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Employers Beware - Advice from HR Consultants Not Legally Privileged

The Employment Appeals Tribunal (EAT) has recently confirmed that legal advice privilege does not attach to advice given to employers by their non-lawyer advisors. As such, this advice may be disclosable to employees who submit data access requests to their employers.

Richard Carron v Fastcom Broadband Limited t/a Fastcom (UD1515/2013)

Mr Carron brought a claim for unfair dismissal against his former employer Fastcom Broadband Limited (Fastcom). Prior to Mr Carron's dismissal, Fastcom took legal advice from HR consultants Peninsula Business Services (Ireland) Limited (Peninsula) in relation to a grievance raised by Mr Carron.

In the course of preparing his claim before the EAT, Mr Carron submitted a data access request under the Data Protection Acts 1988 and 2003 to Fastcom seeking copies of certain documents arising from his grievance, including the advice provided by Peninsula to Fastcom. Fastcom refused to release the documents to Mr Carron claiming that they were subject to privilege. The EAT was asked to determine a preliminary issue as to whether privilege attached to these documents.

The EAT considered the issue of privilege under two headings:

1. Legal Advice Privilege

The EAT reiterated that legal advice privilege applies to communications between a lawyer and client containing legal advice during the course of a professional legal relationship. The EAT examined the status of Peninsula noting that it had referred to itself as a "legal advisor" in its submission to the EAT. Mr Carron disputed this classification and drew the EAT's attention to Peninsula's website where it had described itself as "Employee Assistant Specialists".

The EAT determined that Peninsula was primarily a consultant and advisor to employers which, although involving some advice on legal issues, did not classify Peninsula as a lawyer and thereby enable it to avail of legal advice privilege. Therefore, Fastcom could not refuse to disclose the requested documentation under Mr Carron's data access request as legal advice privilege did not attach to the communications prior to the date on which Mr Carron had filed his claim to the Workplace Relations Commission (WRC).

2. Litigation Privilege

The EAT differentiated legal advice privilege from litigation privilege noting that the latter category of privilege can apply to communications between a client and its non-legal advisor in connection with litigation.

On this basis, the EAT accepted that the communications between Fastcom and Peninsula were subject to litigation privilege from the date on which Mr Carron's unfair dismissal claim was filed with the WRC.

Conclusion

In many employee grievance situations employers obtain sensitive advice at the outset of the matter, long before any claim or litigation is threatened or in being. Employers should bear this in mind. This is particularly so when in the majority of cases an aggrieved employee will, without a doubt, make a data access request to obtain personal data held by the employer in relation to them.

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