EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4100378/2017

Held in Glasgow on 18 September 2018

Employment Judge: Rory McPherson

Ms G Campbell — **Claimant**
Represented by:
Mr W McParland - Solicitor

Addaction — **Respondent**
Represented by:
Mr P Brown - Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:

(1) Having considered submissions, the claimant's objection to the relevancy of the respondent's cross examination of the claimant on communications between the claimant and Mr Obi do not succeed; and

(2) The existing Order requiring the attendance of Mr Obi is not revoked.

REASONS

Introduction

Preliminary Matters

1. This Preliminary Hearing was appointed following upon an objection by the claimant, on the third day of the ongoing Final Hearing of the claimant's claim for Constructive Unfair Dismissal, to any evidence being led relating to communication between Mr Edward Obi (Mr Obi) who was the claimant's

adviser and the claimant on the basis that such communications are privileged.

2. At the conclusion of the claimant's evidence in chief on the morning of the second day of the Final Hearing, her solicitor indicated that he reserved the claimant's right to seek to be recalled as a witness to give evidence at a later date, in the event that the respondent insisted upon calling Mr Obi to give evidence and it was considered necessary.

3. The respondent, through their solicitor has indicated that a decision to call Mr Obi to give evidence would be dependent on their consideration of the claimant's evidence including that given in cross examination. Cross examination of the claimant commenced on the afternoon of the second day of the Final Hearing, it has not however concluded and while the cross examination continued through to the latter part of the morning of the third day of the Final Hearing, discussions thereafter took place which culminated in the appointment of this Preliminary Hearing.

4. As background, this claim, (the ET 1) was presented on 23 February 2017. Mr Obi of Deux Consulting Limited was identified as the representative. The response, (the ET3) was presented 6 April 2017.

5. A previous Preliminary Hearing took place on 18, 19 and 5 March 2018 (the March Preliminary Hearing) to determine an application by the respondent for strike out of the claimant's case, a deposit order against the claimant and an application for a wasted costs order against Mr Obi under Rules 37(1), Rule 39 and Rule 80 of the first schedule to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the 2013 Rules).

6. Evidence was heard at the March Preliminary Hearing from the claimant, Ms Pamela May, an HR Operations partner with the respondent and from Mr Obi who was not represented, but confirmed that he had taken legal advice before preparing a document headed "Response from Deux Consulting".

7. Certain Findings of Fact were made in the Judgment dated 26 March 2018 and sent to the parties 4 April 2018 and, so far as broadly, relevant to this Preliminary Hearing these are summarised below for ease:

a. Mr Obi is a director of Deux Consulting Ltd, a business which gives HR advice to small and medium sized businesses.

b. Mr Obi had acted as a non-solicitor representative of the claimant after the claimant was introduced through a friend.

c. The claimant resigned from her employment with the respondent on 5 January 2017 by letter (although no specific findings of fact were made regarding content it is contained in the Final Hearing joint bundle).

d. The claimant was engaged by Deux Consulting Ltd from February 2017 to assist in the start-up of an office in Glasgow. The only payment she received from Deux Consulting during the period of her engagement was the reimbursement of the cost of a parking fine in the sum of £50.

e. The claimant attended three networking events on behalf of Deux Consulting. The cost of the attendance of the claimant at those networking events was paid for by Deux Consulting Ltd.

f. Mr Obi acted as the claimant's representative until he informed the Employment Tribunal that he had withdrawn from acting on 4 October 2017.

g. Further findings of fact within the March Judgment relate to some of Mr Obi's actings in relation to the claimant against the background of the specific applications before the Tribunal, in particular the Tribunal concluded in relation to the wasted cost application, that while Mr Obi had acted as a representative of the claimant, there was no evidence

that he was acting in pursuit of profit for the purposes of Rule 80 (2) of the 2013 Rules.

8. The Tribunal issued judgment refusing each of the respondent's applications on 26 March 2018 and it was sent to the parties 1 April 2018.

9. No issue was taken at that stage regarding a question of litigation privilege between the claimant and Mr Obi.

10. On 14 June 2018 a Witness Order was granted, on request by the respondent, for Mr Obi to attend the Final Hearing. There being no requirement under Rule 23 of the 2013 Rules to give notice to claimant of the application by the respondent, no such notice was given. The claimant on being notified of the Witness Order, sought by written application revocation of the Witness Order, however that application was refused on review of the written application.

11. At a subsequent Preliminary Hearing on 26 July 2018 (the July Preliminary Hearing) a further challenge was made by the claimant to the Witness Order for Mr Obi's attendance as a witness. This was considered by the Tribunal along with an application by the respondent for an order for emails, correspondence and documents between Mr Obi and the claimant. The respondent did not insist on their request for an Order for Documents. The Tribunal indicated that the Tribunal was not persuaded that it would have been appropriate to grant such an Order for Documents at this Preliminary Hearing. In the Tribunal's Note dated 30 July 2018 following the Preliminary Hearing on 26 July 2017, the Tribunal noted (para 19) *"I indicated that, at this Juncture, I* was *not prepared to revoke the Witness Order for Mr Obi but that the question of whether he is required to attend can be dealt with at the" Final Hearing" I took this view because it became increasingly apparent that the respondent maintains that Mr Obi has evidence that is critical to their argument as to credibility and reliability of the claimant* ..."and at para 20 "...*I am now beginning to form the view that perhaps Mr Obi should not be required to attend at all, but I take the view that I had informed the parties orally on 26 July that I was not prepared to revoke the Witness Order at that stage. It is*

*therefore not appropriate to revoke the Order without hearing further from Mr Brown. Again, and for the avoidance of any doubt, I wish to make it clear that I have not revoked the Order for Mr Obi's attendance but instead have varied it to the extent that he is not required to attend on 6 to 8 August 2018. **

12. No challenge has been notified to the Tribunal by Mr Obi in relation to the Witness Order.

Submissions

13. It was conceded on behalf of the claimant that no issue arises in relation to professional privilege, as Mr Obi is not a solicitor or advocate/barrister. The claimant made written submission supplemented by oral submissions and referred to a number of authorities. The respondent also provided written submission although not in numbered paragraphs. Both parties referred to a number of authorities and I have set these out below.

Submissions for the claimant

14. The claimant broadly argued under 3 specific headings (Relevance, Litigation Privilege and Confidentiality both at common law and what was described as Article 8).

