EMPLOYMENT TRIBUNALS

Claimant: (1) Ms B Lodge
(2) Mr S McVicker-Orringe

Respondent: Ministry of Defence

Heard at: Manchester (in private; by CVP) **On: 1 September 2021 (in chambers 17 & 19 November 2021**

Before: Employment Judge Sharkett (sitting alone)

APPEARANCES
For the claimant: Mr K Hirst
For the respondent: Ms Ling of Counsel

JUDGMENT ON PRELIMINARY HEARING

(i) The emails dated 4th 8th and 10th April 2019 are not protected by legal or litigation advice privilege and can be relied upon by the claimants in these proceedings.

(ii) The emails dated 15th April 2019 and three emails of 31 July 2019 are protected by legal advice privilege. The respondent did not waive privilege in these documents and the claimant is not permitted to rely on them for the purposes of these proceedings.

REASONS

(2) This Preliminary Hearing was to consider the respondent's application to have documents excluded from evidence before the Tribunal on the basis that they were protected by either legal advice and/or litigation privilege known collectively as legal professional privilege (LPP).

(3) It is the respondent's case that the relevant documents are protected by legal advice and/or litigation privilege and the fact that they were mistakenly

disclosed in response to a Subject Access Request (SAR), by the second claimant did not waive the right to that protection. The claimants do not accept that the documents satisfy the criteria needed for protection and that even if they did, the respondent has waived privilege by disclosing the documents in response to a SAR when it was open to it to withhold the documents if they were protected by LPP.

(4) Ms Ling appeared on behalf of the respondent and Mr Hirst on behalf of both claimants.

(5) The parties had prepared a bundle of documents for the assistance of the Tribunal consisting in excess of 3,000 pages. Written and oral submissions were made by both representatives. All references to page numbers in this Judgment are references to pages in the bundle unless otherwise stated.

Submissions

(6) For the respondent Ms Ling explained that the documents which the claimants seek to rely on are emails that were disclosed in response to a Subject Access Request (SAR), made by the claimants. The chain of emails which form the basis of this application span a relatively short period of time in 2019.

(7) Ms Ling submits that under paragraph 19 of Schedule 2 of the Data Protection Act 2018, when responding to the SAR the respondent was entitled to withhold information in respect of which a claim to legal privilege could be maintained in legal proceedings. Ms Ling set out the legal test to be applied when determining whether the documents fell within the class of documents protected by LPP and referred me to the relevant authorities. She submits that the documents concerned meet the criteria in that, they were confidential documents prepared with the dominant purpose of obtaining legal advice, and/or they formed part of a continuum of the exercise of obtaining legal advice. She referred to the cases of Balabel v Air India [1998] 1 Ch 317 p330D and the speech of Lord Scott in Three Rivers DC v Bank of England (No 6) [2005] 1 AC para 81, R (on the application of Jet2.com Limited v Civil Aviation Authority [2020] QB 10027.**('Jet2.com')** She relies on these authorities for the proposition that documents prepared for communication to a lawyer will be protected by legal advice privilege as long as the person from whom they are communicated is the designated 'client' authorised to communicate with the lawyer.

(8) In respect of the question of whether the respondent has waived protection by disclosing the documents to the claimants in response to the SAR, Ms Ling submits that privilege will not be waived where there is an inadvertent disclosure of a document. She refers to Rawlinson & Hunter Trustees SA & others v Director of Serious Fraud Office (No2) [2014] EWCA Civ 1129 and Anlantisrealm Ltd v Intelligent Land Investments (Renewable Energy) Limited [2017] EWCA Civ 2019 and in addition to the case of London Borough Of Redbridge v Lee Johnson [2011]EWHC 2861 which was a case that also involved the inadvertent disclosure of documents following a SAR. In this case Ms Ling submits, the finding was that documents had clearly been inadvertently disclosed and that there had been no waiver of privilege. The documents in

question were found not to have entered the public domain and confidentiality had not been lost.

