**FIRST DIVISION, INNER HOUSE, COURT OF SESSION**

**[2023] CSIH 22**
**XA17/23**

Lord President
Lord Turnbull
Lady Wise

OPINION OF THE COURT

delivered by LORD CARLOWAY, THE LORD PRESIDENT

in the appeal under section 37(1) of the Employment Tribunals Act 1996

by

THE UNIVERSITY OF DUNDEE

Appellants

against

PRASUN CHAKRABORTY

Respondent

**Appellants: Lord Davidson of Glen Clova KC; CMS Cameron McKenna Nabarro Olswang LLP**
**Respondent: Hay; Balfour & Manson LLP**

_____

**1 June 2023**

**Introduction**

[1] This appeal raises a sharp question regarding the scope of a privilege arising from legal confidentiality. Where a comparison of an earlier version of a report with a later version could allow the reader to infer the nature of legal advice, does privilege arising from

confidentiality (legal advice privilege in English law) attach to the earlier document when the later report is disclosed. The appellants contend that it does.

**The appellants' harassment and bullying procedure**

[2] The appellants issued a document entitled *Dignity at Work and Study Policy and Procedures (Harassment and Bullying)*. This sets out their position on harassment, bullying and victimisation. It provides guidance on both informal and formal means of dealing with these issues in the context of an ongoing working relationship. It defines, in some detail, harassment and bullying, especially in the context of the protected characteristics under the Equality Act 2010. The formal procedure involves a person making a complaint against a work or study colleague. It stipulates that the appellants have the responsibility of investigating the complaint. They require to set up a Dignity at Work and Study (DAWS) investigation panel who are tasked with coming to a determination. The DAWS panel consists of a senior member of staff, acting as chair and investigator, and a human resources officer. As a generality, the panel members are to be "independent of the complainant and respondent".

[3] The role of the DAWS panel is to ingather and to consider all the relevant documents and facts. The panel are required to reach a decision on the complaint on the basis of interviews of persons, statements received and any other relevant evidence. They require to "compile a report of the investigation including their decision on the outcome". It is then for the appellants to consider how best to manage the ongoing relationship between the complainer and the respondent. An appeal against the panel decision is available, in which case an appeal panel of two senior members of the academic staff is created and a similar procedure is followed.

**Background**

[4] The respondent was employed by the appellants from 28 January 2013 until his resignation on 30 December 2021. He was a post-doctoral research assistant to Prof Kevin Hiom. On 10 November 2021, he raised a grievance against Prof Hiom under the appellants' DAWS procedures, alleging racial abuse, harassment, bullying and discrimination. The appellants appointed a member of their academic staff, Prof Niamh Nic Daeid, to investigate and to report.

[5] On 21 December 2021, prior to the outcome of the grievance procedure, the respondent lodged a claim with the Employment Tribunal against both the appellants and Prof Hiom for unfair and/or constructive dismissal and racial discrimination. He again alleged racial abuse, discrimination, harassment and bullying. He maintains that the appellants tried to protect Prof Hiom's and their own reputations instead of dealing with his complaints. He contends that he was given negative references by the appellants which caused him to lose alternative employment. He seeks compensation of between £400,000 and £500,000.

[6] Prof Nic Daeid issued her report to the appellants on 28 February 2022. According to the appellants' chronology, in March and June 2022 the report was "amended" by the appellants' law agents. Prof Nic Daeid agreed to the changes and added some of her own. The appellants' law agents proposed one final amendment. When this was incorporated, the report was on its fifth and final version. The court does not know what the changes were. The final version, which remained dated February, was annotated by a footnote to explain that the report had been "amended and reissued on 23.06.2022 following independent legal advice".

**The Employment Tribunal**

[7] An ET hearing was fixed for 4 to 14 July 2022. On the first day of the hearing, the respondent said that he had received the DAWS panel report on 29 June in a bundle which had been lodged with the ET by the appellants. He drew the ET's attention to the annotation. He expressed his suspicions that the original version contained findings which the appellants had altered in order to help Prof Hiom. The original was therefore relevant to his claim that he had been discriminated against. He sought recovery of the original. His application was opposed by the appellants on the basis that a comparison of the original with the final version would reveal the legal advice which had been tendered to the appellants. They claimed legal advice privilege over the original. The ET rejected the appellants' argument. The fact that the appellants had taken legal advice on the original report did not make it privileged. It was highly relevant to the respondent's claims. The appellants were ordered to produce the original. The appellants declined to do so and appealed to the EAT.