15. On relevance the claimant referred to a decision of Underhill J in HSBC Asia Holdings & one other v Gillespie UK [2011] IRLR 209 (HSBC) and in particular para 13 which the claimant argued summarised the power of the Tribunal to exclude evidence on the grounds that it is irrelevant or insufficiently relevant under 4 hearings;

(i) Evidence which is irrelevant is inadmissible;

(ii) Relevance is not an absolute concept, evidence may be theoretically relevant but nevertheless too marginal or otherwise unlikely to assist the court for its admission to be justified; and

(Hi) The Tribunal is entitled to exercise its judgment as to whether evidence is sufficiently relevant to justify its admission to probation...;

(iv) In many cases, evidence which is inadmissible is insufficiently relevant, and can be disregarded by the Tribunal, but there are cases where there are advantages of economy, practicability or fairness which justifies the Tribunal *"ruling out irrelevant evidence before it has sought to been adduced, and, more specifically in advance of the hearing".*

16. The claimant also referred to O'Brien v Chief Constable of South Wales [200 5] 2 ECA 539 and the comments of Lord Bingham *"Any evidence, to be admissible, must be relevant. Contested trials last long enough as it is without spending time on evidence which is irrelevant and cannot affect the outcome. Relevance must, and can only be judged by reference to the issue which the court is called upon to decide. .."*

17. In addition, the claimant referred to the decision of the Court of appeal in Noorani v Merseyside Tech Ltd [1999] IRLR 184 (Noorani) where a Tribunal was permitted to refuse a witness order (and by extension revoke a witness order) noting the comments of Henry LJ at para 30-31 and at 35- 36.

18. Further claimant argued that, as in HSBC, a number of decisions taken by Employment Tribunals to exclude evidence as insufficiently relevant have been upheld in EAT cases of Kreil v Ransome [2006] All ER (D) 166 (Mar) and Digby v East Cambridgeshire [2007] IRLR 585. The claimant referred to Vaughan v London Borough of Lewisham & Others UKEAT /0534/ 12/SM , (Vaughan) as an example of the Tribunal exercising its discretion to refuse evidence which was prima facie relevant but insufficiently material to the matters at issue. The claimant argued that Vaughan illustrates the principal challenge facing the respondent and which it was suggested could not be overcome, specifically the respondent knows nothing about what discussions

between the claimant and her representative relate to. The claimant argued in conclusion under this heading that the respondent cannot asset in good faith to the Tribunal that the evidence will be relevant and thus there is (claimant submission para 2.12) *"nothing upon which it could base a conclusion that the evidence is relevant and the objection"* (to any evidence relating any communications between the claimant and Mr Obi being adduced) *"should be upheld and the witness order in relation to"* Mr Obi should be *"recalled".*

19. On Litigation Privilege, while conceding that legal advice privilege did not apply to the adviser, the claimant argued that litigation privilege did apply. It was argued that the correct approach is summarised in Starbev GP Ltd v Interbrew Central European Holding BV [2014] All ER (D) 116 (Jan) (Starbev) a decision of Mr Justice Hamblen in the Queen's Bench Division of the Commercial Court and can be summarised as follows;

(i) the burden of proof is on the party claiming privilege to establish;

(ii) the court should scrutinise carefully how the claim to privilege is made out;

(iti) the party claiming privilege must establish that litigation privilege as reasonably contemplated or anticipated rather than being a mere possibility of litigation

(iv) that the communications were for the dominant purpose of either, enabling advice to be sought or given; or seeking or obtaining evidence to be used in connection with such anticipated or contemplated proceedings.

20. The claimant argued that, on any reasonable analysis, the dominant purpose of communications in the period upto and including her resignation between the claimant and Mr Obi was for litigation. The claimant argued that this was not (merely) prospective litigation, Mr Obi was acting in a representative capacity (whether formal or not) and held himself out as such.

21. The claimant argued that the respondent was seeking to elicit evidence without identifying a specific timeframe, as demonstrated by a request for an order for production of documents (which they suggested was refused at the Preliminary Hearing of 26 July 2018). The claimant argued that if Mr Obi provided (any) advice immediately prior to the resignation, then logically such advice and communications at that time must have been with the dominant purpose of litigation as these were initiated shortly after and indeed the resignation letter of 5 February 2017 did not reasonably allow for any inference other than the claimant had sought advice and intended to bring a claim for constructive dismissal.

22. The claimant further referred to the EAT decision of Mr McMullen QC in Scotthorne v Four Seasons UKEAT/0178/10/ZT (Scotthorne) where advice of a non-solicitor adviser (employed by Mentor) was covered by litigation privilege and specifically referred to the EAT comments at para 21. This decision the claimant argued had never been overruled and was binding on this Tribunal.

23. In addition, the claimant argued that there are necessary public policy requirements for such privileges including by reference to what was said to be a predominance of non-solicitors/advocates or barristers providing advice and representation before Employment Tribunal. Further, it was argued that litigation privilege arises by necessity where a party is disclosing sensitive information for an imminent dispute. There is a reasonable expectation that the information will be kept private and this runs in parallel with recent Employment Tribunal policy encouraging early intervention and resolution without the need for protracted litigation. An example, of this approach the claimant argued, can be found in Employment Tribunal Act 1996 at s18A setting out that that communication between a party and ACAS is inadmissible.

24. On Confidentiality, the claimant argued for a general prohibition on recovery of documents prepared in the course of a case and on the release of documents including private information. In support of this proposition, the

claimant referred to McPhail Sheriff Court Practice 3rd edition (McPhail) para 15.54, the opening sentence of which references both a later paragraph in McPhail and Walker & Walker, Evidence 4th Edition (2010) (Walker & Walker) paragraph 10.2.1 - 10.2.7 to which I was not directed. The claimant further argued that the claimant had engaged Article 8 of the European Convention of Human Rights (ECHR) rights. The claimant argued she had reasonable expectation of confidentiality in her communications with Mr Obi.

25. The claimant conceded both general confidentiality rights and Article 8 ECHR rights were not absolute (arguing at 4.4 of the claimant's submissions that this could be contrasted to litigation privilege which was said to be absolute) but *"could only do so where the Tribunal concluded it was absolutely required the production of this information because it could not reach a view on the merits of this case without that information"* The claimant relied on an extract from Noorani and which was subsequently examined in HSBC referring to *"external pressure vitiating its use"* The claimant argued in conclusion that there were 6 vitiating factors (against evidence being adduced of communications between the claimant and Mr Obi);

(a) The discussions took place in a private context;
(b) There were public policy considerations for keeping such discussions open and private;
(c) Evidence of the communications related to collateral matters of credibility rather than factual matters;
(d) The time which would be expended on adducing such evidence was considerable and in oral submission noted that there had been already 3 days of evidence from the claimant;
(e) There was a risk to re-litigating matters addressed in the March Preliminary Hearing.
(f) The best evidence is the parole evidence given by witness in a hearing.

