

Employer not required to disclose bullying report in unfair dismissal claim

Mark Kirkman v DP World Melbourne Ltd [2016] FWC 605

By Jon Long and Emma Jack

The FWC upheld the employer's claim of legal professional privilege over an external report and surrounding documents, because they were created to investigate the bullying claims made by various employees and not to provide advice for the yet-to-be initiated unfair dismissal proceedings.

Background

Mr Kirkman brought an unfair dismissal claim against DP World and sought access to a report prepared by Mr David Gunzburg, who was engaged by DP World's solicitors to provide a factual report into various confidential allegations of bullying conduct, as well as associated documents ("the Documents") under an Order to produce issued by the Commission on 11 March 2015.

Commissioner Bisset denied Mr Kirkman access to the Documents on the basis that they were not relevant to his unfair dismissal application. Mr Kirkman appealed this decision, and on 29 January 2016, Deputy President Kovacic affirmed Commissioner Bisset's decision, determining that the Documents were protected by privilege and that privilege had not been waived.

Privilege

Citing *The Commissioner of Taxation v Pratt Holdings* [2005] FCA 1247, the FWC reiterated that the dominant purpose of a document is to be determined *at the time* that the communication or document was created and that any use that a document may be put after being brought into existence is immaterial.

In deciding that the dominant purpose at the time the Documents were created was to assist DP World's lawyers in providing legal advice to DP World, and thus are protected by legal professional privilege, the FWC relied on the following:

- The letter of engagement dated 3 June 2014 clearly dictating that Mr Gunzburg was engaged by DP World's lawyers for the purpose of investigating the merit of the bullying claims to assist the law firm in its advice to its client, DP World
- The Report provided on 9 July 2014 being marked as privileged and confidential;
- Mr Gunzburg's communication being almost exclusively to DP World's lawyers rather than DP World;
- A file note from a meeting between Mr Kirkman and Mr Gunzburg on 30 June 2014 recording that the investigation was not for the purposes of other proceedings and that Mr Gunzburg had been engaged by DP World's lawyers;
- The correspondence between DP World and the Maritime Union of Australia, acting for Mr Kirkman, suggesting that Mr Gunzburg had been engaged to provide

an independent investigative report into the complaints;

- The letter from DP World's COO on 17 June 2014 indicating that DP World would not be providing details of Mr Gunsburg's appointment or report;
- The Report being provided about 5 months before Mr Kirkman was asked to attend a disciplinary meeting on 4 December 2014.

Although the decision to terminate Mr Kirkman's employment was partly based on the findings in the Report, this did not change the dominant purpose for which the Documents were created, that is, legal advice in relation to the bullying allegations.

Waiver

Mr Kirkman argued that, if the Documents were privileged, DP World had waived privilege either by:

- (1) Mr Gunsburg putting the complaint allegations to him during the meeting on 30 June 2014; or
- (2) DP World disclosing the contents of the report in its disciplinary meeting notice letter on 3 December 2014 by stating which allegations of inappropriate behaviour were substantiated by the investigation.

The FWA rejected these submissions.

Firstly, the letter from DP World's COO which preceded the meeting between Mr Kirkman and Mr Gunsburg outlined very clearly that the particulars of the incidents would be discussed verbally in the interviews with the employees, and that a copy of the Report would not be provided to DP World. The *Evidence Act*

provides that a party is not taken to have acted in a manner inconsistent with a party objecting to the adducing of particular evidence simply because the substance of that evidence if disclosed in the course of preparing a confidential document.

Secondly, the FWA determined that the purpose of the partial disclosure before the disciplinary meeting was to allow Mr Kirkman an opportunity to respond to the alleged conduct that had been substantiated by the investigation conducted by Mr Gunsburg. It was not to provide some forensic advantage but rather for Mr Kirkman to provide his version of events regarding the substantiated complaints, as opposed to all the complaints, for DP World to then come to an educated and considered decision.

Implications for employers

Although this case affirms the general principle that such investigative material may attract legal professional privilege in appropriate circumstances, it also serves as a timely reminder for employers to take steps to ensure the dominant purpose test can be met without difficulty.

Employers should therefore consider the need to (1) clearly define and limit the scope of engagement of any independent investigator in writing; and (2) maintain proper communication records in relation to the investigation, and ensure any communication properly reiterates its purpose.

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The content of this article is intended to provide a general overview and guide to the subject matter. Specialist advice should be sought about specific circumstance.