



EMPLOYMENT TRIBUNALS

Claimant: Mrs C Whitfield

Respondent: CVS Commercial Valuers and Surveyors Limited

HELD AT: Manchester

ON: 10 October 2016

BEFORE: Employment Judge Feeney

REPRESENTATION:

Claimant: P Hodges Solicitor

Respondent: R Rees Consultant

JUDGMENT having been sent to the parties on 13TH October 2016 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Issues

1. This preliminary hearing was listed in order to decide whether or not the respondents were entitled to refuse disclosure of certain documents (currently numbered 1 to 37 on exchange of lists) on the basis of litigation privilege. The respondents are a organisation giving legal and human resources advice to a large number of businesses. They have a legal services department which employs people who are qualified solicitors but they were not able to employ them as solicitors due to the SRA rules preventing the employment of solicitors in non-regulated companies having conduct of matters therefore they employed qualified solicitors as Consultants and they were treated as lay representatives at the Tribunal.

2. The hearing was therefore to consider whether or not the respondents could legitimately claim litigation privilege. At the hearing however the respondent indicated that they also wished to claim Legal Professional Privilege.

3. The respondent gave evidence by Ellen Singer who is a professional Support Manager within the legal services department at the respondent's business, she looked into this matter beginning with August 2014 as she was aware that one of the respondent's competitors Citation held out their employed solicitors as solicitors within their advice department and she wished to look into whether or not this was a breach of SRA rules.

Legal and Regulatory Framework

Litigation Privilege and Legal Advice Privilege

4. In the Civil Courts documents and other communication are privileged on disclosure on the grounds of legal professional privilege in two types of situation. First, communications passing between the parties legal advisors are privileged provided they are confidential and were made for the purposes of obtaining or giving legal advice (legal advice privilege). They encompass but are not limited to communications made with reference to litigation that is pending or contemplated. The second situation concerns communication between a party or his legal advisors a third party (litigation privilege). The privilege here is more limited in that such communications will only be free from disclosure if they are made for the purpose, either of existing or contemplated litigation. The term legal advisor in this context means a properly qualified lawyer, a solicitor, a barrister or salaried legal advisor. It has been debated as to whether it should be extended to unqualified advisors, particularly in the Employment Tribunal in order to discourage unnecessary legalism however at present that rule still remains.

5. Of further relevance is the rules of the Solicitors Regulatory Authority, in particular the professional frame work agreement. Rule 4 relates to in house practice, 4.1 says

"if you are a solicitor REL or RFL conducting in house practice:

(a) you must not act for clients other than your employer except in the circumstances in 4.4 to 4.26 (all of which are subject to 4.1(b) and 4.2) and where you are able to act without compromising the principles or your obligations under the SRA code of conduct.

(b) nothing in this rule permits any person to conduct reserved legal activities in circumstances where to do so would require authorisation under LSA and you must satisfy yourself that any such authorisation is in place before conducting such activity".

4.2 Indemnity

In order to act for a client other than your employer under Rule 4.10, 4.14, 4.16 and 4.19 you must have professional indemnity insurance cover.

4.14 If you are employed by a commercial organisation providing a telephone legal advice service you may advise persons making enquiries of that organisation, provided

- (a) the advice comprises telephone advice only together with a follow up letter to the enquirer when necessary;
- (b) you are satisfied that there is indemnity cover reasonably equivalent to that required under the SRA Indemnity Insurance rules and
- (c) you do not undertake any reserved legal activities".

6. The guidance notes say:

"(1) This rule applies to you if you are a solicitor or REL working in an in house practice which is generally when you are working otherwise than through a regulated legal practice such as an authorised body or an authorised non-SRA firm however these provisions also apply if you are a solicitor REL or RFL when working in the licensed body or an authorised non-SRA firm but are doing work for example for the firm itself which is outside the scope of the firm's own authorisation.

- (2) The general principles subject to limited exceptions is that your employer itself will need to be authorised if in your capacity as an employee and as part of your employer's business you wish to provide reserved legal services to the public (LSA Section 15(4)). The provisions of 4.4 to 4.26 regarding acting in an in house capacity for clients other than your employer are subject to the provisions of the LSA which may nonetheless require your employer to obtain authorisation for examples members of an association may be "a public or a section of the public" for the purposes of the LSA

7. I was also referred to the cases of Scotthorne -v- Four Season Conservatories (UK) Limited 2010 EAT where McMullen J stated "at that stage it could be said there was legal litigation privilege, any earlier stage attracting legal advice privilege is fraught with difficulty in the light of the respondent's concession that some of the RBS mentor team are not qualified lawyers. There is a qualified lawyer and any advice given by him is protected by legal advice privilege. The real issue in this case is litigation privilege. I would be inclined to consider that in the light of what was believed by the respondent to have gone off on 21st April 2009 the purpose of consulting RBS Mentor was litigation. In the context of the 2004 regulations steps which might lead to dismissal and litigation were being considered".