(9) Ms Ling submits that the SAR was document heavy and was carried out by people who were not legal advisors. She submits that although care had been taken about what documents were disclosed there was no reason for the respondent to disclose more than it had to and so the disclosure of those documents that could properly fulfil the criteria required for LPP was clearly a mistake. She submits that whilst these documents had been previously examined, the occasion on which this had occurred was for a different purpose i.e. disclosure in response to the SAR. As soon as the respondent became aware of these proceedings it raised the issue of privilege. She submits that privilege is absolute until it is waived and that the case of Redbridge makes clear that delay does not prevent a party from seeking to assert the right attached to the document concerned.

(10) For the claimant Mr Hirst submits that legal advice privilege does not apply to all the emails in the chains referred to. The first is a chain of emails which starts on 4 April and is followed by emails dated 8 April, 10 April and 15 April 2019 between Laura Bales Smith (LBS), and other non-lawyers. Mr Hirst submits that it is manifestly the case that these communications when taken as a whole do not attract legal privilege.

(11) The second chain is made up of four emails dated 31 July 2019 the first to LBS, the second from LBS to the legal mailbox, the third from the legal mailbox (which is fully redacted save for the subject and signature line), and the fourth an email to the legal mailbox and LBS from someone in FTC which provides legal advice. This document has some but not full redaction.

(12) Mr Hirst submits that the first email of 31 July 2019, asserts legal privilege but was not a communication between a lawyer and his client because it came from an officer and was sent to LBS.

(13) Mr Hirst submits that any privilege that attaches to any of the above emails has been waived by the respondent during the process of responding to the SAR. Mr Hirst reminded the Tribunal that the respondent had taken over six months to comply with the SAR and that it was clear from the documents disclosed that the respondent had addressed the task in a careful and considered manner with the assistance of professional advice. He submits that this is evidenced by the fact that there has been full and partial redaction of some of the documents disclosed, and that other documents have been deliberately withheld on reliance of the exemptions provided under the Data Protection Act 2018. He reminds the Tribunal that one such exemption available in withholding documents is that of LPP. Mr Hirst refers the Tribunal to p464-469 of the bundle where he submits the relevant documents have been widely referenced. He submits that it would be a perverse situation where the respondent was able to adjudicate on documents that would not be made available to the Employment Tribunal.

(14) In determining whether these emails should be excluded from these proceedings is it necessary to firstly established whether any of the documents are protected by privilege, and if so, whether the respondent waived such privilege by disclosing them to the claimants in response to the SAR.

(15) In order for privilege to apply to a communication between a client and a lawyer the communication must be confidential and made for the dominant purpose of enabling the client to obtain legal advice or the lawyer in giving legal advice in a relevant legal context. It follows that documents that have entered the public domain cannot by definition be confidential. Privilege will also apply not just to communications where legal advice is given but also to a continuum of correspondence between the lawyer and client keeping each updated and informed. The question of whether legal privilege is maintained in respect of communications sent to multiple addressees, some of whom were lawyers and some who were not was addressed in Jet2.com where Morris J said:

"In my judgment, if the dominant purpose of the email is to seek advice from the lawyer and others are copied in for information only, then the email is privileged regardless of who it is sent to. If on the other hand the dominant purpose of the email is to seek commercial views and the lawyer is copied in, whether for information or even for the purpose of legal advice, then the email in so far as it is sent to the non-lawyer for a commercial comment, but sent to the lawyer for legal advice then, in my judgment the email is not protected by privilege, unless it or the non-lawyer's response discloses or might disclose the nature of the legal advice sought and given"

(16) Morris J went on to find that drafts of documents produced before lawyers were consulted were not privileged even if it were known that in due course legal advice would be taken on the draft, unless, the dominant purpose of the person creating the draft was to seek legal advice on it. In other words if the draft was created by either a lawyer or another, specifically for the purpose of seeking of giving legal advice, then that draft will be privileged. In addition once a lawyer has been instructed for the purpose of obtaining legal advice any communication with the lawyer and non-lawyers on the matter will be privileged if it discloses or is likely to disclose the nature and content of the legal advice sought and obtained.

