Check your privilege:

Recent developments in the without prejudice rule and legal professional privilege.

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Disclaimer

This seminar is aimed at providing an oversight and should not be considered as an alternative to fully informed legal advice.

Webinar outline

- Introduction to litigation and legal professional privilege
- University of Dundee v Chakraborty [2023] CSIH 22
- Scheldebouw BV v Mr Martin Evanson [2022] EAT 157
- Garrod v Riverstone Management Ltd [2022] EAT 177
- Swiss Re Corporate Solutions Ltd v Sommer [2022] EAT 78
- Meaker v Cyxtera Technology UK Ltd [2023] EAT 17
- Practical considerations

Types of privilege?

- Legal advice privilege
- Enable consultation with lawyers without risk of being required to disclose documents
- Broader category; communications relating to legal rights and obligations
- Non-legal advice in litigation context
- Privilege can be lost by circulating advice

- Litigation privilege
- Purpose of allowing investigation into potential disputes or enable settlement
- Inter party correspondence
- “Without prejudice”
- Contemplation of litigation
- Litigation relating to same dispute

University of Dundee v Chakraborty [2023] CSIH 22

- Inner House, Court of Session, Scotland on appeal from EAT
- Disclosure of original version of investigative report into grievance raised by Claimant
- Original report prepared Professor Daeid dated 28 February 2022
- Finalised (5th) version dated 23 June 2022 following independent legal advice
- Claimant sought disclosure of original report given relevance of potential findings made in the first report on allegations of discrimination, bullying and harassment and modification may have impacted neutrality and independence of professor appointed to investigate grievance
- Starting point: conceded by the Appellant that original version of the report was created before legal advice tendered
- Original version retrospectively become privileged when final version issued because comparison of the differences would permit inference about the legal advice received?
- If established, had confidentiality be waived by the Appellants?

Judgment given by Lord Carloway, Lord President

- Para 17: It may not be obvious to grasp why the appellants were seeking legal advice once Prof Nic Daeid had produced her report on 28 February 2022, but there is no doubt that, whatever the reason was, the advice tendered would be privileged as being simply a communication arising out of the relationship of lawyer and client. The appellants were seeking legal advice and that advice is confidential. However, that is irrelevant. The advice could not have influenced the original version of the report because it had not then been tendered.
- Para 19: Although the court agrees that, as a generality, confidentiality will extend to material which would allow the reader to work out what legal advice had been given (Three Rivers DC (No. 6) at para 48; Three Rivers DC (No. 5) [2003] QB 1556; Longmore LJ at para [21]), the original report does not do that, and that is what this case is about.

Followed Re Edwardian Group [2017] EWHC 2805 (Ch) at paragraph 28

- Distinction drawn between circumstances where the "definite and reasonable foundation in the contents of the documents…. Substance of advice given"
- "Allow one to wonder or speculate whether legal advice had been obtained and as to the substance of that advice"
- Comparative exercise between two reports would not necessarily reveal advice received
- Appellant revealed that advice had influenced final version
- Limited circumstances to fall into *Three Rivers* rule

Waiver of privilege: consideration of Scottish Lion Insurance Co v Goodrich Corp 2011 SC 534

- Behaves in a manner inconsistent with maintenance of privilege
- Objective assessment
- Para 20: In this case, the privilege was probably abandoned when the advice, which was obtained by the appellants, was revealed to the person who was carrying out what was supposed to be an impartial investigation. It was certainly lost once it became known, as the footnote in the report stated, that the original report had been altered as a result of that advice.

