Employer’s correspondence with lawyer could not be relied upon by Claimant under the iniquity exception to legal privilege

In Shawcross v SMG Europe Holdings Ltd and ors, Ms Shawcross argued that email correspondence between her former employer and its legal advisers, which she had been accidentally copied into, was not legally privileged meaning she could rely on it to support her claim.

What happened in the case?

The Claimant was dismissed by SMG Europe Holdings Ltd (**SMGEH**) on 28 April 2023. Two days prior to her dismissal, the Claimant was copied into an email chain between SMGEH and its legal advisers by mistake. There were seven emails in the chain, one of which had a draft dismissal letter attached to it. The dismissal letter had been drafted by SMGEH’s solicitors. All of the emails were sent on either 25 or 26 April 2023.

The Claimant claimed that her dismissal was, amongst other things, an act of victimisation for having raised a grievance on 29 November 2022. She sought to rely on the email chain in support of her victimisation claim. Specifically, the Claimant argued that the emails contained a discussion about fabricating the reason for her dismissal and disguising the

true identity of the dismissal decision-maker.

SMGEH argued that the emails were subject to legal advice privilege, since they were communications between SMGEH and its solicitors. The Claimant argued that legal advice privilege did not apply to the emails because they fell within the "iniquity exception". The iniquity exception to legal advice privilege arises where correspondence has come into existence in furtherance of fraud, crime or other iniquity.

What was decided?

In the first instance, the Employment Judge held that, on the balance of probabilities, the emails were not evidence of iniquitous conduct. As such, the iniquity exception was not engaged, and the emails remained subject to legal advice privilege and could not be relied upon by the Claimant.

The Claimant appealed to the EAT. She argued that the emails showed that her dismissal was a sham and that the decision to dismiss had been taken by 25 April 2023, meaning the Judge had erred in law in finding that the iniquity exception did not apply.

The EAT dismissed the appeal. It held that the Employment Judge had not erred in law in finding that the iniquity exception did not apply, as he had carefully scrutinised the terms of the correspondence as a whole before reaching his decision.

The EAT also made substantive findings as to the nature of the

emails. It found that SMGEH's solicitors had provided advice on the risks that the dismissal might be considered unfair or an act of victimisation, but that there was no mention in any of the emails that the Claimant's grievance formed part of the decision to dismiss her. Therefore, read as a whole, the emails were properly characterised as legal advice provided that SMGEH should review the decision to dismiss the Claimant as it would need to be able to justify the decision before an employment tribunal if necessary.

Further, the EAT said that even if the emails *had* shown that SMGEH and its solicitors considered there to be an overwhelming likelihood that the Claimant would be dismissed, this would not have crossed the threshold required to establish the iniquity exception. This was said to be the sort of advice which employment lawyers regularly give to their clients and which falls within the normal scope of professional engagement.

The EAT also agreed with the Employment Judge's observation that the advice contained in these emails was similar in nature to the advice in *Curless v Shell International Ltd*. In that case, the emails in question related to whether an individual who had submitted a disability discrimination claim could be dismissed on the grounds of redundancy. Similarly to the correspondence in this case, those emails were considered to be the sort of day-to-day advice which employment lawyers provide to their clients and the iniquity exception did not apply.

What does this mean for employers?

As a general comment, employers should be careful to ensure

that legal advice and other potentially sensitive correspondence is not inadvertently forwarded to unintended recipients to avoid this situation arising in the first place.

This case also highlights that the threshold for establishing the iniquity exception is high. Therefore, correspondence between employers and their legal representatives will be subject to legal advice privilege in the majority of cases, provided the advice cannot be seen to be fabricating a position or acting in a genuinely underhand or iniquitous way.

As such, employers should continue to feel comfortable discussing tricky areas of employment law with their advisers, including consulting advisers on decisions to dismiss employees. In fact, consulting with specialist employment advisers who understand the complexities of the law is usually the most advisable way forward to mitigate an employer's risks.

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BDBF is a leading employment law firm based at Bank in the City of London. If you would like to discuss any issues relating to the content of this article, please contact Abdullah Ahmed (AbdullahAhmed@bdbf.co.uk), Amanda Steadman (AmandaSteadman@bdbf.co.uk) or your usual BDBF contact.