

Case In Point

Court Finds Emails Between Management and HR Department Not Privileged

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A Master of the Ontario Superior Court of Justice recently rejected an employer's assertion that emails between management and its Human Resources (HR) department were privileged and therefore not subject to disclosure in a constructive dismissal action. He stated that if "management seeks confidentiality in dealing with an employee, it should consult with counsel and not its HR department."

In [Guthrie v. St. Joseph Print Group Inc.](#), the plaintiff had been employed for 34 years with the employer and had been placed on a performance improvement plan with respect to poor sales. His failure to meet certain sales targets led to a 10% reduction in his salary. He resigned and alleged constructive dismissal.

In the course of examinations for discovery, the plaintiff became aware of five undisclosed emails between the defendant's senior management and its HR department. The emails in question related to the plaintiff's poor sales and the establishment of a performance management strategy.

While acknowledging the relevance of these emails, the defendant claimed privilege and argued that a) they were created in contemplation of litigation and b) they met the *Wigmore* test for common law privilege.

Master Champagne summarily dismissed the first assertion that the emails were created in contemplation of litigation, as they arose over a year prior to the plaintiff's departure.

In regards to the *Wigmore* test, the Master wrote:

[19] Extending the *Wigmore* privilege to cover the relationship between a HR department and management in circumstances such as these could have wide-ranging implications for employment law and must be based on persuasive and compelling evidence. Such evidence is simply not before me. While I accept that the parties to the impugned emails might have thought that their communication was confidential, that is not enough. The third and fourth branch of the *Wigmore* test must be satisfied.

Recall that common law privilege under the *Wigmore* test arises when a communication meets all four of the following criteria:

1. the information or communications must originate in a confidence that they will not be disclosed;
2. this element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties;
3. the relation must be one which in the opinion of the community ought to be sedulously fostered;
4. the injury that would inure to the relationship by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation. [at para 17]

The defendant argued that it regularly relied on its HR department to fill an advisory role with respect to disciplining and terminating employees and relied on being able to have a “full and frank “without prejudice” discussion” with it.

Master Champagne stated:

[20] There is insufficient evidence as to the nature of the relationship between the defendant's HR department, management and employees. Defendant's counsel concedes that HR “both assists employees and advises management”. In the course of regular performance management and absent any threat of litigation, I am not persuaded that in this case, or as a general rule the relationship between HR and management is one in which confidentiality is essential or that the community would say “ought to be sedulously fostered” [...].