

# Loose lips sink ships: A reminder about keeping conversations confidential

GRANT FEARY, DEPUTY DIRECTOR, LAW CLAIMS

The UK Court of Appeal has just ruled on another interesting case concerning legal professional privilege. In *Curless v Shell International Limited* [2019] EWCA Civ 1710 Mr Curless had been employed as an in-house lawyer at Shell since 1990.

There had been issues surrounding his work performance since 2011 and he had submitted a claim to the Employment Tribunal in 2015 complaining of discrimination. Shell acquired British Gas in 2016, following which there was a group wide program of redundancy, and Mr Curless' employment was terminated, ostensibly on the ground of redundancy in January 2017. He then made a second claim in the Employment Tribunal alleging that the real reason behind the termination of his employment was not genuine redundancy but was discriminatory.

At issue in this case was whether Mr Curless could rely on two pieces of information (1) a leaked email, and (2) a conversation overheard in a pub which he said helped prove his case that his redundancy was, in effect, a sham. The email, dated April 2016, was sent by Shell's Managing Counsel to a lawyer from the firm Lewis Silkin LLP who was working with Shell on employment related matters and discussed how the redundancy program might be used "*across the UK legal population, including [in respect of] the 'individual'*". It was not in dispute that "*the individual*" was Mr Curless. At some stage, an anonymous person in the Shell legal department "*leaked*" this email to Mr Curless.

Further, in late May 2016, Mr Curless was in "*The Old Bank of England*" a pub in Fleet Street just near Chancery Lane, when a group of "*professionally dressed*" people came in and sat at a table behind Mr Curless who was in a position to overhear their conversation. One was carrying a Lewis Silkin LLP notepad. One of the women in that group mentioned dealing with a complaint by a senior lawyer at Shell



who had brought a discrimination claim which was taking up a lot of time. She also said that "*his days were numbered as there was now a good opportunity to manage him out by severance or redundancy in a big re-organisation exercise that was underway*" as a result of the British Gas takeover.

Shell claimed that both the leaked email and the pub conversation were covered by legal professional privilege and could not be relied upon by Mr Curless.

The Employment Tribunal held in favour of Shell however, Slade J in the Employment Appeal Tribunal found for Mr Curless holding that the email, properly interpreted, recorded legal advice that the genuine redundancy exercise could be used as a "*cloak*" to dismiss Mr Curless to avoid his continuing complaints. Her Honour also held that, although it was of significantly lesser importance, legal advice privilege could not be claimed in relation to the pub conversation.

The Court of Appeal overruled Slade J's decision and held that the email and the pub conversation were privileged and could not be relied upon by Mr Curless. It was found that the advice in the email was the sort of advice which employment lawyers give "*day in day out*" in cases

where an employer wishes to consider for redundancy an employee who, rightly or wrongly is regarded as underperforming. The Court of Appeal did not agree that this was advice to act in an underhand or iniquitous way, and also held that the email advice could not be tainted by a conversation (The Old Bank of England conversation) involving gossip from someone else after the event.<sup>1</sup>

Notwithstanding the fact that legal professional privilege between Shell and Lewis Silkin LLP was ultimately upheld, the whole episode must have been extremely embarrassing to all involved. How much better would it have been for the pub conversation to have been limited to Brexit or the Premier League rather than work gossip?

In the run up to Christmas, when perhaps more lawyers than usual are in pubs and restaurants, remember, "loose lips, sink ships".

## Endnotes

- Given the "*leak*" of the email, a further interesting question arises as to whether or not this decision would be decided in the same way in Australia following the High Court's judgment in the *Panama Papers* case – *Glencore v Commissioner of Taxation* [2019] HCA 26.