

Internal reports and privilege

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A grievance investigation report was produced by an internal member of academic staff of the University following a grievance being raised by the Claimant under its Dignity at Work and Study policy. The University's external legal advisors suggested a number of changes to the report, and further amendments were also made by the original author of the report before a final version was disclosed to the Employment Tribunal.

The Claimant made an application for disclosure of the original un-amended report. The University resisted this application on the basis that the amended version would demonstrate the nature of the legal advice received, and therefore sought to argue that the original version of the report was subject to legal privilege. This argument was rejected by the Employment Judge and the order for disclosure of the original report was granted.

On appeal, the University accepted that the original version of the document was not privileged at the point when it was created, but contended that it retrospectively acquired legal advice and litigation privilege once the amended version of it was lodged because comparison of the two versions could allow conclusions to be drawn about the terms of the legal advice received.

The decision of the Employment Judge was upheld on appeal. The EAT held that whilst the terms of any advice given by the solicitor about the original document and any amended version of the original document created for the purposes of litigation would be privileged, the original un-amended document was not; nor could it retrospectively become privileged even if an incidental consequence of its disclosure and comparison with the disclosed final version might allow inferences to be drawn about why the two versions were different.

The duty of disclosure requires parties to an Employment Tribunal claim to disclose any documents that are relevant to the issues in dispute that are in their possession or control. Employers should have this in mind when conducting any internal grievance or disciplinary process; and be aware that relevant correspondence and investigation reports, including earlier non-privileged drafts, will likely be disclosed as part of the Tribunal claim.

Contact

Katie Williams

Associate

Katie.Williams@brownejacobson.com

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