‘Without prejudice’ privilege – key principles

- *Cutts v Head [1984] Ch 290, 306* – parties should be encouraged to settle their disputes without resort to litigation and such that they can speak freely.
- Bona fide attempt to resolve
- Protection not dependent on use of words ‘without prejudice’ – *Faithorn Farrell Timms LLP v Bailey [2016] ICR 1054*
- Objective test – what on a reasonable basis was the intention of the author and how would it be understood by a reasonable recipient – *BE v DE [2014] EHWC 2318*

Barnetson v Framlington Group [2007] ICR 1439

- ‘Opening shot’ principle
- Balancing act: drawing the line between serving policy interest and preventing a party from putting its case at its best.
- Whether in the course of negotiations the parties contemplated or might reasonably have contemplated litigation if they could not agree.

Garrod v Riverstone Management Ltd [2022] EAT 177

- Grievance citing discrimination
- Invited to meeting for ‘preliminary discussion’
- Termination payment offered
- No agreement reached at meeting or afterwards

Meeting covered by privilege

- There was an existing dispute
- References to ACAS mediation or early conciliation in grievance
- Genuine attempt to employer to settle
- Claimant and her husband understood what ‘without prejudice’ meant.

Was it a *Mezzoterro* situation?

- *BNP Paribas v Mezzoterro [2004] IRLR 508* – act of raising a grievance does not necessarily mean parties to employment relationship are in dispute – and therefore in scope of 'without prejudice' rule.
- Too much weight attached to grievance
- Virtually indistinguishable from *Mezzoterro*

EAT decision in Garrod

- Claim rested on events preceding the 8 November meeting. Dispute already existed at date of the meeting.
- Meeting part of narrative surrounding claim
- *Mezzoterro*: allegedly WP meeting an unlawful act itself giving rise to a head of claim

Scheldebouw BV v Martin Evanson [2022] EAT 157

"On 20th September 2018, the claimant had a meeting in London to discuss his possible retirement, his outstanding holiday entitlement and his car allowance. It was agreed that the issue of the claimant's potential retirement would be reviewed in December 2018 along with his outstanding holiday entitlement. Discussions were held between the parties to attempt to amicably resolve the issue of the outstanding holiday entitlement accrued by the claimant, which led to an offer by the respondent to pay the claimant for 168 days of accrued holiday (equating to £68,199.60) which was rejected."

Chronology

12 October 2018 - meeting to discuss terms for termination

23 October – R's email to C setting out 'gentleman's agreement'

24 October – email correspondence. 3 of 4 issues agreed on. R prepares settlement agreement

12-13 December – R gives C draft settlement agreement

17 December – C gives R counter settlement agreement

19 March 2019 – C dismissed with holiday pay unresolved

Why not privileged until mid-December?

- Not a misconduct dismissal
- Agreement on all but narrow issue (of holiday pay)
- Substantial agreement reached on 12 October – termed a 'gentleman's agreement'
- No hostility on either side
- A reasonable person would not have reason to think the discussion would not end amicably
- R did not think it necessary to get legal advice
- No ref to 'without prejudice' regarding 12 October discussions
- Only at exchange of settlement agreements did attitudes harden

EAT decision in Evanson

- ET did not mistakenly focus on one party in applying Framlington test
    - Objective test: so express finding about C's state of mind is unnecessary
    - Settlement agreement – product of commercial good sense and caution. Awareness of theoretical risk of litigation not the same as contemplating litigation (para 46)
- ET entitled to place reliance on non-usage of term 'without prejudice'. *Faithorn* does not prevent this.

- ET not erred in understanding of 'opening shot' principle. Simply not relevant here.
- ET erred in concluding no dispute because there was no dispute as to potential reason for termination

    - Entitled to take into account that no fault-based ground for dismissal.

    - Class of case *"one often sees in a case of senior executives"*..no longer wanted or needed but *"no reflection on ..abilities"*. Vast majority of these cases, this doesn't need to litigation.

    - ET entitled to conclude parties fully expected to resolve matters.

