



EMPLOYMENT TRIBUNALS

Claimant: Ms J Rusby

Respondent: Helping Hand Domiciliary Care Ltd

Heard at: Leeds (by video) **On:** 8 August 2022

Before: Employment Judge Knowles

Representation

Claimant: Mr Storey, Solicitor

Respondent: Ms Letts, Employment Tribunal Advocate

RESERVED JUDGMENT UPON A PRELIMINARY POINT

The documents contained at pages 4-16 and 42-43 in the Bundle of documents are privileged from production and should not be brought before the Tribunal at the final hearing.

RESERVED REASONS

Issues

1. The issues before me today were set out at a preliminary hearing before Employment Judge Buckley on 24 May 2022 as follows:

- (i) Whether any of the documents relied on by the claimant are subject to legal advice privilege or litigation privilege.
- (ii) Whether that privilege has been waived.

Evidence

2. This matter was heard by video using HMCTS's cloud video platform.

3. I heard sworn evidence from the Claimant, who produced a written witness statement.

4. The parties produced a bundle of documents, 43 pages.
5. References numbers in brackets are to page numbers in the bundle of documents unless otherwise stated.
6. Both parties produced written submissions. Additional verbal submissions were heard during the hearing.
7. At the conclusion of the hearing, I reserved my decision to allow time to consider the matter and deliver a reserved decision with written reasons.

Findings of fact

8. I made the following findings of fact on the balance of probabilities.
9. Largely the core facts are agreed between the parties.
10. The Claimant has claimed that on 22 February 2021 she was provided with a tablet computer device to undertake training modules through an application. She did so. She states that she used the tablet for other purposes, such as checking notes and using google maps.
11. The Claimant states that there was a mail icon on the tablet computer which showed a number of unread emails. She opened the email app and found emails about her written by Mr Drabble to representatives of the Respondent's advisors at Citation and emails from Citation to Mr Drabble (4-15).
12. The Claimant also accessed an email headed "note to self" (16) which appears to be an email Mr Drabble sent to himself although the text appears to be an email to Citation. I have not heard evidence about what that is.
13. The Claimant read these documents and printed them to confront the Respondent about them.
14. The Claimant has opened and printed one email exchange and one note and states that the documents contained her initials "JR" so she thought they were for her. She has not explained how she came to access the document at page 16.
15. I doubt that the Claimant would have opened the emails and not realised that they were not intended for her, whether or not they had her initials upon them. She was accessing an email account she knew not to be hers. The emails accessed were dated from the beginning of the year and the subject header was her appeal hearing.
16. The inclusion of page 16, which does not contain a reference to JR in any subject matter (the re: is "note to self"), only in the note content, tends to suggest that the Claimant has continued to look for documents written in the past by Mr Drabble about her.
17. On the balance of probabilities, that is what I conclude happened.
18. The Respondent had previously spoken to and written to Citation about the Claimant; there is an email dated 22 December 2020 and a telephone call record dated 13 August 2020 (42 and 43). These documents have been disclosed by the

for the purposes of determining the issue of litigation privilege. They differ from the documents mentioned earlier because they do not form part of the documents accessed and viewed by the Claimant on the tablet computer on 22 February 2021.

19. The emails contained on pages 4-15 and 42, together with the telephone note on page 43, are unequivocally records of advice requested and given concerning the management of issues at work with the Claimant. The note to self on page 16, although not emailed to Citation, appears to be the text of an email intended to be sent to Citation, but sent by Mr Drabble to himself, and therefore may have been a draft.

20. Neither of the people at Citation involved in the giving of advice by email or telephone to the Respondent were qualified practitioners (Solicitors or CILEX professionals) but are supervised by solicitors.

21. After the Respondent became aware that the Claimant had accessed Mr Drabble's messages on the tablet computer, an investigation took place. The bundle includes the documents concerning the investigation (17-39).

22. These refer to the Claimant accessing the documents and to their existence. The Respondent does not object to the investigation documentation being included in the bundle of documents.

Submissions

23. The Claimant submitted that legal advice privilege applies only to communications with and from professional legal advisers whereas Litigation privilege has wider application covering communications with advisers who are not lawyers but only in relation to pursuing or defending or avoiding or settling actual or anticipated litigation.

24. The Claimant challenges privilege noting that the advisors are not qualified and that the materials are significantly before proceedings were begun. They note that in the case of Mr Drabble's note to self no advice is sought and none is offered.

25. The Claimant suggests that privilege has been waived in any event, through collateral reference in the investigation documents, and through the it being the Respondent that gave the tablet computer to the Claimant in the first place. In relation to the subsequent disclosure (42-43), again these have been voluntarily disclosed.

26. The Claimant submits that the documents are highly relevant because they show how and why the Claimant was treated subsequently and that the Respondent never wanted the Claimant to return to work after her initial dismissal but was reinstated on appeal. The documents also show Mr and Mrs Drabble confirming there was not a working relationship going forwards.

27. The Respondent submits that their advisers are supervised by lawyers and that legal advice privilege applies.

28. The Respondent submits that in any event litigation privilege applies because advice was taken on how to deal with a specific situation to ensure matters were dealt with correctly and with a view to avoiding litigation. The Respondent submits that the tone of the correspondence from the Claimant was indicative of someone

prepared to fight her corner and the notes on 42-43 refer to making contact with ACAS.

29. The Respondent disputes that the emails are relevant because the Claimant's harassment complaint is based upon being given the device with the email on as opposed to the content of the emails themselves.

30. In the alternative the Respondent suggests that the Claimant looked at the emails of her own accord and that the Respondent had no intention that she should see them.

31. The Respondent further submits that the Claimant was scrolling through the emails and went into sent emails in circumstances where she would not have sent emails whilst she was off sick.