26. The claimant argued that the decision of Lord Glennie in WF Petitioner [201 6] CSOH 27 and in particular paragraphs 28 and 29 supported the claimant's position that recovery is only justified where the court is satisfied "that it is in

the interests of justice" and this reinforced a requirement on the court to consider matters proactively rather than (para 4.6 and 4.7 of the claimant's submissions) *"leaving it to parties to lead such evidence as they see fit and then assessing the relevance"* and even if the Tribunal was *"satisfied that the evidence is prima facie relevant... the overall balance of rights engaged., in the context of the overriding objective... ought to lead to the conclusion that the line of evidence ought not to be permitted."*

27. In addition, reference was made to Howes v Hinckley & Bosworth BC [2008] All ER (D) 112 (Aug) where it was concluded on the evidence that litigation was in contemplation and a local authority's limited and oblique reference to the content of the advice did not amount to a waiver. It was concluded that this was not sufficient to lose confidentiality in the advice, and it was not a case where reliance was being placed on it in legal proceedings so as to render it unfair for the privilege to be maintained.

Submissions for the respondent

28. The respondent felt that it was unhelpful to follow the claimant heading based approach. However, the respondent argued they had previously explained why Mr Obi required to attend as a witness, and while they had not sought to insist upon a request for production of documents at the July Preliminary Hearing, that request had been superceded of the grant of the Order for Mr Obi to give parole evidence. It was argued that it was not appropriate for the claimant now to seek to challenge the earlier judicial decision to grant the Order or seek to suggest that it was not properly issued. The respondents made a number of references in their submission to an order for "documents which it has been requested that" Mr Obi provide. The respondent, appropriately, conceded that, as set out above, they had not insisted upon the request for the order and while there was some discussion as to whether that order was refused or withdrawn the Tribunal Note of 30th July 2017 issued following upon the July Preliminary Hearing confirms at para 25 that the respondent *"appeared to accept that"* they "were *no longer expecting a*

Documents Order to be granted and' were *"not insisting upon that application. "*

29. The respondent argued that the claimants were seeking to restrict the evidence which the respondents would be able to lead at Tribunal.

30. On the question of relevance, the respondent argued that they had already satisfied the Tribunal of the relevance of Mr Obi's attendance as a witness as the Order had been granted and at this stage argued that *"the evidence is relevant and goes directly to the credibility of the Claimant and establishing motive and rationale for the Claimant's resignation... the Respondents are entitled to challenge and question the evidence of the Claimant in order to challenge her credibility and her genuine reasons for resigning".*

31. The respondent argued that, having regard to the HSBC case, the claimants were seeking to exclude evidence which may be relevant including ultimately the reasons for the claimant's resignation. It would, they argued be relevant for the Tribunal to examine the extent and content of Mr Obi's support to the claimant including prior to her grievance in view of the general correspondence and evidence already led by the claimant on her emails and discussions with another witness in the Final Hearing.

32. The respondent argued that, in broad terms, the claimants were seeking to rely upon case law which addressed issues around extensive evidence which could (respondent's written submission page 3) *"unnecessarily elongate the length of Tribunal hearing"* and this was not the case in this hearing. The evidence which the respondents say they would seek to adduce from Mr Obi was *"logically probative and necessary for the matters to be determined"*

33. The respondents argued (respondent's written submission page 3) that the Tribunal '7s *not entitled to automatically revoke the Order based on the claimant's representation that"* the claimant did not wish the order to be granted and it was incorrect to suggest the existing Order requiring Mr Obi's attendance) was *"improperly granted".*

34. The respondents argued (respondent's written submission page 3 & 4) that Noorani did not support the claimant argument that the Tribunal could revoke the Order on the question of relevancy, arguing that *"this is same point about relevance and the extent of the evidence and the time taken to lead the evidence. .. cases referred to excess length of evidence and external pressure vitiating its use, such as the time likely to be taken in resolving collateral issues...* "did not arise here and the Tribunal was entitled to hear the evidence of the claimant and Mr Obi on the matters the respondent was seeking to adduce.

35. Although not raised as a heading by the claimant the respondent further argued (page 4 of the respondent written submission) that evidence, including I understand oral evidence, adduced before the March Preliminary Hearing and which was not the subject of Findings of Fact (as not necessary for the issues before the Preliminary Hearing) should be presented again and to exclude it would be contrary to the *"interest of justice in that evidence which has been previously presented, is now sought to be excluded".*

36. Again, and although not set out as a specific heading by either party, the respondents argued that they had been permitted to treat Mr Obi as a *"hostile witness"* (page 5 of the respondent's written submission) in the March Preliminary Hearing and this position should apply for the Final Hearing.

37. The respondent argued that Mr Obi had provided a redacted exchange of e-mails which *"clearly excluded which would be relevant to the tribunal on this occasion".*

38. The respondent further argued (page 5 and 6 of the respondent's written submission) that Mr Obi had further documentation which would be of benefit to the Tribunal and of those pages 623-625 of the existing bundle for the Final Hearing produced by Mr Obi these were *"redacted documents there is further information which ... would be of relevance* to" the Final Hearing. This was not a situation where the respondent was seeking to lodge 39 hours of tape recording and it was wrong *'to suggest that the respondent had to*

demonstrate in advance... why each and every part of their evidence is relevant..."

39. On Litigation Privilege (page 6 of the respondent's written submission) the respondent argued that this did not apply where litigation is the dominant purpose of advice. The respondent argued that existing evidence at the Final Hearing "when *claimant first spoke to Mr Obi, it was simply for "support" and not as adviser … and... decision to lodge grievance hers alone and Mr Obi has just helped her structure the terms of the grievance... her decision to resign was her decision alone an she was not doing so with a view to raising proceedings"* and referred to (their notes of) Mr Obi's evidence at the March Preliminary Hearing and when taken together demonstrated that litigation was not the dominant purpose of support by Mr Obi.

40. The respondent argued that they were seeking to establish *'the real motive for the claimant taking the action she did, including her grievance and resignation. "*

41. The respondent argued that Mr Obi had already given evidence and provided some documents in the context of a wasted costs application (the March Preliminary Hearing) and in doing so, both Mr Obi and the claimant had *"lost any right to assert litigation privilege"* (page 8 of the respondent's written submission) and referred to Brennan v Sunderland City Council [2009] ICR 479 which they argued considered a higher test of legal privilege and argued that in that case it was concluded once evidence had been deployed for a certain purpose the disclosing party could not *"subsequently hide behind legal privilege"* (page 8 of the respondent's written submission) and referred approach of Elias J (as he was then) in Brennan at para 66 (or rather 65) that *the 'fuller the information provided about the legal advice, the greater the risk that waiver will have occurred" and* at para 67 *"a degree of reliance is required before waiver arises"* and Mr Obi having relied on documents and his evidence at the March Preliminary Hearing, the position now was *"fairness requires to the full advice be made available … but the answer to whether there has been waiver may be easier to discern if the focus is on the question*

whether fairness requires fuli disclosure". On this aspect the respondent argued that fairness required that Mr Obi attend the tribunal (page 8 of the respondent's written submission) *"in order to restate the evidence that he has already provided about his support for the claimant... and that litigation privilege has been waived".*