8. This was a case where there had allegedly been a very heated face to face confrontation between a manager and the employee which ultimately resulted in the employee being dismissed and the respondents had sought advice at an early stage following the initial encounter from RBS Mentor.

9. McMullen went on to say "the description of the confrontation from the notes of the hearing indicates gross misconduct, it would not surprise me that there was then a decision to consult RBS Mentor about what to do about this. The natural

response of an employer faced with gross misconduct would be dismissal carrying the risk of litigation It would not surprise me that advice was taken at that stage for the dominant purpose of avoiding litigation or about how to handle matters which could well lead to litigation ... it was given for dominant purpose of litigation which could well ensue in the light of what the respondent told RBS Mentor about the altercation with the claimant. We were also referred to United States of America and Philip Morris Incorporated and Others and British American Tobacco (Investments) Limited 2004 Court of Appeal and Rawlinson and Hunter Trustees SA and Others -v- Ackers and Another Court of Appeal 2014 as particular referred to in paragraph 13 of that judgment which says "for a communication to be subject to litigation privilege it must have been made with a dominant purpose of being used in aid of or obtaining legal advice from a lawyer about actual or anticipated litigation. Where litigation has not been commenced at the time of the communication it has to be reasonably in prospect, this does not require the prospect of litigation to be greater than 50% but it must be more than a mere possibility. The burden of proof is on the party claiming privilege to establish that the dominant purpose test is satisfied ..."

10. The issue here is whether the notes of a solicitor working on the respondents advice line are protected by either or both the privileges, the respondent not being a regulated LSA body

Findings/Evidence

11. Miss Singer took advice from the Solicitors Regulatory Authority. On 30 September 2014 Miss Singer had sent an email to the SRA explaining the respondent's organisation as follows:

"Employment Advice Service

This is a telephone advice providing advice for our clients in connection with employment law matters. The advice is primarily by telephone and is generally HR management advice but in line with employment law and help clients to bring a matter to conclusion pre-litigation. This could include advising clients on what to put in letters including phrasing and reviewing letters to conclude that they are in keeping with established case law and procedures, as well as providing template letters for clients to adapt, whilst this is done primarily by telephone this can be confirmed in writing, most commonly by email or may be providing in that form particularly for clients who have difficulty in managing this with only telephone support.

Legal Services

This department assists with matters that have reached the Tribunal stage or are in an early conciliation, the initial stages of the work within the department consist of discussing matters with clients by telephone and email in order to prepare a Tribunal response. Once a response is submitted the case is handed over to another Consultant who prepares the case for hearing up to and including representation. We represent at Employment Tribunals and at the EAT, neither of which have restrictions on rights of audience or who can

appear before them as a representative. The work carried out within Legal Services falls into two main categories - insured and non-insured. We are the approved legal provider for Irwell Insurance who provide the policy cover that is on offer to our clients through ourselves, our clients are not obliged to take out this insurance, we are regulated by the FSA in respect of the sale of the insurance product. Our clients are the insurance policy holder. Where a client has met the terms of the insurance then we are approved by Irwell to carry out the case on our client's behalf and the legal expenses are met by the insurers. Where a case is not insured we carry it out in house on a pro bono basis for our clients. Early conciliation work is also carried out on a pro bono basis, this work is primarily telephone based.

We would like to know if we can employ people as solicitors in either of the departments carrying out any of the work while not being an SRA regulated company provided that they have valid practising certificates. We carry professional negligence insurance in respect of our employees.

Reserved Legal Activities

We would also like to confirm whether or not any of the work we do in either department constitutes reserved legal activities, we believe that reserved legal activities would only potentially apply to the work of a legal services department but we are not sure if it meets the definition because work before the Employment Tribunal does not require rights of audience and there is no restriction on the person entitled to carry out this activity, we believe that these would therefore constitute excluded activities in accordance with Schedule 2 at points (3.2) and (4.2)."

She sent a further email explaining that the consultants 'did not take things through' from initial advice to tribunal. In this case we were concerned with an employed solicitor working on the Advice Service.

12. The reply from the SRA on the 1st October 2014 was as follows:

"I understand your organisation has two departments, Employment Advice Service (EAS) and Legal Services (LS). You would like to know whether the consultants employed in each department can be held out as solicitors. I understand you are regulated by the FCA in respect of selling insurance products, you offer insurance policies to your clients to cover any Tribunal work, if they accept the insurance offer and meets the terms of the insurance I understand you carry out the case on behalf of the client. You confirmed the client is the insurance policy holder. On the telephone we briefly discussed Rule 4 of the PFR in particular rules 4.10, 4.13 and 4.14. The following options are available to you:-

EAS Department

The EAS department can operate as an in house legal team under Rule 4.14 of the PFR and in the circumstances the Consultants can be held out as solicitors on the basis they comply with the conditions set out in that rule and

they have current practice certificates. Please note the solicitors working under this rule must provide a telephone legal advice service in accordance with Rule 4.1, 4.2 and of course 4.14.