Garrod Continued: Ground 3 and unambiguous impropriety

- Para 17: findings made by EJ Harrington at first instance that meeting was amicable and professional
- Claimant/ Appellant argued that focus on the way the meeting was conducted was too limited, the threshold was too high as the conduct had amounted to victimisation and the content of the meeting was relevant generally to the claims
- Correct direction that without prejudice rule would not be applied where it would "*act as a cloak for perjury, blackmail or other unambiguous impropriety*": Unilever plc v Proctor & Gamble Co [1999] EWCA Civ 3027.
- Claim had not been pursued on the basis that the termination meeting itself amounted to an unlawful act
- Para 65: Mr Justice Bourne queried whether disclosure of content of the meeting would add to the claim
- Para 65: "The point of the rule is that the policy aim of encouraging settlement of disputes outweighs the competing aim of allowing all relevant material to be placed before courts and tribunals. That is why the rule can be displaced only by very clear and very serious wrongdoing. Making a settlement offer which could, on one view, provide a clue to a party's discriminatory attitudes falls far below that threshold.

Swiss Re Corporate Solutions Ltd v Sommer [2022] EAT 78

- Decision of Mr Justice Bourne in EAT; decided before Garrod in April 2022
- Admissibility of a letter that was headed “Without Prejudice” dated 22 January 2021
- Employer had made an offer to terminate employment and made allegations relating to forwarding emails, breach of confidentiality and alleged criminal offences
- Copied in person email address and blind-copied in husband when submitting grievances
- HR partner corresponded with Claimant and referred to as a “low-level data breach”
- EJ Grewal decided that the letter was admissible as it constituted unambiguous impropriety
- Letter amounted to improper threats and pressure to persuade Claimant to accept offer

- Review of authorities including *Unilever* and *Motorola Solutions Inc. v Hytera*
- *Communications Corp Ltd [2021] EWCA Civ 11 WLR 679*
- *"Truly exceptional"* to prevent erosion of the without prejudice rule and policy reasons in allowing parties to speak freely in settlement discussions
- Para 34: no misdirection by the EJ on the law
- Para 35: refer to potential disciplinary proceedings but not *"free to raise such matters dishonestly or to use them in an attempt to blackmail".*

Ground 1(b) and Ground 2

- Finding that there was "no basis at all" for allegations contained in the letter or were "grossly exaggerated"
- Respondent argued that finding was not open on the evidence; more thorough consideration of allegations (and alleged breaches of regulatory and Data Protection laws) would have led to finding that employer had genuine belief in allegations being true
- Ferster v Ferster [2016] EWCA Civ 717
- Para 51: Impropriety identified in *Ferster was threat of criminal or quasi-criminal proceedings for settling civil dispute*

- Para 54: “I would not decide that, as a matter of principle, there is no such category which can satisfy the test for unambiguous impropriety. Baseless or exaggerated allegations could, for example, be evidence of dishonesty, which is a well-recognised basis for lifting the without prejudice privilege.”
- Context of determining issue at preliminary hearing without hearing oral evidence
- Need for rigorous analysis of what was said to justify finding of unambiguous impropriety
- Para 55: “… can only made in a very clear case.”
- Did not engage in arguable merits of allegations made in letter; could amount to being gross exaggerated but not pass high threshold without findings about party’s state of mind
- Para 60: does not mean letter was free from impropriety and “sailed close to the wind”.
- Public policy in maintain privilege led to conclusion that exaggeration insufficient to amount to exception

Meaker v Cyxtera Technology UK Ltd [2023] EAT 17

- Feasible for a termination letter to include ‘without prejudice’ content as well as open material of legal effect

- Whether that occurred depended on a reading of the substantive content as a whole

Practical considerations?

1. Term ‘without prejudice’ not determinative but a relevant factor
2. Context is everything. E.g. the relevance of the reason for dismissal, the tone and expectations of the negotiations.
3. Extent to which matters in original grievance correspond to those in ultimate dispute.
4. Wording of grievances.
5. Implications of amending investigation reports.
6. What is the foundation for allegations used in negotiations?

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Questions?

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