42. The respondent additionally referred to National Centre v Boateng UKEAT/0440/10 (National Centre) arguing that in the present case the claimant has disclosed certain evidence and referring to the comments of HH Peter Clark at para 25 *"applying the fairness principle to which Elias J, as he then was, referred in Brennan, it seems to me manifestly unfair on the Respondent not to have the opportunity to place before the Employment Tribunal the evidence of Mr Fletcher which will either support the Claimant's account or otherwise. If the latter, then it is to the Employment Tribunal, as the judge of fact, to decide whose account it believes".*

43. On Confidentiality and Privilege, the respondent argued that the claimant sought to rely upon rules of Sheriff Court practice which the tribunal is not bound to apply and Tribunals are (page 8 and 9 of the respondent's written submission) *"more open judicial bodies and are not bound... by restrictive rules of procedure... judges have discretion to make decisions … in accordance with the overriding principle of fairness between the parties".*

44. The respondent argued that Article 8 ECHR did not apply, the claimant has raised proceedings and given evidence relating to the circumstances of her employment and the termination and, in doing so, (page 9 of the respondent's written submission) *"has waived any right to privacy in that regard".* If Article 8 applied (page 9 of the respondent's written submission) *"no court of tribunal could operate properly. The Tribunal has specific rights to compel witness and the production of documents. These rules are not in breach of Article 8. It is submitted that Article 8 relates to interference from authorities into individuals' private lives, not the process of court or tribunal procedures which and individual has invoked".*

Relevant Law

Unfair Dismissal

45. While I was not directed to any authority on constructive unfair dismissal I am reminded that there is considerable authority in this area. Although both parties focused on the broad concept of relevancy and whether litigation privilege applies in the specific case, it is considered useful at this stage to set out the law in relation to unfair dismissal.

46. This is contained in the Employment Rights Act 1996. Section 94(1) of this Act provides that an employee has the right not to be unfairly dismissed by his employer. Section 95(1)(c) provides that an employee is to be regarded as dismissed if *"the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."*

47. The leading case relating to constructive unfair dismissal is Western Excavating (ECC) Ltd v Sharp 1978 ICR 221 in which it was held that in order to claim constructive dismissal, an employee must establish that there was a fundamental breach of contract on the part of the employer or a course of conduct on the employer's part that cumulatively amounted to a fundamental breach entitling the employee to resign, whether or not one of the events in the course of conduct was serious enough in itself to amount to a repudiatory breach; the final act must add something to the breach even if relatively insignificant; if she does so, and terminates the contract by reason of the employer's conduct and she is constructively dismissed.

48. In a complaint of constructive unfair dismissal, Langstaff P in Wright v North Ayrshire Council [2014] ICR 77 (Wright) at paragraph 2 said *"that involves a tribunal looking to see whether the principles in Western Excavating (ECC) v Sharp [1978] IRLR 27 can be applied"* and sets out 4 issues to be determined:

(1) "that there has been a breach of contract by the employer";

(2) *"that the breach is fundamental or is, as it has been put more recently, a breach which indicates that the employer altogether abandons and refuses to perform its side of the contract";*

(3) *"that the employee has resigned in response to the breach, and that"*

(4) *"before doing so she has not acted so as to affirm the contract notwithstanding the breach"*

49. As set out above, the resignation must be in response to the breach. Further, as Langstaff P confirmed in Wright para 10, the correct position with regard to causation was set out in the judgment of Keane LJ in Meikle v Nottinghamshire County [2004] IRLR 703 at paragraph 33:

'...the repudiatory breach by the employer need not be the sole cause of the employee's resignation... there may well be concurrent causes operating on the mind of an employee whose employer has committed fundamental breaches of contract and that the employee may leave because of both those breaches and another factor, such as the availability of another job. It suggested that the test to be applied was whether the breach or breaches were the "effective cause" of the resignation. I see the attractions of that approach, but there are dangers in getting drawn too far into questions about the employee's motives.... The proper approach, therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation, but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation ...' and although not quoted by Langstaff P above, Keane LJ concludes *"It is enough that the employee resigns in response, at least in part, to fundamental breaches of contract by the employer."*

50. Langstaff P in Wright at para 15 continues 'The *point does not rest simply on the judgment of the Keene LJ in Meikle, a judgment agreed to in that case by*

Thorpe LJ and Bennett J, but also was put in words which I doubt could be bettered by Elias J as President of the Appeal Tribunal in Abbycars (West Horndon) Ltd v Ford [2008] All ER (D) 331 (May)..: 'On that analysis it appears that the crucial question is whether the repudiatory breach played a part in the dismissal. …It follows that once a repudiatory breach is established if the employee leaves and even if he may have done so for a whole host of reasons, he can claim that he has been constructively dismissed if the repudiatory breach is one of the factors relied upon.' That expression of principle was not material to the actual decision of the Appeal Tribunal in Abbycars but it is one which we wholeheartedly endorse."

Applicable Law

Relevance

51. Underhill J in HSBC at para 13 set out 10 points to be considered when considering the issue of relevancy:

"(1) The basic rule is that if evidence is relevant, it is admissible and if it is irrelevant, it is inadmissible. In O'Brien (above) Lord Bingham said, at paragraph 3 (p.540F-G): 'Any evidence, to be admissible, must be relevant. Contested trials last long enough as it is without spending time on evidence which is irrelevant and cannot affect the outcome. Relevance must, and can only, be judged by reference to the issue which the court (whether Judge or jury) is called upon to decide. As Lord Simon of Glaisdale observed in R v Kilbourne [1973] AC 729, 756: 'Evidence is relevant if it is logically probative or disprobative of some matter which requires proof … relevant (i.e. logically probative or disprobative) evidence is evidence which makes the matter which requires proof more or less probable.'

(2) Crucially for present purposes, relevance is not an absolute concept. Evidence may be, as it is sometimes put, 'logically' or 'theoretically' relevant but nevertheless too marginal, or otherwise unlikely to assist the court, for its admission to be justified. As

Hoffmann LJ said in Vernon v Bosley [1994] PIQR 337, at p.340:'The degree of reievance needed for admissibility is not some fixed point on a scale, but will vary according to the nature of the evidence and in particular the inconvenience, expense, delay or oppression which would attend its reception … [Although a judge [in a civil case] has no discretion to exclude admissible evidence, his ruling on admissibility may involve a balancing of the degree of relevance of the evidence against other considerations which is in practice indistinguishable from the exercise of a discretion. '

(3) There may be some divergence in the authorities as to whether the exclusion of evidence in such cases is to be described as being on the basis that the evidence in question is, properly understood, not relevant at all or rather that it is not sufficiently relevant. That question is reviewed in Phipson on Evidence (17th edn) at para. 7-07. In my view the language of 'sufficient relevance' gives a better idea of the nature of the judgment required; but the difference is one of terminology only. Likewise, it makes no real difference, as Hoffmann LJ observes in Vernon v Bosley, whether the exercise of judgment required is described as the exercise of a discretion.

