege (Ground 2).

12. In developing his submission on Ground 1, Mr Napier accepted that legal advice privilege did not attach to the report of 28 February 2022 when it was first created by Professor Nic Daeid. He submitted, however, that advice privilege came to attach retrospectively to the un-amended document because of the advice that was later given about its contents by the external solicitors between March and June 2022. In particular, he submitted that if the un-amended version of the report were now to be disclosed and compared to the final version which had already been lodged, it would be possible to infer what legal advice had been given by the external solicitors to whom the first version of the report had been referred in March. Mr Napier described that scenario as "jigsaw identification" of the legal advice.

13. Mr Napier relied upon **Lyell v. Kennedy (No. 3)** (1884) 27 Ch D 1 and upon Bingham LJ's analysis of **Lyell** in **Ventouris v. Mountain** [1991] 1 WLR 607 at page 615.

14. In **Lyell**, certain public records had been ingathered by the defendant's solicitor for the purpose of defending proceedings against his client. The solicitor had also taken photographs for that same purpose. An application by the plaintiff for production of those documents and photographs was refused. At page 615 of **Ventouris**, Bingham LJ suggested that ratio of **Lyell** was that,

> **"where the selection of documents which a solicitor has copied or assembled betrays the trend of the advice which he is giving the client the documents are privileged."**

15. Whilst acknowledging that **Lyell** was a case involving litigation privilege rather than advice privilege, Mr Napier nevertheless submitted that the same principle applied to a claim of advice privilege. If disclosure of the original version of the report would tend to betray the trend of the advice given to the Appellant, legal advice privilege retrospectively applied to the document, even where – as here – the privilege had not applied to it when the document was first created.

16. Turning to litigation privilege, Mr Napier again conceded that this had not applied to the report on 28 February 2022 when it had first been created by Professor Nic Daeid. For the same reasons as had been advanced in relation to advice privilege, however, he submitted that litigation privilege retrospectively attached to the original version of the report following its amendment between March and June 2022 (per **Lyell** and **Ventouris**).

17. In response to a question raised by me about the extent to which principles from cases on litigation privilege could be read across into cases about advice privilege, Mr Napier produced a supplementary written submission in which reference was made *inter alia* to **Edwardian Group Limited v. Singh** [2017] EWHC 2805 (Ch) and to extracts from *Passmore on Privilege* (4th edition).

Claimant

18. The Claimant did not refer me to any additional authorities. He confirmed that he was content for me to determine the issue of privilege as the law required. He responded to Mr Napier's supplementary submission in an e mail dated 8 September 2022.

Relevant law

19. There is no significant difference between the Scottish and English approach to legal professional privilege (**Prudential plc & anor, v. Special Commissioner of Income Tax & Anor** [2013] UKSC 1 per Lord Reed at para. 107).

20. The burden of establishing a claim of privilege rests upon the party claiming it (**West London Pipeline and Storage Limited v. Total UK Limited** [2008] EWHC 1729).

21. In **Buttes Gas and Oil Co v. Hammer (No. 3)** [1981] Q.B. 223, Lord Denning summarised the two branches of the principle as follows:

> **"Privilege in aid of litigation can be divided into two distinct classes: The first is legal professional privilege properly so called. It extends to all communications between the client and his legal adviser for the purpose of obtaining advice. It exists whether litigation is anticipated or not. The second only attaches to communications which at their inception come into existence with the dominant purpose of being used in aid of pending or contemplated litigation. That was settled by the House of Lords in *Waugh v. British Railways Board* [1980] A.C. 521. It is not necessary that they should have come into existence at the instance of the lawyer. It is sufficient if they have come into existence at the instance of the party himself—with the dominant purpose of being used in the anticipated litigation. The House approved of the short statement by James L.J. in *Anderson v. Bank of British Columbia* (1876) 2 Q Ch.D. 644, 656: '. . . as you have no right to see your adversary's brief, you have no right to see that which comes into existence merely as the materials for the brief.' Lord Simon of Glaisdale in the *Waugh* case, at p. 537 emphasised the word 'merely.'"**

22. In **Narden Services Ltd. v Inverness Retail & Business Park Ltd** 2008 SC 3 Lord Johnston delivering the opinion of an Extra Division similarly summarised the general principles of legal professional privilege (LPP) in the following way (para. 11):

> **"The notion of LPP as we have indicated is enshrined in the common law of Scotland. There is (in broad terms) a right of absolute privilege in respect of communications emanating between a solicitor and a client relating to advice and also in respect of any documents…which were prepared in the contemplation of litigation...."**

23. Legal advice privilege is not confined simply to the original communications between clients and their lawyers but extends also to other later documents which "evidence" the subject matter of such communications (**Three Rivers DC v. Bank of England (No. 5)** [2003] QB 1556) or which reproduce, summarise or otherwise paraphrase the advice sought or received (e.g. **Bank of Nova Scotia v. Hellenic Mutual War Risks Association (Bermuda) Limited** [1992] 2 Lloyds Rep 540).

