# No retrospective application of legal privilege to a grievance investigation report

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**In University of Dundee v Chakraborty, the EAT held that legal advice privilege could not be applied retrospectively to the original version of a grievance investigation report where it had been amended afterwards by the Respondent’s legal advisors.**

**What happened in this case?**

Mr Chakraborty was a post-doctoral research assistant at the University of Dundee. On 10 November 2021 he raised a grievance, alleging racial abuse, harassment and bullying, including an allegation that his line manager had falsely accused him of fraud. An independent member of academic staff was appointed to investigate the grievance and create a report.

By the time the report was finished, Mr Chakraborty had already submitted claims for race discrimination and harassment. The University sought legal advice on the report before sharing it with Mr Chakraborty. Amendments to the report were suggested and these were sent to the investigator. The investigator accepted these and made further changes.

This amended version of the report was then shared with Mr Chakraborty and included within the trial bundle. The report stated “Note: This report was amended and reissued on 23.06.2022 following independent legal advice”.

On the first day of the Tribunal hearing, Mr Chakraborty made an oral application for disclosure of the original unamended version of the report. The University resisted this application contending that it was subject to legal advice

privilege. It submitted that the production of the unamended 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 University by its solicitors.

The Tribunal did not accept that submission and made an order for the original version of the report to be disclosed.

The University appealed on the grounds 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; and
- while acknowledging that no argument of litigation privilege had been advanced in the Tribunal, the report was confidential on the basis of litigation privilege.

The University accepted that neither legal advice privilege nor litigation privilege attached to the report when it was first created. However, it claimed that such privilege attached retrospectively to the unamended document because of the advice that was later given about its contents by the external solicitors and that it would be possible to infer the advice given.

**What was decided?**

The EAT dismissed the appeal.

The EAT commented that any legal advice given about the original document and any amended versions of the original document created for the purpose of litigation would plainly be privileged. Here, it found that the original report was created as part of an investigation of a grievance brought under an internal policy, rather than in contemplation of litigation.

Furthermore, the EAT could find no case law which supported

the contention that privileged status could be acquired retrospectively.

As the original version of the report was not subject to privilege, retrospective application could not be applied. This was the case even if the consequence of disclosing the document might allow inferences to be drawn from the differences between the two versions. The EAT Judge noted that, in any event, it would be difficult to ascertain the advice as the investigator had made further changes to the report himself.

**What are the learning points for employers?**

This case shows that an underlying document cannot be rendered privileged simply because advice has subsequently been sought on its content.

Employers should remember that where a document is created as part of an internal investigation, rather than for the purposes of litigation, then legal advice privilege may not apply, and the document may be disclosable in a future dispute.

To benefit from legal advice privilege, employers should seek legal advice from a solicitor on the content of the document at the time that it is created. Further, employers should control the number of individuals the document is shared with and the number of versions of the document. It may also help to be open with employees at the outset that legal advice might be sought as part of the process.

**University of Dundee v Chakraborty**

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

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