LS Department

The consultants in the LS Department cannot operate as solicitors because they do not fall within any of the acceptance within Rule 4 of the PFR. You felt that 4.13 of the PFR may be applicable because the work LS does would be funded by an insurance company, we do not think the LS Department would fall under this rule because your client is the policy holder and the employer is your organisation which is not an insurance company. You also suggest 4.10 of PFR, you indicate the work would be done on a pro-bono basis if the client was not insured. Rule 4.10 would not be option because your organisation would be providing services under Rule 4.14. Please refer to rule 4.11 which refers to this point. We have considered the possibility that the LS Department operates as a team of Employment Consultants who provide legal advice to the members of the public. They can do this as long as they do not conduct reserved legal type activity of work and do not hold themselves out as solicitors whether explicitly or in implicit terms. This is subject to the comments regarding a separate business below.

Chapter 12 the SRA Code of Conduct 2011

If there is movement of staff between the departments then there may be a problem. This is because of the separate business rule, outcome 12.1 of Chapter 12 of the SRA Code of Conduct states that

"you do not:

- (a) own; or
- (b) actively participate in, separate business which conducts prohibited separate business activities".

If the Solicitors in the EAS department also work in the ES department they will be caught out by outcome 12.1 ... if the departments are strictly separate Chapter 12 may not be an issue. Please note that a solicitor working in the ES department as a practising solicitor cannot also work or supervise work for the LS department

Reserved legal activity

Finally with regard to the issue of reserved legal activity I have consulted practice and advise with the Law Society on the issues of individuals having rights of audience before a Tribunal. I was advised that a client can instruct an individual of their choice and this was not restricted to a Barrister or a Solicitor however they could not confirm whether this was also applicable to the Appeal Tribunal".

13. Ms Singer's evidence was that following this advice she worked with her colleagues in the Employment Advice Department to ensure that the manner in which any solicitors employed on the advice line worked was in compliance with the restrictions i.e. telephone advice with written contact being restricted to confirmation and follow up of that advice. The respondents also provided evidence that the solicitor involved in the correspondence in this case that was subject to the application was Rebecca Ashton and that she was a Practising Solicitor and they also provided the disputed correspondence for me to read.

14. The claimant submitted that the respondents initially claimed legal professional privilege and litigation privilege, the respondent had not made this clear before but had I not allowed them to argue this today the hearing would have to be re-arranged which was not in anybody's interest. In relation to legal professional privilege the respondent relied on Rebecca Ashton and the correspondence with the SRA which established that she could claim legal professional privilege.

15. Ms Singer also gave evidence under cross examination that they had made it clear that the solicitors on the advice line giving advice would not have face to face meetings with clients.

Respondent's Submissions

16. The respondents refer to the Scotthouse case where the Judge assessed the disputed documents and made a ruling as to whether it was covered by privilege or not. The respondent claimed legal professional privilege regarding the whole 37 pages. There was a telephone log and advice recording the exchanges by Rebecca Ashton and the respondent company.

17. Regarding litigation privilege R submits that at the time of the documentation the dominant purpose was to advise regarding litigation and that there was a real prospect of litigation. The Judge has to identify the point in time when litigation becomes a dominant purpose. The documents provided went up to the ET proceedings brought by the claimant, and discussed the specific situation regarding the claimant. The respondent claimed litigation privilege from 8th February.

Claimant's submissions

18. The claimant submitted that insofar as any documents were templates they believed that took the respondent outside 4.14 because the rule is very narrow in respect of legal professional privilege. In respect of litigation privilege they disputed that the dominant purpose of the document before notice of termination was given that that could have been in contemplation of litigation. They also doubted that the advice was limited to telephone advice and confirming telephone advice.

Conclusions

19. Having viewed the documents I agreed that litigation privilege applied from the 8th February, obviously I cannot go into more detail as to how I reached this conclusion without revealing the contents of the documentation. I was satisfied that

there was a real possibility in the client and advisors mind that the issue could be litigated and advice was required to prevent or manage that.

20. In relation to legal professional privilege considering Rule 4.14 I agree this applies also as the respondents made clear to the Solicitors Regulatory Authority that work was being done included template letters, that the respondent had been careful to keep within the parameters set out by the SRA, that no litigation activities in relation to the actual case were taken on by the solicitor involved and that the work did comprise specifically telephone advice and the only written material was confirming that advice.

Employment Judge Feeney

Date 24th August 2018

REASONS SENT TO THE PARTIES ON

29 August 2018

FOR THE TRIBUNAL OFFICE

[JE]