32. The Respondent submits that the reference to emails in the subsequent emails does not amount to a waiver of privilege and the notes themselves are not privileged.

33. The Respondent submits that there has been no disclosure by them, the Claimant took it upon herself to take copies and disclose the documents.

34. The Respondent submits that there has been no collateral waiver by them because they are not seeking to use privileged documentation in litigation and there are no other privileged communications to join.

The Law

35. Certain documents and evidence are protected from production in Tribunal owing to legal professional privilege. There are two main types, firstly legal advice privilege and secondly litigation privilege.

36. The relevant test for determining whether legal advice privilege applies is to ask whether the communication was made confidentially for the purpose of legal advice, construing such purpose broadly (*Balabel and anor v Air India* [1988] 2 All ER 246, CA).

37. In *Civil Aviation Authority v R (on the application of Jet2.com Ltd)* [2020] EWCA Civ 35, CA it was held that the party claiming privilege must show that the relevant document or communication was created or sent for the dominant purpose of obtaining legal advice.

38. Case law has confirmed that legal advice privilege applies only to advice given by qualified lawyers including barristers, solicitors, legal executives and foreign lawyers. Privilege also extends to employees such as secretaries, barrister clerks, trainees, pupil barristers and paralegals, provided they are properly supervised by a lawyer. See *R (on the application of Prudential plc and anor) v Special Commissioner of Income Tax and anor* [2013] 2 All ER 247, SC, *Alfred Crompton Amusement Machines Ltd v Commissioners of Customs and Excise (No.2)* [1973] 2 All ER 1169, HL and *Azko Nobel Chemicals and anor v Commission of the European Communities* [2011] 2 AC 338, ECJ.

39. In *Howes v Hinckley and Bosworth Borough Council EAT* 0213/08 it was held that communications with an employment consultant who was also a solicitor

and who was contacted for that reason were held to be covered by legal advice privilege however, communications with unqualified consultants would not be covered.

40. In ***New Victoria Hospital v Ryan*** [1993] ICR 201, EAT, the employer argued that correspondence with a firm of personnel consultants was protected from inspection. The EAT dismissed this argument. In its view, to extend legal privilege to unqualified advisers such as personnel consultants was both unnecessary and undesirable. Essentially, this means that a party to tribunal proceedings who has been advised by a trade union official, an advice worker or a personnel or employment consultant (many of whom have specialist legal knowledge but are not legally qualified) cannot claim privilege in respect of any confidential legal communications with such an adviser.

41. Litigation privilege applies where adversarial litigation is contemplated or commenced where the communication is made for the dominant purpose of that litigation.

42. In ***Abbeyfield (Maidenhead) Society v Hart*** EAT 0016/21 the EAT held that an email between an employer and an HR consultant did not fall within the 'iniquity' exception to litigation privilege, even though it contained an indication by the employer that it intended to dismiss H come what may and was sent before a disciplinary hearing had taken place. The employer had not sought, and the consultant had not given, advice on how to act unlawfully.

43. For litigation privilege to apply, the communication must be made in the context of current or contemplated adversarial litigation. 'Adversarial litigation' covers court or tribunal proceedings and arbitrations but not inquisitorial or investigative proceedings (such as internal grievance procedures) — In re ***L (a minor)*** [1997] AC 16, HL. Such litigation will be regarded as being contemplated (i.e. reasonably in prospect) when there is a real likelihood rather than a mere possibility of litigation, although the chance of litigation needs to be greater than 50 per cent.

44. One specific public policy exception to the right to assert legal advice privilege in order to prevent disclosure is where the document in question reveals conduct or advice that is in breach of the so-called 'iniquity principle', meaning legal advice sought or given with the purpose of effecting a crime or fraud, with 'fraud' being given a wide meaning in this context sufficient to extend to 'sharp practice' or engagement in something underhand in circumstances where good faith is required (***Barclays Bank plc v Eustice*** [1995] 1 WLR 1238, CA; and ***BBGP Managing General Partner Ltd v Babcock and Brown Global Partners*** [2011] CH 296, ChD). This principle applies to both legal advice privilege and litigation privilege.

45. In either form of privilege, the dominant purpose can be that of the maker of the communication.

Conclusions

46. In my conclusion, there is no doubt that the emails between Mr Drabble and Citation attract legal advice privilege, as would the draft of the email sent to himself.

47. Their content was confidential and made for the purposes of obtaining their legal advice.

48. The advisers are supervised by lawyer, a point not challenged by the Claimant.

49. There is no iniquity within the documents and none is argued by the Claimant.

50. There can be no waiver of privilege by giving the Claimant a tablet computer for different purposes.

51. The Claimant did act unconscionably in accessing then working her way through Mr Drabble's' email account.

52. The reference to those documents in disclosed documentation concerning the investigation cannot amount to a waiver of privilege. These are not privileged documents, nor is any privilege asserted in relation to them. They refer to privileged documents because they are notes of the investigation that took place into the Claimant's conduct. The Respondent is not seeking to deploy any privileged documentation.

53. There has been no waiver of privilege in relation to pages 42-43; the Respondent has utilised those documents only for the purposes of this hearing concerning privilege and those documents are also subject to legal advice privilege.

54. There is, within the email reference at page 43 to the Claimant taking her previous employer to tribunal and Mr Drabble is clearly communicating with his legal advisers because he contemplates litigation. The advice sought is about actions to be taken in connection with that litigation, either to prevent it or to best position a defence.

55. In my conclusion litigation privilege also attaches to the documents.

56. None of these documents should come before the Tribunal at any final hearing of this matter.

Employment Judge Knowles

21 August 2022