(4) There is, as I have already said, no distinction in principle between the powers in this regard of the civil courts - before or after the introduction of the CPR - and those of the employment tribunal. If anything, it is arguable that employment tribunals, while guided by the same principles, should be rather more willing to exclude irrelevant, or marginallyrelevant, evidence. In Noorani (above) the Court of Appeal upheld the decision of a tribunal to refuse an application for witness orders on the grounds that the evidence which the witnesses would have given was insufficientlyrelevant to the claimant's case…

A modern affirmation of that rule was made by Lord Templeman in his speech in Ashmore v Corporation of Lloyd's [1992] 2 All ER 486 at 493. Lord Templeman said...

> *35. ... [Proactive judicial case management in the law courts becomes more and more important now that it is generally recognised that, unless the judge takes on such a role, proceedings become overlong and over costly, and efforts must be made to prevent trials being disproportionate to the issue at stake, and thus doing justice neither to the parties, to the case at point or to other litigants.*
>
> *36. The position in relation to employment tribunals is a fortiori since they are intended to be relatively informal and inexpensive. Costs are seldom awarded to the successful party... It has never been the position that any evidence that might be relevant must be admitted....'*

(5) Consistently with the approach in Noorani, there have been a number of subsequent decisions of this tribunal in which decisions of an employment tribunal that evidence was insufficiently relevant to be admissible have been upheld. I was referred in particular to Krelle v Ransom [2006] All ER (D) 166 (Mar); Digby v East Cambridgeshire District Council [2007] IRLR 585; and McBride (above). In Krelle the tribunal had refused to allow the claimant to call his wife to give evidence on matters which it regarded as being of only peripheral relevance. Although in the event the appeal was decided on other grounds, Langstaff J discussed the point fully and made it clear that a challenge to this aspect of the tribunal's decision would have been unlikely to succeed. In McBride HH Judge Peter Clark upheld the decision of an employment Judge at a case management discussion that the evidence of certain witnesses whom the claimant proposed to call at the hearing was inadmissible: at paragraph 19, applying Noorani, he characterised the question as being whether the

witnesses' evidence would be 'sufficiently relevant'. In Digby Judge Clark upheld the decision of a tribunal in the course of a hearing to exclude evidence on an issue which it held to have no capacity to affect the outcome of the case.

(6) In both Krelle and Digby the claimant sought to rely on an old decision of this tribunal, Rosedale Mouldings Ltd v Sibley [1980] IRLR 387… and in Digby it was disapproved as a matter of ratio. Judge Clark, adopting an observation of Langstaff J in Krelle, held, at paragraph 12 (p.586): 'A tribunal has a discretion, in accordance with the overriding objective, to exclude relevant evidence which is unnecessarily repetitive or with only marginal relevance in the interests of proper modern-day case management.' Before me, Mr Craig sought, somewhat faintly, to contend that Digby was wrong and that the proposition quoted from Rosedale remained good law. I do not accept that submission. .. (Judge Clark in Digby referred specifically to the overriding objective set out in reg. 3 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004, but in fact I believe that Rosedale was wrong (or at least too widely expressed) from the start: I like to think that the principles enunciated in reg. 3 fell to be, and generally were, observed by tribunals as much before as after the explicit adoption of the overriding objective.)

(7) The fact that evidence is inadmissible because it is insufficiently relevant does not, however, mean that it is necessary to take steps to exclude it in every case, and certainly not to seek to do so interlocutorily or at the outset of a hearing. On the contrary, employment tribunals are constantly presented with irrelevant evidence; but most often it is better to make no fuss and simply disregard it or, if the evidence in guestion is liable to prejudice the orderly progress of the case, to deal with it by a ruling in the course of the hearing. In the generality of cases the cost and trouble involved in a pre-hearing ruling are unjustified. Further, where there is genuine

room for argument about the admissibility of the evidence, a tribunal at a preliminary hearing may be less well placed to make the necessary assessment. As Mummery LJ observed in Beazer Homes Ltd v Stroude [2005] EWCA Civ 265, at paragraph 9: 'In general, disputes about the inadmissibility of evidence in civil proceedings are best left to be resolved by the judge at the substantive hearing of the application or the trial of the action, rather than at a separate preliminary hearing. The judge at a preliminary hearing on non-admissibility will usually be less well informed about the case... '

(8) Notwithstanding the general position as stated at (7) above, there will be cases where there are real advantages in terms of economy (in the broadest sense of that term) in ruling out irrelevant evidence before it is sought to be adduced and, more specifically, in advance of the hearing. .. it may also come up by way of a frank application to exclude evidence as a matter of case management - for example where if the evidence in question is called it will seriously affect the estimate for the hearing or where its introduction might put the other party to substantial expense or inconvenience. That seems to have been the basis of the order which was upheld in McBride, where the claimant wished to call no fewer than seven witnesses all of whose proposed evidence the judge held to be irrelevant.

(9) Discrimination claims constitute a particular class of case in which it may - I emphasise 'may' - be appropriate to decide questions of admissibility in advance of the hearing...

(10) Whether a pre-hearing ruling on admissibility should be made in any particular case will depend on the circumstances of that case. For the reasons identified at (7), caution is necessary. As Mummery LJ pointed out in Beazer Homes (above), it will not always be possible to make a reliable judgment on the issue of relevance at an interlocutory stage... But each case is different, and caution should not be treated

as an excuse for pusillanimity. If a judge is satisfied on the facts of a particular case that the evidence in question will not be of material assistance in deciding the issues in that case and that its admission will (in Hoffmann LJ's words) cause 'inconvenience, expense, delay or oppression', so that justice will be best served by its exclusion, he or she should be prepared to rule accordingly."

52. Underhill J noted that the power of the courts in England & Wales was by that point subject to the codified Civil Procedure Rules (CPR Rules) and in particular CPR Rule (CPR) 31(2) and that it had been conceded in principal that the approach in Employment Tribunal in England & Wales was no different. He, however made it clear that his approach was not based of the specific formulation within CPR Rule 31 (2).