(17) The findings of Morris J were upheld on appeal (Civil Aviation Authority v R (on the application of Jet2.com) 2020 EWCA civ35 CA, ('Jet2'). In as far as there were multiple addressee emails Hickinbottom LJ set out the following approach:

(i) *As I have indicated, the dominant purpose test applies to LAP. As I have indicated (para 67 above)*, *although the general role of the relevant lawyer may be a useful starting point (and may in many cases in practice be determinative) the test focuses on documents and other communications and has to be applied to each such*

(ii) *In respect of a single, multi-addressee email sent simultaneously to various individuals for their advice/comments, including a lawyer for his input, the purpose(s) of the communication need to be identified. In this exercise, the wide scope of 'legal advice' (including the giving*

of advice in a commercial context through a lawyer's eyes) and the concept of "continuum of communications" must be fully taken into account. If the dominant purpose of the communication is, in substance, to settle the instruction to the lawyer, then subject to the principle set out in (Three Rivers (No5) see para 47 and following above), that communication will be covered by LAP. That will be so even if that communication is sent to the lawyer himself or herself by way of information; or is part of a rolling series of communications with the dominant purpose of instructing the lawyer. However, if the dominant purpose is to obtain commercial views of the non-lawyer addressee, then it will not be privileged, even if a subsidiary purpose is simultaneously to obtain legal advice from the lawyer addressee(s)

(iii) The response from the lawyer, even if it contains legal advice will almost certainly be privileged, even if it is copied to more than one addressee. Again, whilst the dominant purpose test applies, given the wide scope of "legal advice" and "continuum of communications", the court will be extremely reluctant to engage in the exercise of determining whether, in respect of a specific document or communication, the dominant purpose was the provision of legal (rather than non-legal) advice. It is difficult to conceive of many circumstances in which such an exercise could be other than arid and unnecessary.

(iv) There was some debate before us – as there is in the textbooks (e.g. in Hollander (see para 91 (iii) above) – as to whether multi-addressee communications should be considered as separate bilateral communications between the sender and each recipient, or whether they should be considered as a whole. My preferred view is that they should be considered as separate communications between the sender and each recipient. LAP essentially attaches to communications. Where the purpose of the sender is simultaneously to obtain from various individuals both legal and non-legal advice/input it is difficult to see why the form of request (in a single multi-addressee email on one hand, or in separate emails on the other) in itself should be relevant as to whether the communications to the non-lawyers should be privileged. That is not to say of course that the form may not, in some cases reveal the true purpose of the communication e.g. it may appear from the form of the email that the dominant purpose of the email is to settle the instructions to the lawyer who has merely been copied in by way of information, or to the contrary that the dominant purpose of sending the email to the non-lawyers is to obtain their substantive (non-lawyer) input in any event.

(v) In my view there is some benefit in taking the approach advocated by Hollander (at para 17-17) namely to consider whether, if the email were sent to the lawyer alone, it would have been privileged. If no then the question of whether any of the other emails are privileged hardly arises. If yes then the question arises as to whether any of the emails to the non-lawyers are privileged because (e.g.) its dominant purpose is to obtain instruction or disseminate legal advice.

(18) Once legal advice privilege is established it will extend to all communications relating to the matter between the lawyer and their client, even where legal advice is not specifically sought or given and, the term legal advice should be be construed broadly (Balabel and anor v Air India 1988 2 All ER 246 CA).

(19) In considering each of the emails in turn I have regard to the nature of the privilege which might attach to these documents. It is clear in this case that any advice sought is for the purpose of dealing with an internal matter only, and cannot therefore attract litigation privilege as there is no evidence that adversarial litigation was anticipated by the respondent at that time. In addition I note that the legal advice sought is from in-house lawyers who will have existing relationships within the respondent and I also note that there has been reference in the evidence produced to a policy in place which provides for the 'types' of employees who are authorised to seek legal advice from the in-house lawyers.

