Advice Given to Employers by Human Resources Consultants: Privileged or not?

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Many employers who lack their own human resources departments have become accustomed to calling on the services of independent human resources consultants to help them deal with employment issues and disputes that arise in the workplace. Such consultants, who are frequently retained through agencies as independent contractors, may enter a long-term retainer with the employer and act as a substitute HR department. Alternatively, they may be required only to parachute in to deal with one particular dispute in which the employer is involved, so that advice is given and acted upon and the retainer comes to an end.

If that dispute then progresses to a claim of one sort or another, the question may arise as to whether privilege can be claimed for the advice given by the HR consultant and for documentation generated by or through him or her. The majority of HR consultants are not legally qualified and no automatic claim to legal advice privilege can therefore be made. This may leave the employer in a seemingly anomalous and disadvantaged position: if a solicitor had been retained to give identical advice, privilege may well have been available in relation to that advice and to any documents in which it was embodied.

In this paper I will examine some situations in which questions of privilege may arise where an HR consultant is involved.

The most common type of case arises where a consultant is brought in to advise on a pending internal dispute between employee and employer. The consultant may for example be required to advise on and become involved in internal disciplinary procedures where dismissal is a possible outcome. This was the situation that arose in New Victoria Hospital v. Ryan. Having been through a disciplinary process that led to her dismissal, Mrs Ryan took her claim to the tribunal and sought disclosure of documents that related to the advice received by her employer from a firm of HR consultants retained by them since the beginning of the disciplinary process. Specifically, disclosure was sought of documents relating to the disciplinary process, the dismissal and the effective date of termination. The tribunal ordered such disclosure and the employer appealed. Two arguments were deployed. First, that, although not legally qualified, the consultants had given confidential legal advice which should be afforded the same protection as if it had been given by a solicitor. Second, that the documents attracted privilege because they came into existence for the dominant purpose of obtaining legal advice in respect of anticipated proceedings.

In a brief judgment, the EAT rejected both submissions. As to the first, it was held that, for policy reasons, legal professional privilege should be strictly confined to legal advisers such as solicitors and counsel. As to the second, having examined the documents in question, the EAT found that they had not come into existence for the dominant purpose of obtaining legal advice in respect of anticipated proceedings.
Although the EAT in Ryan gave permission to the employer to take the case further, they did not do so and the Court of Appeal has not in the intervening 13 years been given the opportunity to consider the matter. This is surprising given that some believe there are cogent arguments in favour of extending legal professional privilege in the way argued by the respondent. Particularly, there is the point that the party who employs non-legal advisers may well be at a disadvantage when compared with an opponent who is represented by a lawyer.

It is not uncommon for Ryan to be relied upon by claimants in support of the contention that advice given by HR consultants can never be privileged. However, this is clearly not so. It was implicit in the decision that had the documents satisfied the test of ‘dominant purpose’ then another kind of privilege (ie distinct from lawyer/client privilege) may have been available. Reference was made to an earlier decision of the NIRC in the case of M&W Grazebrook v. Wallens, in which Sir John Donaldson said (at paragraph 10):

“...in the interests of the administration of justice, we hold that...privilege exists in relation to proceedings before an industrial tribunal. We would, however, draw attention to the fact that it is a limited privilege. It exists only in relation to communications with an actual view to the litigation in hand and the mode of conduct of it. It does not exist in relation to the situation at the time when the matters complained of were arising.” [emphasis added]

Thus if, as frequently happens, an HR consultant is retained (whether in addition to or in substitution for a solicitor) to deal with litigation rather than merely with the employer’s day to day internal employment matters, then, provided the dominant purpose test is met, the employer will be able to claim privilege in respect of communications passing between him and the HR consultant.

Three points arise in relation to the nature of privilege arising in these circumstances.

First, the correct term for this privilege is ‘litigation privilege’. It is important to be clear about the terminology when discussing privilege. The terms ‘legal professional privilege’, ‘legal advice privilege’ and ‘litigation privilege’ are sometimes used as if they were interchangeable, which they are not. The relationship between these terms was recently examined by the House of Lords in the case of Three Rivers District Council v. Bank of England (No.6). Lord Scott said at paragraph 10 of that decision:

“The modern case law on legal professional privilege has divided the privilege into two categories, legal advice privilege and litigation privilege. Litigation privilege covers all documents brought into being for the purposes of litigation. Legal advice privilege covers communications between lawyers and their clients whereby legal advice is sought or given.”

Second, as is also clear from this extract from the Three Rivers case, litigation privilege is a wide privilege. At paragraph 27 of the judgment, Lord Scott went on to say:

“...it has been held that litigation privilege can extend to...any document brought into existence for the dominant purpose of being used in litigation.
The connection between legal advice sought or given and the affording of privilege to the communication has thereby been cut.\textsuperscript{vi}

Thus, in a situation where an HR consultant is required by the employer to speak to or interview a witness for the purposes of litigation, documentation passing between the consultant and the witness will attract litigation privilege.

Third, the privilege is that of the client (ie the employer), not the HR consultant. It is therefore the client’s to waive. The consequences of this may be unfortunate for the consultant who has little or no control over the employer’s file once the litigation is over. At worst, the consultant may be exposed to proceedings him/herself. For example, where he/she has recommended a certain course of action, the use of the vicarious liability provisions in the discrimination legislation may enable the employee to draw the consultant into further litigation in which that course of action is alleged to be discriminatory\textsuperscript{vii}.

HR consultants who are involved in their client’s litigation would be well advised to make clear that they wish to be consulted before any part of the file is disclosed eg in response to an application under the Data Protection Act 1998 once proceedings have finished.

A final point is that there will be cases where documentation generated by the HR consultant will be partly privileged and partly not. Suppose, for example, that a consultant is brought in to deal with a grievance issued by a current employee who is already in litigation with the employer. The true reason for bringing the grievance may be in order to comply with s32 of the Employment Act 2002 and as a preliminary to adding the subject matter of the grievance to the existing proceedings. The grievance however remains an internal procedure not directly related to the proceedings. In this situation, careful thought will have to be given to the dominant purpose test before documentation is deemed discloseable. Documents that come into existence for the purposes of and as part of the grievance procedure are not likely to satisfy the test, whereas a document in which, for example, the HR consultant discusses how the existing litigation will be affected by the outcome of the grievance procedure may well do.

\textsuperscript{i} [1993] IRLR 202
\textsuperscript{ii} Note that the application for disclosure related to documents generated up to the point of dismissal only, that is, before the dispute went to litigation.
\textsuperscript{iii} See Harvey on Industrial Relations and Employment Law para T[507].
\textsuperscript{iv} [1973] IRLR 139
\textsuperscript{v} [2005] 1 AC 2005
\textsuperscript{vi} Lord Scott also pointed out (para 29) that the litigation must be adversarial in nature (which tribunal proceedings clearly are). Interestingly, he was critical of the justification for litigation privilege. But, as he acknowledged, ‘that is for another day’. The current state of the law is therefore as he stated at paras 10 and 27 of the judgment.
\textsuperscript{vii} In a recent case that did not reach a final hearing, an HR consultant was included as a respondent in a race discrimination claim. The central allegation was that the respondent employer had settled the employee’s previous claim against it on terms that were discriminatory and were a result of the advice given by the consultant. Following settlement of the first claim, the claimant made a subject access request under the Data Protection Act 1998. In error, the employer’s solicitor, who dealt with the request, disclosed to the claimant all the documents containing advice given by the consultant. The HR consultant was drawn in by the use of ss32(2) and 33(1) of the Race Relations Act 1976.