53. In the subsequent EAT decision of Vaughan, Underhill J, as the claimants set out, comments at para 22 that *"The essential reason why we think that the Judge was right was that it was plainly not possible for her to form any view on the relevance, and thus the admissibility, of the tapes on the material that the Claimant had produced. It was not enough to say simply that they ail related to matters that were relied on in the pleadings. Relevance is not a black-and-white concept: see the recent review of the authorities by this tribunal, myself presiding, in HSBC Asia Holdings BV and another v Gillespie [201 1] IRLR 209, particularly at para 13 (pp 213 - 215). It is necessary in the case of any piece of evidence to assess how relevant it is, and in what way, and also the extent to which the individual matters that may have been pleaded are themselves central to the allegations. This involves questions of degree and, to use the term with which we are all now familiar, proportionality. That being so, the Judge could get nowhere without sight of the transcripts of the recordings on which the Claimant sought to rely, so that an informed view could be taken whether it was indeed proportionate or, to put it another way, necessary in the interests of justice that the recordings be admitted in evidence..".*

54. Underhill J continues paragraph 22 of Vaughan setting out the factual matrix to the decision to refuse *"The transcripts were not produced, and indeed when the Judge asked for more details even without the transcript the Claimant simply relied on generalities. (It is convenient to make clear at this stage that although the Claimant said that the Judge was plainly wrong to find that the recordings were not of probative value, that is not in fact what the Judge said. What she said at para 7 of the Reasons was that "I was therefore [our emphasis] not satisfied that the recordings were of probative value". That meant that she had not been shown that they were; and the reason why she had not been shown that they were was that the transcripts themselves were not available and the Claimant was not willing to answer detailed questions about why she said they were relevant.) We therefore find that the Judge had no alternative but to make the order that she did in the circumstances that she made it."*

55. At para 23 to 25 of Vaughan Underhill J continues *"The reasons why we are not entirely happy with the Judge's reasoning are really twofold.*

First, we are not convinced, certainly on the material that we have seen, that it should have been treated as a precondition of admissibility that the recordings be independently transcribed in their entirety, which would of course involve very great cost for the Claimant. . . . In any event, no-one will know for certain until the material has been produced. . .

We accordingly have reservations about the first reason that the Judge gave. As regards the third, which related to proportionality, the Judge's reasoning is very short. If all she meant was that it is highly unlikely that 39 hours' worth of recordings would need to be referred to, she is no doubt right. We strongly suspect - though, to repeat myself for the second or third time, we ***cannot know until the material has been produced*** *- that nothing* ***like*** *that amount will require to be referred to, if anything is; but that is not a decision that can safely be taken at this stage. If all the Judge meant was that, as with relevance, it had not been proved, so be it; but clearly a blanket ruling going further than that would not be Justified."*

Applicable Law

Litigation Privilege

56. As the claimant commented Mr Justice Hamblen in the Queen's Bench Division of the Commercial Court in Starbev GP Ltd v Interbrew Central European Holding BV [20141 All ER (D) 116 (Jan) (Starbev), considered Litigation Privilege. This was in the context of the English CPR Rules and at para 11-12 sets out a useful summary of the requirements for litigation privilege to apply. The fuller quote is considered useful here:

71 1] (1) The burden of proof is on the party claiming privilege to establish it - see, for example, West London Pipeline and Storage v Total UK [2008] 2 CLC 258 at 50.

(2) An assertion of privilege and a statement of the purpose of the communication over which privilege is claimed in a witness statement are not determinative and are evidence of a fact which may require to be independently proved. The court will scrutinise carefully how the claim to privilege is made out and the witness statements should be as specific as possible - see, for example, Sumitomo Corporation v Credit Lyonnais Rouse Ltd (14 February 2001) at 30 and 39 (Andrew Smith J); Wesf London Pipeline and Storage Ltd v Total UK Ltd [2008] EWHC 1729 (Comm) at 52, 53, 86 (Beatson J); Tchenguiz v Director of the SFO [2013] EWHC 2297 (QB) at 52 (Eder J).

(3) The party claiming privilege must establish that litigation was reasonably contemplated or anticipated. It is not sufficient to show that there is a mere possibility of litigation, or that there was a distinct possibility that someone might at some stage bring proceedings, or a general apprehension of future litigation - see, for example, United States of America v Philip Morris Inc [2004] EWCA Civ 330 at 68; Westminster International v Dornoch Ltd [2009] EWCA Civ 1323 at paras 19-20. As Eder J stated in Tchenguiz at 48(iii):'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.'

(4) It is not enough for a party to show that proceedings were reasonably anticipated or in contemplation; the party must also show that the relevant communications were for the dominant purpose of either (i) enabling legal advice to be sought or given, and/or (ii) seeking or obtaining evidence or information to be used in or in connection with such anticipated or contemplated proceedings. Where communications may have taken place for a number of purposes, it is incumbent on the party claiming privilege to establish that the dominant purpose was litigation. ***If there is another purpose, this test will not*** *be* ***satisfied:*** *Price Waterhouse (a firm) v BCCi Holdings (Luxembourg) SA [1992] BCLC 583, 589-590 (cited in Tchenguiz at 54-55);* West *London Pipeline and Storage Ltd v Total UK Ltd at 52.*

[12] In relation to the court's approach to the assessment of evidence in support of a claim for privilege, it has been stated that it is necessary to subject the evidence "to 'anxious scrutiny' in particular because of the difficulties in going behind that evidence" - per Eder J in Tchenguiz at 52. "The court will look at 'purpose' from an objective standpoint, looking at all relevant evidence including evidence of subjective purpose"- ibid 48(iv). Further, as Beatson J pointed out in the West *London Pipeline case at 53, it is desirable that the party claiming such privilege "should refer to such contemporary material as it is possible to do without making disclosure of the very matters that the claim for privilege is designed to protect".*

Applicable Law

Article 8

57. Article of 8 of the European Convention on Human Rights (ECHR), is concerned with the right to respect for private and family life. The Human Rights Act 1988 (HRA) incorporates the ECHR and this tribunal, pursuant to

section 3 of the Human Rights Act 1998 (HRA) is required to apply Article 8 ECHR.

58. Article 8 ECHR provides, in para 1, that:

> *"1. Everyone has the right to respect for his private and family life, his home and his correspondence. "*

Para 2 sets out the qualifications or exceptions to this right, and provides:

> "2. *There shall be no interference by a public authority with the exercise of this right* ***except such as is in accordance with the law and is necessary in a democratic society*** *in the interests of national security, public safety or the economic well-being of the country, for* ***the*** *prevention of disorder or crime,* ***for the protection of health or morals, or for the protection of the rights and freedoms of others. "***

59. In WF, Petitioner [2016] CSOH 27 Lord Glennie sets out the context of that judicial review at para 1 and 2:

> *"[1] This petition for judicial review arises in respect of criminal proceedings against an accused. .. brought on indictment in the sheriff court... The petitioner, a complainer in the criminal proceedings, has applied for legal aid so as to enable her to be represented at a hearing before the sheriff of the accused's petition for recovery of her medical records. She argues that recovery of such documents would infringe her Convention rights to private and family life.* ***The Scottish Ministers have refused to make legal aid available for this purpose, arguing inter alia that she has no right to be heard or represented in front of the sheriff on that application.***
>
> *[2] In this petition the petitioner seeks reduction of that decision. She also seeks declarator that the failure of the Scottish Ministers to promulgate such legislation as may be required to enable her to be represented*

before the sheriff in opposition to the application for recovery of her medical records is incompatible with, and a breach of, her Convention rights under Article 8 and/or Articles 6 and 14."