(20) The respondent accepts that the email at p242 of the bundle of documents prepared for the purposes of this hearing and dated 4 April 2019, is not privileged. The next email is dated 8 April 2019 (p241) and although the identity of the author of the email is redacted it is accepted that this is an email from Captain Napp to LBS. Neither party is a qualified lawyer and whilst it may be that the writer intended the document to be confidential as between themselves, if the document was not created for the dominant purposes of obtaining legal advice it cannot be protected. I note that the first line of that email reads:

"*Further to my last email, grateful if you could offer some context and agree our proposed way forward"*

(21) The content of the email asks for clarity on procedural matters including, but not limited to, whether the author would be authorised to obtain legal advice directly from the respondent's lawyers or whether he would need to go through LBS. It then goes on to set out the proposed way forward in dealing with the complaint, based on the information he already has. Whilst the email is signed off "*Grateful for your thoughts and any legal advice"* it is clear that any advice given by LBS would not be privileged as she is not qualified to give legal advice for the purpose of attracting legal advice privilege. I find that this email falls far short of meeting the criteria needed to attract legal advice privilege or that it has demonstrated that the dominant purpose of the communication was to seek legal advice. It is a communication between two colleagues about the proposed handling of an internal matter, and an enquiry from the author as to the process to be followed in obtaining legal advice from a qualified lawyer. It is not a document protected by legal advice privilege and can be relied upon by the claimants if relevant to the issues to be determined by the Tribunal at the final hearing.

(22) The response from LBS of 10 April 2019 reads only *"We need to chat call me when you get back".* This is not a communication between a lawyer and client, it is not a continuum of correspondence of that nature and it is not written for the dominant purpose of obtaining or giving legal advice. It is not protected by legal

advice privilege because it fails to meet the criteria needed for such protection and the claimants can rely on this document if relevant to the issues to be determined by the Tribunal.

(23) The next email is dated 15 April 2019, (p239) is from Captain Napp addressed to a multi-user legal omailbox. It is not disputed that Captain Napp had authority to seek advice from the respondent's lawyers, and the email of 8 April 2019 is indicative of the fact that it is likely that he would have fallen within the category of the 'type' of employee who was authorised to obtain legal advice from the respondent's in-house lawyers. This then is a communication that is from a client to his legal advisor. I find the fact that it is sent to a general legal inbox does not detract from that relationship as only those working within the legal department would have had access to the mailbox. The fact that non -lawyers would have access to the mailbox would not strip it of its confidential nature if their access to the email was authorised. I consider that such an arrangement would be akin to a pool of secretaries, paralegals and lawyers working in a large department in a firm of solicitors that had its own departmental inbox. Such practices are not uncommon in todays' working environment and all those with authorised access are aware of their duty of confidentiality to the workings of the department in which they work. It is quite clear from the content of this email than the dominant purpose of the same was to seek legal advice and the criteria required to attract legal advice privilege is met i.e. it is confidential communication between a client and lawyer with the dominant purpose of obtaining legal advice.

(24) The question is whether by copying in other non-lawyers to the email the document loses the protection it would otherwise have been afforded. This was a matter that was addressed in Three Rivers DC & ors v The Governor & Company of the Bank of England (No 5) and more recently by LJ Hickinbottom in Jet2.com.

(25) The Jet2 case confirmed that it should be possible for an 'employer' to share privileged advice where its 'employees' need it for the purpose of their work without losing privilege, as long as there is no loss of confidentiality. The approach to be taken in determining whether privilege attaches to such emails is set out at paragraph 17 above. As set out above, I find that the email from Captain Napp to the legal inbox to which it is addressed, is clearly intended to be of a confidential nature and has been written with the dominant purpose of obtaining legal advice. The recipients who are copied into this email are for the most part redacted, however, LBS is one of the parties copied in and it is clear from the evidence before me that she plays an integral role in the matter on which legal advice is sought. In the circumstances I find that this email has been copied in to the other recipients with a view to keeping them informed of the advice sought and obtained so that they may use that advice for the purpose of the work in which they are engaged, i.e. dealing with the internal issues raised in the email of Captain Napp. I find it is clear from that authority in Jet2.com, that privilege attaches not only to the document from the lawyer containing the advice but also to communications that pass on that advice from the lawyer to others who will need to consider or apply the advice received. I

find that confidentiality was not lost and the email is protected by legal advice privilege.