**The Employment Appeal Tribunal**

[8] The EAT judge reasoned that there were two branches of legal professional privilege; legal advice privilege and litigation privilege. The former extended to all communications between client and lawyer for the purpose of obtaining legal advice. The latter attached to communications which came into existence for use in litigation (*Buttes Gas and Oil Co* v *Hammer (No. 3)* [1981] QB 223 at 243). Advice privilege extended to later documents which demonstrated the content of prior legal communications (*Three Rivers DC* v *Bank of England (No. 5)* [2003] QB 1556) or those which reproduced, summarised or otherwise paraphrased

the advice (*Bank of Nova Scotia* v *Hellenic Mutual War Risks Association (Bermuda)* [1992] 2 Lloyds Rep 540 (Note)).

[9] It was conceded by the appellants that the original was not protected by privilege when it had been created. It was an investigative response to a grievance under the appellants' policy. It was not a communication between a client and a lawyer for the purposes of giving or receiving legal advice. It was clear from the chronology that Prof Nic Daeid had made her own amendments to the report. How it would be possible, from a comparison exercise, to distinguish between changes made following legal advice and changes made by Prof Nic Daeid, had not been explained.

**Submissions**

***Appellants***

[10] The protection of confidential communications between client and lawyer lay at the heart of legal professional privilege (*Ventouris* v *Mountain* [1991] 1 WLR 607 at 475). Communications between clients and lawyers should be "secure against the possibility of any scrutiny from others" (*Three Rivers DC* v *Bank of England (No. 6)* [2005] 1 AC 610 at para 34). There had to be a "relevant legal context" in which the communications were made (*ibid* at paras 38, 62 and 111). The advice could relate to the rights, liabilities, obligations or remedies of the client under private or public law (*ibid*). In this case the advice related to the interpretation and sufficiency of the matters discussed in the original report. The advice may relate partly to the rights or obligations of others (*ibid* at para 56). It may not be strictly legal but could be presentational or revisal.

[11] What was prohibited from being done directly could not be achieved by indirect means. Where a document, which was not itself privileged, would permit the content of

legal advice to be deduced, privilege could be invoked to prevent its disclosure (*Barr* v *Biffa Waste* [2010] 3 Costs LR 291 at [48]; *Re Edwardian Group* [2017] EWHC 2805 (Ch)). What was important was the protection of the confidentiality of the communication, not the sequence in which ancillary documents gave an indication of the legal advice. Privilege over the original version had arisen when the amended version had been made available to the respondent. Privilege should be sufficiently flexible to protect the advice from disclosure.

[12] The EAT judge had suggested that changes had been made by Prof Nic Daeid without legal advice. That was incorrect. Prof Nic Daeid's changes were made after she had discussed them with the appellants' Director of Legal. All of her changes were approved by the appellants' lawyers.

[13] The respondent's arguments on waiver (*infra*) were unsound. The test for waiver in *Scottish Lion Insurance Co* v *Goodrich Corporation* 2011 SC 534, whereby the client's conduct is inconsistent with the retention of confidentiality, was not met.

***Respondent***

[14] Grievance and disciplinary investigations were fact-gathering exercises. They were not undertaken to obtain legal advice or for the purpose of litigation. At the time when the report was created, neither litigation nor legal advice privilege applied. Even where external counsel had been brought in to conduct an investigation, the resultant report would not be privileged (*Ms A* v *UBS*, unreported, ET No. 2200832/2019, 1 November 2019). The respondent had no interest in the legal advice which the appellants had received. His intention was to obtain the original report in order to secure proportionate, fair and just proceedings in the ET. Disclosure would provide evidence about whether the appellants had tried to cover up incidents of racial discrimination, harassment, bullying and

victimisation. The modification of the report following legal advice suggested a lack of neutrality and independence. It raised questions about the integrity of the investigation. The issue was one of legal advice privilege and not *post litem motam* work. The question which was left begging was the nature of the legal advice to which privilege is said to attach. There was no apparent relevant legal context. It was for the appellants to establish the privilege claimed (*Re Edwardian Group* at para 42). The advice had to be in a relevant legal context (*Three Rivers DC* v *Bank of England (No. 6)* at paras 38, 56 and 60). There was a difference between being able to draw an inference of advice and speculating upon what it might have been (*Re Edwardian Group* at para 39). In *Three Rivers (No. 6), Edwardian Group* and *Barr*, the relevant context was clear and easily identified. The appellants' DAWS panel procedures did not contemplate lawyers. What the relevant legal context might be was not obvious nor was the nature of the legal advice which was given. All that existed was an assertion that the legal advice would be revealed if a comparison of the two versions were carried out. If legal advice privilege were established, it had been waived. The respondent's complaints included criticisms of the manner in which they had been processed. The appellants were relying on the final version of the report to demonstrate this. That meant that confidentiality in the original version had been waived in terms of *Scottish Lion Insurance Co* v *Goodrich Corporation* (at para [48]).