60. In summary the Outer House of the Court of Session required to consider whether the right to privacy and medical confidentiality under Article 8 ECHR entitled the party to be heard and have legal representation before any orders were made for recovery of medical records.

61. Lord Glennie held (para.32) that Article 8 rights *'are engaged whenever there is an application by the accused for records of this kind. *.* He noted that, while the question of whether the party had the right to appear and oppose the application for recovery of her records was unanswered in Scotland.

62. Lord Glennie held (para 39) that it is only when the party is given the opportunity to be heard that the court has the necessary information before it to carry out the required balancing of the accused's interest in obtaining medical records against Article 8 rights. Without the party having an opportunity to be heard, the court would simply have to conduct an artificial balancing exercise with no knowledge of the particular sensitivities of the case.

63. Although not referred to, I am reminded that in McLeod v HM Advocate 1998 JC 67 the court concluded that, in effect, the respondent has a corresponding Article 6 right to a fair hearing.

Applicable Law

Tribunal Rules of Procedure

64. Both the claimant and respondent referred to the "overriding objective". Rule 2 of the 2013 Rules provides that:

"The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and Justly includes, so far as practicable -

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting or exercising any power given to it by these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal".

65. While neither party drew my attention to Rule 31 of the 2013 Rules I have reminded myself that it provides that *"The Tribunal may order any person. ..to disclose documents or information... as might be ordered by a county court or, in Scotland by a sheriff. "*

66. In addition, and again, while not direct to Rule 41 of the 2013 Rules, however I have reminded myself that it provides that *'the Tribunal may regulate its own procedure and shall conduct the hearing in the manner it considers fair, having regard to the principles contained in the overriding objective.... The Tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts. "*

Applicable Law

Court Rules of Procedure

67. CPR Rule 31(2) referred to in Wright above sets out the power of court in England and Wales to control evidence:

(1) The court may control the evidence by giving directions as to -

(a) the issues on which it requires evidence

(b) the nature of the evidence which it requires to decide those issues; and

(c) the way in which the evidence is to be placed before the court.

(2) The court may use its power under this rule to exclude evidence that would otherwise be admissible.

(3) The court may limit cross-examination.

68. There is no precise equivalent to the codified CPR Rule 31(2) in Scotland. Although in Scotland, Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 No 1953 (the Sheriff Court Ordinary Cause Rules) at Schedule 1 sets out at Ordinary Cause Rule 9A.3(2) that *"A party who seeks to rely on the evidence of a person not on his list … shall, if any other party objects to such evidence being admitted, seek leave of the sheriff to admit that evidence whether it is to be given orally or not; and such leave may be granted on such conditions, if any, as the sheriff thinks fit".*

69. Further the Sheriff Court Ordinary Cause Rules at 28.2 set out procedural requirements for an Application for Commission and Diligence for Recovery of Documents or for Orders under section 1 of the Administration of Justice (Scotland) Act 1972 which Act in turn provides that:

(1) Without prejudice to the existing powers of the Court of Session, of the Sheriff Appeal Court and of the sheriff court, those courts shall have power, subject to the provisions of subsection (4) of this section, to order the inspection. .. which appear to the court to be property as to which any question may relevantly arise in any existing civil proceedings before that court or in civil proceedings which are likely to be brought, and to order the production and recovery of any such property...

…

(3) The powers conferred … to regulate the procedure of the sheriff court … shall include power to regulate and prescribe the procedure to be followed...

(4) Nothing in this section shall affect any rule of law or practice relating to the privilege of witnesses and havers, confidentiality of communications and withholding or non-disclosure of information on the grounds of public interest...

70. Sheriff Court Ordinary Cause Rule 28.2 makes no express reference to considerations of relevancy. I have however reminded myself that the Court will not require recovery of a document unless the documents will, or at least may, have a bearing on the averments remitted to proof; Walker & Walker, Evidence 4th Edition (2010) (Walker & Walker) para. 21.6.1 citing British Publishing Co Ltd v Hedderwick & Sons (1892) 19 R. 1008.

71. Further Walker & Walker at para 21.6.2 sets out there is no requirement that the documents sought to be recovered should be admissible as evidence (Johnston v South of Scotland Electricity Board 1968 SLT (Notes) 7), although questions of their admissibility may be raised in the course of the hearing and decided at the court proof when a party seeks to adduce them in evidence. Indeed Walker & Walker at para 21.6.1 sets out that recovery should not be refused on the ground that the written pleadings are of doubtful relevancy: Duke of Hamilton's Trs v Woodside Coal Co (1897) 24 R. 294.

72. On the term fishing diligence, which the claimants seek to deploy in support of their position, I have reminded myself as also set out in Walker & Walker para 21.6.1, that this refers to an application for recovery of documents in the Scottish civil court which is not relevant to the existing written case set out in the written pleadings, but which may be relevant to a case *which it is hoped to set out',* Fife CC v Thoms (1898) 25 R. 1097; Earl of Morton v Fleming 1921 1 S.L.T. 205 and would be refused. This, however, reflects Scottish civil procedure on written pleadings in seeking to prohibit recovery of documents which a party has not averred on record Mackintosh v Macqueen (1828) 6 S. 784.

73. In the present matter the Employment Tribunal ET 1 and ET3 do not accord to the Ordinary Cause system of written record and we have in addition the

existing Findings of Fact as set out above. However, it is not considered that the respondent's approach, seeking to argue that the tribunal does not require to have regard to the Sheriff Court rules, has direct merit in the present case, the position as set out in HSBC above is clearly informed by the approach of the civil courts and as set out in Rule 31 of the 2013 Rules recoverability in the Tribunal reflects the position in the Sheriff Court.

Applicable Law

Waiver of Privilege

74. I was not referred to Scottish authority on issue of waiver of privilege in Scotland. I have, however, reminded myself that this is comprehensively addressed by Lord Reed in the Inner House in Scottish Lion Insurance Co Ltd v Goodrich Corp & Oths [201 1] CSIH 18 (Scottish Lion) at para 46 to 49:

[46]... it is necessary to begin by understanding the nature and purpose of privilege. Privilege is the name given to a right to resist the compulsory disclosure of information (B v Auckland District Law Society [2003] 2 AC 736 at paragraph 67 per Lord Millett). It exists in order to maintain the confidentiality of the information in question. It follows that privilege will be lost if the information in question ceases to be confidential: if, for example, it is published in the press. In such circumstances there is no longer any confidentiality to maintain, and the information therefore ceases to be privileged. Waiver of privilege can be distinguished from loss of privilege (see e.g. B v Auckland District Law Society at paragraphs 68 and 69). It will arise, as we have explained, in circumstances where it can be inferred that the person entitled to the benefit of the privilege has given up his right to resist the disclosure of the information in question, either generally or in a particular context. Such circumstances will exist where the person's conduct has been inconsistent with his retention of that right: inconsistent, that is to say, with the maintenance of the confidentiality which the privilege is intended to protect.