(26) The next chain of emails starts at 01.18hrs on 31st July 2019 (p244). It is an email from Lt. Colonel Hetherington to LBS and is headed "REQUEST FOR LEGAL ADVICE". The communication contains a rider at the beginning which reads *"Although directed to you, I deem this to be a privileged conversation seeking legal advice, I just don't know which 6XX LEGADS you wish to use for this case hence forwarding to you*".

(27) It is the claimant's case that this first email of 31 July 2019, cannot attract legal advice privilege because it is not between a lawyer and a client. It is between what could possibly be seen as a 'client' and LBS. The respondent disagrees with this proposition and maintains that the email is protected because it satisfies the dominant purpose test.

(28) It is clear from the content of that email that the dominant purpose of its creation was to seek legal advice and the reason why it was sent via LBS is also clear, she was the one with the direct line to the in-house lawyers. I find that this is entirely different to the facts in Three Rivers (No 5) where a separate department was set up by the bank to send information to external solicitors appointed by the bank. This is a document that was specifically created with the only purpose of obtaining legal advice from the inhouse lawyers and that LBS was in a role akin to that of a secretary. I find this email meets the criteria needed to attract protection from legal advice privilege.

(29) The question is whether when LBS forwarded the email to the in-house lawyers and copied in the disciplinary team the document lost its confidential nature and therefore its protection. In carefully examining each of the subsequent emails and applying the approach in Jet2.com I find that the disciplinary team formed part of the core group of clients that would rely on the legal advice given in response to Lt Col Hetherington as they would also have input into what was essentially a disciplinary process. Their inclusion has not detracted from the core purpose of the document. The email from LBS to the legal inbox also meets the criteria for legal advice privilege as it is a request for legal advice from the in-house lawyer. There is then a response from the legal mailbox at 11.34am which is fully redacted (presumably because the person disclosing it recognised it as legal advice from a lawyer). A further response at 13.39 which is not redacted is clearly a comment about the issue that is the subject of legal advice and discloses the nature of the advice given or sought,

(30) In respect of this second chain of emails I find that viewed bilaterally between the sender and each recipient, the dominant purpose of each email within that chain was giving or seeking legal advice and commenting on thereon as a continuum of that communication.

(31) The Jet2 case also confirmed that it should be possible for an 'employer' to share privileged advice where its 'employees' need it for the purpose of their

work without losing privilege, as long as there is no loss of confidentiality. I find it is clear from that authority that privilege attaches not only to the document from the lawyer containing the advice but also to communications that pass on that advice from the lawyer to others who will need to consider or apply the advice received. The recipients of the emails I have found to be protected formed part of the core client group in this matter in that they were all involved in the process and application of the issue on which legal advice was sought. The advice was needed to enable them to either carry out their role or provide input in relation to the matter. Confidentiality was not lost and the document chain of 31st July 2019 all remained protected by legal advice privilege.

Waiver

(32) It is the claimant's position that any right to privilege attached to the documents has been waived, not only by their disclosure in response to the SAR but also that the confidential nature of the documents was lost when they were referred to during the handling of the Service Complaint and that they are now at large within the respondent. Mr Harris referred to p464-469 to demonstrate the fact of the reference to these emails. It is noted that the witness statement the Tribunal is referred to is dated 10 August 2021 some 7 months after the claimant was put on notice that the respondent considered the documents to be protected by legal advice privilege.

(33) It is the respondent's case that privilege is absolute until waived and that there is no authority for the proposition that documents referred to 'in-house' as here, would amount to a waiver.

(34) The Tribunal first has regard to the process by which these documents came to be disclosed to the claimant. It also has regard to the background of the SAR and the fact that initially the Data Protection Team were told to withhold documents on the basis that they fell within the exemption 'management forecast'. Those investigating the claimant's complaint about the handling of his request took advice from both the respondent Data Protection Team and the MOD's central Legal Services. There is no evidence that the MOD's central Legal Services continued beyond this initial complaint.

