

When will communications with HR be protected by privilege in the UK?

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Employment tribunals in England tend to be very difficult to persuade that the principal reason for a dismissal was discriminatory, even when they have accepted that the claimant was unfairly dismissed, or discriminated against in other ways.

The strongest cases will often settle before trial, but a recent article by [Yerty](#) estimated that tribunals have only been prepared to make such findings in under 1% of all claims issued.

In the recent case of [Farmer v Fresh Cut Video](#), however, the tribunal accepted that the principal reason for dismissal was discriminatory, in that it related to the claimant's pregnancy and related sick leave, and therefore awarded substantial damages to a claimant who did not have the necessary length of service to bring an ordinary unfair dismissal claim.

The most interesting feature of this case was the extent to which the tribunal relied on the communications and meeting notes between the respondent and its own advisors.

HR pitfalls

Throughout the period leading to dismissal, Fresh Cut was advised by Peninsula, a large HR consultancy. Most of the documents the tribunal quoted from extensively in its judgment would have been protected by legal advice privilege had they been between Fresh Cut and its solicitors.

However, privilege does not usually apply to legal advice taken from HR personnel, whether employed directly by the organisation or through an external agency.

Communications will usually be covered by legal advice privilege if HR is merely forwarding legal advice obtained from a solicitor, although probably not if they choose to summarise the advice instead.

Correspondence with HR may also be covered by litigation privilege, where the communication is created for the sole or dominant purpose of preparing for, or conducting, actual or reasonably contemplated adversarial proceedings.

“But, it is probably the very fact that these exceptions will sometimes apply that can lull managers and HR into a false sense of security, causing them to forget that communications will not usually be protected if no proceedings are yet contemplated. Similarly, if a HR adviser provides legal advice from their own knowledge, rather than passing on advice from a solicitor, that will also go unprotected.

It is important to note that there was no suggestion in this case that any of the advice given by Peninsula was either incorrect or improper as legal advice privilege would not cover advice made for an improper purpose, such as an email advising a client how to discriminate, even from a solicitor.

Instead, the problem for the employer was the way the requests for advice had been put and the detail of the advice provided. Together, they showed the tribunal how seriously both Fresh Cut and Peninsula had viewed the claimant’s performance and actions before the employer learned of her pregnancy, which were a large part of the reason it concluded that the principal reason for the dismissal was actually pregnancy related, rather than performance related.

In other words, these documents were, in the tribunal’s view, inconsistent with the explanation that the employer had been on the point of dismissing before learning of the claimant’s pregnancy.

Employers should bear in mind that a prospective claimant will not necessarily have to bring a claim and wait for disclosure (under which the parties are usually required to disclose any relevant documents in their possession, whether helpful or unhelpful) in order to be able to gain access to any non-privileged material, as they can usually obtain this at a much earlier stage by making a subject access request under the UK General Data Protection Regulations.

Legally privileged material, on the other hand, does not usually have to be disclosed in response to such a request either.

Key takeaways

This decision is a short one which bears reading in full, as it serves as an important reminder to employers that:

- They should be very careful not to take a harsher view of someone’s performance after learning of their pregnancy than they can demonstrate that they were taking before learning of it.
- If they take advice from HR (whether within or outside the organisation), it is a sensible precaution to check whether the advice is likely to be covered by litigation privilege or legal advice privilege in all the circumstances of the case.
- If any communications or meeting notes generated may not be privileged, they should ensure that the reasons they rely on in dismissing will not be undermined by those documents.

Employers should also keep in mind that legal advice privilege is an important difference between the advice provided by solicitors and the advice provided by others, even those who may be equally well versed in the law.

Although this did not happen in Fresh Cut, there will also be cases where suboptimal or incorrect advice has been given and possibly acted on, in which case this will obviously be much more apparent to a tribunal if the advice is not privileged.