**Decision**

[15] The court is concerned solely with the question put before it: whether confidentiality attaches to the original version of Prof Nic Daeid's report. Nevertheless, confidentiality is part of the law of evidence which is to be applied in determining the merits of the

respondent's claims. It is part of the overall framework of fairness within which the Employment Tribunal will determine these claims.

[16] The general rule is well known; professional communications between solicitor and client are confidential. They cannot be adduced as evidence, even although they would be relevant to the issue (Walker & Walker: *Evidence* (5th ed) para 10.1.1). They are privileged, whether related to litigation or otherwise (*McCowan* v *Wright* (1852) 15 D 229, Lord Wood at 237). Thus a client need not and a solicitor must not disclose information which has been communicated for professional purposes; ie instructions or advice on the law or what should be done prudently and sensibly in the relevant legal context (Walker & Walker, para 10.2.1, citing *Three Rivers DC* v *Bank of England (No. 6)* [2005] 1 AC 610, Lord Rodger at para [58]). The purpose of the rule, in the context of an adversarial system, is to enable people to consult fully with their lawyers without the risk of the nature of anything communicated being revealed at a later date. It provides an exception to the general rule that all relevant evidence is recoverable.

[17] Privilege in the non-litigation context applies where the communication or document is confidential and arises out of the relationship of confidence between lawyer and client. The statement to that effect in *Three Rivers DC* v *Bank of England* (*No.* 6) [2005] 1 AC 610 (Lord Scott at para 24) is applicable under the Scots Law of confidentiality. When, in that case, reference is being made to a "relevant legal context", it is not adding a requirement for confidentiality to exist. Rather its existence allows non-legal advice to attract confidentiality if it is made in such a context (*ibid* at para 38 citing *Balabel* v *Air India* [1988] Ch 317, Taylor LJ at 330-331). If such non-legal advice is not given in such a context, it does not attract privilege (*ibid*). 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. The original version does not therefore attract privilege and the appellants were correct to concede that point. The argument then becomes one of whether it became confidential when the final version was issued because a comparison of the differences would permit an inference about what the legal advice had been. Put another way, the appellants' own act of issuing the final version containing a footnote revealing that the report had been amended following "independent legal advice" made the original confidential. If that were correct, it would prevent the respondent from seeing what Prof Nic Daeid had said in her original version and, if so advised, from cross-examining her on the validity of her ultimate findings.

[18] The court agrees with the general principle which was set out, in relation to legal advice privilege under English law, in *Three Rivers Council* v *Bank of England* [2003] CP Rep 34 (Tomlinson J at para 5):

> "It is … axiomatic that it ought to be possible to say of any material at its creation whether or not it is privileged from disclosure. Its status ought not to depend upon the use subsequently made of it, or the fortuity whether it is used in the manner intended …".

Although this first instance decision was reversed on appeal (*Three Rivers DC* v *Bank of England (No. 6))*, this *dictum* was not criticised. *Barr* v *Biffa Waste* was concerned with *post litem motam* confidentiality (see Coulson J at para 27).

[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. The respondent may be able to deduce what legal advice might have been given only because the appellants themselves revealed the existence of such advice as having influenced the content of the final version. *Re Edwardian Group* [2017] EWHC 2805 (Ch) did not concern litigation privilege but legal advice privilege (Morgan J at para 28). There, a distinction was made between a situation where there is "a definite and reasonable foundation in the contents of the document for the suggested inference as to the substance of the legal advice given and merely something which would allow one to wonder or speculate whether legal advice had been obtained and as to the substance of that advice" (*ibid* at para 37 following *AWB* v *Terence Cole* [2006] FCA 571). Even if the court were able to compare the original and final versions of Prof Nic Daeid's report, which it was not asked to do, the case fits into the latter category. The appellants have certainly not shown that it fits into the first.

[20] The applicability of waiver, in the context of confidentiality, was extensively analysed in *Scottish Lion Insurance Co* v *Goodrich Corp* 2011 SC 534 (Lord Reed, delivering the opinion of the court, at para [43] *et seq*). The term connotes the abandonment of a right. That abandonment can be inferred from facts and circumstances. It will occur when the party possessing the right behaves in a manner which is inconsistent with its maintenance. This is to be judged objectively and not by reference to the subjective intention of the party. The right may be given up only in relation to a particular context; a good example being where it may be necessary for the purpose of challenging a particular matter in a taxation (*Goldman* v *Hesper* [1988] 1 WLR 1238). 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. It must have been obvious to the appellants, when they revealed the content of the final version of the report, that the basis of that report would have to be the subject of scrutiny by the Employment Tribunal. If some of its content were based on legal advice, that advice would have to be revealed in the interests of both fairness and understanding. Waiver has been established.

[21] The appeal is refused.