(35) The claimant's complaint into the handling of his SAR revealed that the respondent had incorrectly relied on the 'management forecast exemption' contained in paragraph 19 of Schedule 2 of the Data Protection Act 2018.The claimant was informed of this finding and some but not all the class of documents he requested were disclosed. The Tribunal note that the reason for the delay in the disclosure under the SAR were for reasons which related to the Service Complaint and that the delay was not as a result of prolonged inspection of the documents before disclosure by the respondent.

(36) The documents which are the subject of this application were disclosed to the claimant in October 2019. The respondent argues that the documents were disclosed for a purpose other than these proceedings and therefore privilege in these proceedings has not been waived. I have not been told of any instruction

to the claimant about the basis on which the documents were disclosed under the SAR, or that they were disclosed on a limited basis. It is the respondent's case that there were unintentionally disclosed and that as soon as it came to the notice of lawyers instructed by the respondent in these proceedings, action was taken to have them excluded. The Tribunal has regard to State of Qatar v Banque Havilland SA & others [2021] EWHC 2172, and that the absence of an express waiver clause is not necessarily fatal. The question of whether there has been a general waiver will depend on all the circumstances of the case including what each party must have reasonably understood.

(37) Before considering this part of the application I remind myself of the circumstances in which a party may lose privilege, one of which may be an inadvertent or unintentional disclosure of documents. The question of whether privilege has been waived will depend on the nature of what and how much has been revealed and the circumstances in which it is revealed. I have regard to the fact that the disclosure of the emails relevant to this application were not disclosed for the purposes of these proceedings. They were disclosed in response to a SAR made by the second claimant. It is also clear from the documents that the emails contain requests for legal advice, or comments from the disciplinary team, as opposed to the legal advice itself which has been fully redacted.

(38) The Tribunal accepts that documents can be disclosed by mistake and that in this case the respondent was not required to disclose anything more than that which it was obliged to disclose.

(39) In looking at the documents that I have found attracted protection under legal advice privilege (p239, p243 & both documents at p244), I note that there has been a consistent approach taken to redaction, albeit it may not have been a correct approach. Taking them in date order the email of 15 April 2019 appears to have been considered from a basic GDPR approach with only the identity of the author and some recipients redacted. It would appear that little or no thought has been given to the content of that communication or whether it may or may not fall within one of the exemptions provided under Schedule 2 DPA 2018. That same approach was taken in respect of the emails of 4th 8th and 10th April 2019, although for the reasons set out above I found that they were not protected documents.

(40) Turning to the second chain of emails, much of which I have found are protected by LAP. The first email of 31 July 2019, makes clear it is a request for legal advice but is not addressed or cc'd to the respondent's legal team. Only the identity of the author is redacted from this email. The second is from LBS to the legal and disciplinary team with the subject headed 'request for legal advice'. Once again only the identities of the recipients have been redacted together with some effort to remove the identity of the author – albeit with limited success. As with the previous email nothing is redacted from the content of the email. The third email is of 31st July at 11.34. There is no attempt to remove the identity of the author, which is the respondent's legal department, or the recipients but the content of this email has been fully redacted. It is noted that this email is a response to the previous email asking for legal advice. I note

the difference is that the response comes from the legal department so would be easily identifiable to the employee charged with disclosing the documents, as legal advice. The last email of 31 July 2019, forms part of the chain originating in the second email and is providing an input into the matter from Headquarters. Again the only attention this document seems to have attracted, even though it has the same subject heading as the previous email, is the removal of the identity of the author and recipients other than LBS. Although I have not been addressed on why the name of LBS has not been redacted I assume it is because the team making the disclosure have been told her name does not need to be redacted.

(41) Given the content of these emails and the manner in which they have been treated for the disclosure under the SAR, I accept that the documents were disclosed by mistake. I make this finding because the only email that has been fully redacted is the one from the legal department itself. The approach taken by the person carrying out this exercise is mistaken and it follows that the documents were mistakenly or inadvertently disclosed. The Tribunal notes that the claimants have stated they have experience in the area of legal advice privilege (p274), however given that the Court of Appeal Decision in Jet2 did not confirm the position in respect of the dominant purpose test or multi-addressee emails until January 2020 it may be that they were not immediately alerted to the possibility that the documents attracted legal advice privilege.

