



**St John's  
Buildings**

## **EAT success: legal advice privilege and the iniquity exception**

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Tom Wood was recently successful before the President of the Employment Appeal Tribunal in relation to the iniquity exception to legal advice privilege.

As is well-known, legal advice privilege ensures that correspondence between a client and solicitor is confidential, provided that it is created for the purpose of seeking and giving legal advice. However, there is no privilege where the correspondence is created in order to perpetrate an “iniquity”. That is not an exception *per se*, it is the case that there is no privilege in the first place. The so-called exception has been referred to as the “crime or fraud exception”, with the implication that only in cases in which a client is seeking to carry out one of those offences is there no privilege. However, “fraud” has been held to mean fraud in a wide sense, and includes sharp practice, or something of an underhand nature.

In the case in question, an employer (the respondent in the litigation), having provided an outcome to its employee’s (the claimant’s) wide-ranging grievance, approached its solicitors a few days later with a view to discussing the employee’s dismissal. There was a telephone discussion of the options, which was followed by an email confirming the same. The email suggested bringing in a previously-uninvolved member of senior management to review the position and “conclude” that the employee could not return to work. The email discussion developed the idea, but eventually was accidentally copied to the claimant so that she saw the entire chain. She was then dismissed two days later. She alleged that the email chain disclosed an iniquity, namely either victimisation or an unfair dismissal. She said that the review of documents was a sham because (a) dismissal was predetermined by someone else entirely, and (b) it concealed the true decision-maker.

Disclosure of the emails having been made, the respondent applied to have the documents excluded from proceedings.

The matter came before EJ Lancaster in Leeds. EJ Lancaster agreed that privilege or confidence was not lost by the inadvertent disclosure. The claimant was then required, *per* the authorities, to show that there was iniquity on balance of probabilities. EJ Lancaster agreed with the respondent’s argument that, by reference to *Curless v Shell International Ltd* [2020] ICR 431, the emails went no further than to provide the kind of advice that solicitors provide “day in day out”. There was therefore no iniquity. Having done so, EJ Lancaster did not go on to decide, as was also the case at all levels in *Curless*, whether victimisation was sufficiently serious to constitute iniquity.

The claimant appealed, and her appeal was permitted to proceed to a full hearing. At the full hearing of the appeal, Tom pointed out that there was a lengthy history of the claimant’s difficulty working with a particular manager (the principal subject of the grievance), so that there was no surprise that, on her grievance being rejected, the question of her continued employment arose (the claimant, in her claim form, had described her position as untenable). There was therefore no search for a sham reason, a real one existed. Second, the iniquity “exception” did not necessarily bite where the client intended to commit an iniquity but did not reveal it to the solicitor, even where it could reasonably be apparent that there was iniquitous intent (by reference to comments made by the EAT in *Abbeyfield (Maidenhead) Society v Hart* [2021] IRLR 932). Third, even if the process was a sham, it was not necessarily iniquity (also *Hart*). Fourth, there was nothing suggesting that there was a sham in any event. Fifth, there was nothing to show that the cause of dismissal was the claimant’s grievance. Sixth, victimisation and unfair dismissal were not sufficiently serious to amount to

iniquity, which the authorities suggested was conduct that was criminal or quasi-criminal, or something of that level or nature.

The interpretation of the emails is a question of law, and for the EAT to decide without deference to EJ Lancaster. The EAT (The Honourable Lord Fairley, President) agreed with the respondent's argument. In particular, picking up on submissions on the wording of the emails in question, the EAT agreed that the review by a senior manager was not a sham, and that he in fact had sufficient independence such that it was genuine and not the rubber-stamping of a decision of another decision-maker. The EAT repeated that it was the kind of advice given "day in day out", and that the situation was analogous with that in *Hart* in which an appeal decision-maker had already expressed that the employee could not work for the employer in any circumstances. Albeit that suggested predetermination of the appeal process, the EAT had held that it was the sort of frank instruction that a client could provide in confidence.

However, having made that finding on the interpretation of the emails, the EAT did not go on to give any indication as to the scope of the exception, in particular whether victimisation is or is not an iniquity. Although not addressed by EJ Lancaster and technically not the subject of the appeal, the issue overlapped with that of the nature of the correspondence so the EAT was prepared to deal with it. The tribunal at first instance in *Curless* had stated that it would go too far to elevate a tort to the status required to disapply legal advice privilege. There is therefore, as it stands, uncertainty as to whether a scheme between client and solicitor to discriminate against or victimise an employee (or worker), or indeed unfairly dismiss them, would benefit from privilege or not. There are very few cases on the scope of the iniquity exception, particularly in the employment field. Inadvertent disclosure of confidential communications is rare, and it could be some time before the issue comes before appellate courts again.

Tom was instructed by Stephen Mutch and Ciara Scanlon of Pannone Corporate LLP.

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