Analysis and decision

24. An important feature of this case is the concession by Mr Napier that the report dated 28 February 2022 was not protected by either of the two branches of legal professional privilege at the point when it was created by Professor Nic Daeid. In my opinion, that concession was properly made. On no view of the report was it a communication between a client and a legal advisor for the purposes of the giving or receiving of legal advice, even applying the broad approach of **Three Rivers District Council v. Governor and Company of the Bank of England (No 6.)** [2005] 1 AC 610 to what constitutes "legal advice". It was also not a document created in contemplation of litigation. Rather, it was an investigative response to a grievance intimated by the Claimant under the Appellant's Dignity at Work and Study policy.

25. The proposition relied upon by Mr Napier was therefore that, following its creation, the original document dated 28 February 2022 retrospectively acquired privileged status as a result of advice having been given about it, an amended version of it having been created during the period between 1 March to 23 June 2022 following such advice and the amended version having been lodged.

26. In **Lyell** the documents sought to be recovered were documents ingathered by a solicitor on behalf of his client specifically for the purposes of the defence of a litigation. They consisted of (a) extracts from a public record obtained by the solicitor; and (b) photographs taken by the solicitor. **Lyell** is therefore an example of litigation privilege in which the fruits of the solicitor's professional activities on behalf of his client in preparing to defend a litigation were held to be privileged. The documents came into existence with the dominant purpose of being used in the anticipated litigation, and were privileged at the point when they came into existence. That is entirely consistent with the general principles of litigation privilege described by Lord Denning in **Buttes Gas and Oil Co**.

27. The *ratio* of **Lyell**, as described by Bingham LJ in **Ventouris**, is not that the privilege which attached to the inventory of documents and the photographs prepared for the purposes of the litigation also attached to a wider class of documents such as, for example, the other documents contained within the public record which the solicitor chose not to extract. Recovery from within that wider class of documents was not the issue before the court in **Lyell**. **Lyell** does not represent authority for such a proposition, and Bingham LJ's description of the *ratio* of **Lyell** was not intended to suggest that it did.

28. A hypothetical example illustrates the importance of this distinction. A client passes an un-privileged file to his solicitor for the purposes of the defence of an apprehended litigation. The solicitor extracts and copies certain documents from the file and prepares an inventory of those extracted documents for the purposes of the defence. It might well be possible to infer from a comparison of the entire original file to the more restricted inventory what view that the lawyer was taking of the issues in the case or what advice the lawyer had given. In that scenario, however, the privileged document would only be – as in **Lyell** – the more restricted inventory and not the whole of the client's original file. That, as I understand it, was the basis of the decision in **Sumitomo Corportation v Credit Lyonnais Rouse Limited** [2002] C P Rep 3 (referred to in **Edwardian Group Limited** at para. 33).

29. Nor is **Lyell** authority for the proposition that an original document which was not privileged when it was created may retrospectively acquire the status of privilege by virtue of an amended version of it being created and disclosed. Even assuming the amended version to be subject to one of the two branches of privilege – most likely, litigation privilege – it does not follow that the original version of the document retrospectively acquires that status. Such a conclusion would be contrary to Lord Denning's definition of litigation privilege in **Buttes Gas and Oil Co**.

30. Turning to the issue of legal advice privilege, on careful examination, **Edwardian Group Limited** and the cases referred to therein all related to situations where, legal advice having been given, another document was then created from which the tenor of the prior legal advice could be inferred or deduced. The issue in those cases was, therefore, whether privilege attached to that later document. Thus, in **Barr v. Biffa Waste Services Limited** [2009] EWHC 1033, the document for which privilege was claimed was an after the event ("ATE") insurance policy. With a degree of hesitation, Coulson J accepted (para 48) that the level of premiums disclosed by such a policy might allow an inference to be drawn about what advice on prospects had been received. Similarly, in **Edwardian Group Limited** the privilege was found to attach, on the same basis, to litigation funding documents.

31. There is, however, nothing in **Lyell**, **Ventouris**, **Edwardian Group Limited** or any of the cases to which I was referred to support the proposition that an un-privileged original version of a document can acquire privileged status retrospectively. That, however, is the proposition upon which this appeal depends.

32. Specifically, the Appellant contends that privilege attached retrospectively to the 28 February 2022 document as a result of the external solicitors having given advice about it which led to an amended version of it being lodged with the Tribunal. In my view, that proposition is unsupported by authority and is incorrect. The terms of any advice given by the solicitor about the original document

and any amended version of the original document created for the purpose of the litigation would plainly be privileged. The original un-amended document was not, however, privileged did not retrospectively become so even if an incidental consequence of its disclosure and comparison with the disclosed final version might be to allow inferences to be drawn about any differences which there may be between the two versions.

33. Whilst that is sufficient to dispose of this appeal, I should also note that I find it difficult to understand how it can be said that it would be possible to infer what legal advice was given simply from a comparison of the 28 February 2022 document with the version ultimately lodged by the Appellant. It it is clear from the chronology produced by the Appellant in this appeal that Professor Nic Daeid made her own amendments to the report on 23 June 2022. How it would be possible, simply from a comparison exercise, to distinguish between changes made following legal advice and changes made by Professor Nic Daeid which may have been unconnected to such advice was not explained to me.

Conclusion and disposal

34. Since there is no basis either in authority or principle for the proposition upon which this appeal relies, the appeal falls to be refused. When the case returns to the Employment Tribunal, it will be necessary, given the passage of time, for a new date to be fixed for compliance with the Rule 31 order which will remain, in other respects, unchanged.