(42) The Tribunal accepts that once the respondent became aware of the content of the claimants' claims before the Employment Tribunal and the emails on which it intended to rely, it brought the matter to the attention of the employment tribunal and the claimants on 29 December 2020.

(43) The Tribunal has regard to the claimants' argument that confidentiality has been lost in these documents because they have been widely referred to and are therefore, as Mr Hirst put it, 'widely referenced in the service complaints'. In support of this submission Mr Hirst refers to p464 – 469 of the bundle which is part of the second claimant's witness statement. This statement is dated 10 August 2021, which is some seven months after it was brought to the attention of the claimants that the respondent would seek to rely on the protection afforded to these documents by legal advice privilege.

(44) In determining whether or not protection has been waived by the respondent it is important to have regard to the way in which waiver is said to have taken place and the means by which these documents are now said to have lost confidentiality because they alleged to now be at large within the respondent. I also have regard to the submissions of Ms Ling and the decision in the case of Redbridge.

(45) I find that the issue of the service complaint was an internal matter, the content of which would be confidential as between the parties and those involved in dealing with the case. To the extent that there could have been any loss of confidentiality in respect of these email communications, it would be implicit that any waiver would be for limited purposes only and not for general distribution to the respondent or public at large.

(46) In addition to the reference to these documents in the claimant's witness statement of 10 August 2021, I also note that the first claimant disclosed copies of these document in the letters she wrote to The Chief of Defence Staff General Sir Nicholas Carter on 2 March 2020 and Sir Stephen Lovegrove the Permanent Secretary to the Ministry of Defence. I am not aware if either of these recipients responded to the claimant but I note the seniority of the position they each hold within the respondent. The purpose of the disclosure of the documents by the claimant would appear, from reading the letter, was to bring to their attention the circumstances of matters which were internal to the respondent and ask for their assistance. The documents were not disclosed outside the Ministry of Defence and given the position and seniority of the recipients of the documents it is more than likely that they would have been alert to the need for confidentiality.

(47) Having considered all the circumstances of this case and the context in which the documents were both created and disclosed to the claimant, I find that those documents I have found are protected by legal advice privilege, i.e. the email of 15 April 2019 and the emails of 31 July 2019, were mistakenly disclosed to the claimant in response to the SAR and as such have not lost their protection. The documents were clearly subject to the legal advice privilege exemption set out in Schedule 2 DPA 2018 and the respondent was not obliged to disclose them. It is evident from the way in which these documents were treated by the individual carrying out the disclosure exercise that a mistake was made and as soon as the respondent's legal advisors became aware of the situation it took steps to remedy the matter.

(48) I have also considered the treatment of these documents since they were disclosed in response to the SAR and the extent to which their confidential nature may have been lost. In doing this I have regard to the purpose for which their protection is now relied upon as opposed to the purpose for which they were originally inadvertently disclosed. Whilst there has been some extended disclosure of these documents outwith the email chains mentioned above, I find that, to date that has occurred only in respect of the service complaints. Consequently, it is only those employees within the respondent that have direct involvement with the complaint that have become aware of them and, given the sensitivity of such matters, would know of the need for the maintenance of confidentiality. The first claimant has also sent copies to the Chief of Defence and Permanent Secretary to the Ministry of Defence, but given the senior positions held by both recipients, there can be little doubt that these will have been received on a confidential basis.

(49) Considered in the round I am not satisfied that the protection afforded to these communications through legal advice privilege has been waived and the respondent is entitled to rely on that protection in excluding the documents from evidence before the Tribunal.

Employment Judge Sharkett
DATE: 29 November 2021

SENT TO THE PARTIES ON
2 December 2021

FOR THE TRIBUNAL OFFICE

(1) Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.

(2) Under rule 6, if this Order is not complied with, the Tribunal may take such action as it considers just which may include (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rules 74-84.

(3) You may apply under rule 29 for this Order to be varied, suspended or set aside.