[47] There are two further points which it is important to understand. First, waiver does not depend upon the subjective intention of the person entitled to the right in question, but is Judged objectively... Secondly, privilege may ***be taken to have been waived for a limited purpose without being waived generally:*** *in other words, the right to resist disclosure may be give up only in relation to a particular context. The point can be illustrated by the case of Goldman v Hesper [1988] 1 WLR 1238, in which a party to legal proceedings had disclosed privileged documents to the court in support of the taxation of her costs. The question arose whether the taxing officer could order disclosure of the documents to the paying party, where necessary to enable that party to raise a bona fide challenge to any item of cost claimed. The court concluded that, although disclosure would rarely be necessary in practice (since the taxation would not normally depend upon the contents of the document), the taxing officer had to see that the paying party was treated fairly and given a proper opportunity to raise a bona fide challenge. Disclosure could therefore be ordered where necessary. Taylor LJ, in a judgment in which Lord Donaldson of Lymington MR and Woolf LJ concurred, observed at pages 1244-1245 that any disclosure of privileged documents to the paying party would be only for the purposes of the taxation:*

"That it is possible to waive privilege for a specific purpose and in a specific context only is well illustrated by the decision of this court in *British Coal Corporation v Dennis Rye Ltd. (No 2) [1988] W.L.R. 1113. ...By* ***the same token voluntary waiver or disclosure by a taxing officer on a taxation would not in my view prevent the owner of the document from reasserting his privilege in any subsequent context. "***

Similar observations were made in B v Auckland District Law Society, where Lord Millett, delivering the judgment of the Judicial Committee of the Privy Council, distinguished (at paragraph 68) between waiver generally and waiver for a limited purpose:

"It does not follow that privilege is waived generally because a privileged document has been disclosed for a limited purpose only: see *British Coal Corpn v Dennis Rye Ltd (No 2) [1988] 1 WLR 1113 and Bourns Inc v Raychem Corpn [1999] 3 All ER 154. The question is not whether privilege has been*

*waived, but whether it has been lost. It would be unfortunate if it were. It must often be in the interests of the administration of justice that a partial or limited waiver of privilege should be made by a party who would not contemplate anything which might cause privilege to be lost, and it would be most undesirable if the law could not accommodate it.**

[48] ***Whether the conduct of a person entitled to the benefit of privilege has been inconsistent with the maintenance of confidentiality, either generally or for a limited purpose, is dependent upon the relevant circumstances. The*** *question has most often arisen in circumstances which are different from those of the present case. One such circumstance is where a person sues his legal advisers and seeks to rely on the privilege to prevent them from adducing evidence relevant to their defence. In such a case, the* ***privilege is taken to have been waived because of "the unfairness of both opening the relationship by asserting the claim and seeking to enforce the duty of confidence owed by the defendant" (Nederlandse*** *Reassurantie Groep Holding NV v Bacon & Woodrow [1995] 1 All ER 976 at page 986 per Colman J: a passage approved in Paragon Finance Pic v Freshfields [1999] 1 WLR 1183 at page 1191 per Lord Bingham of Cornhill CJ). Another type of situation where the question has often arisen is where a party to legal proceedings seeks to rely upon part of a confidential document (or sequence of related documents), but asserts privilege so as to prevent disclosure of the remainder. In such a case, the privilege may be taken to have been waived on the basis that "a party may not waive privilege in such a partial and selective manner that unfairness or misunderstanding may result" (Paragon Finance at page 1188 per Lord Bingham of Cornhill CJ). As these dicta indicate, where proceedings require to be conducted fairly, considerations of fairness may bear on an assessment of whether a person's conduct in relation to those proceedings has been inconsistent with the maintenance of confidentiality, and whether he must therefore be taken to have waived privilege...*

[49] A third type of situation where the question has arisen, which is more directly relevant to the present case, is where a person has chosen to disclose a privileged communication in particular circumstances, and has subsequently asserted privilege in order to prevent the disclosure of the same communication in different circumstances. There are many such cases, but two examples will illustrate how the approach adopted has reflected the same underlying principles as have been applied in the other situations we have discussed. In British Coal Corporation v Dennis Rye Ltd (No 2) (1988) 1 WLR 11 13 the plaintiffs had disclosed documents to the police to assist in a criminal investigation as a result of which charges were brought against the defendants. The documents, which were covered by litigation privilege, were then disclosed by the police to the defendants prior to the trial. The plaintiffs were ordered to disclose further documents to the defendants during the trial. The question then arose whether the plaintiffs could assert privilege in respect of the documents in civil proceedings brought against the defendants. The court held that privilege had not been waived, even on the assumption that the plaintiffs had impliedly consented to the disclosure of the documents to the defendants for the purpose of the criminal proceedings. Neill LJ, with whom the other members of the court agreed, said (at page 1121) that the plaintiffs had made the documents available for a limited purpose only, namely to assist in the conduct of the criminal investigation and trial. That action of the plaintiffs, looked at objectively, could not be construed as a waiver of any rights available to them in the civil action for the purpose of which the privilege existed. The criminal proceedings and the civil action were separate processes, with the consequence that there was no inconsistency between disclosure in one process and the assertion of privilege in the other. That case might be contrasted with Goldman v Hesper, which we have already mentioned, where the documents in question had been disclosed to the taxing master in order to support the party's bill of costs. The court noted that taxation was a procedure which involved not only an assessment of the bill of costs by the taxing master but also an opportunity for the paying party to challenge any item in the bill. The documents lodged in support of the bill must therefore be disclosed to the paying party if that were necessary in order

for the taxation to be conducted fairly. It can be seen that in that case the purpose for which the documents had been disclosed formed part of a process which involved an opportunity for challenge by the paying party, with the consequence that there was an inconsistency between disclosing the documents to the taxing master and asserting privilege against the paying party, in so far as the paying party had to see the documents in order for the taxation to be conducted fairly."

75. The approach by Lord Reed above is, I consider, consistent with that in Brennan and indeed the subsequent cases of Howes and National Centre. It cannot be said that having adduced some evidence for one purpose, all privilege is waived. On this basis the attendance of Mr Obi for the restricted March Preliminary Hearing does not mean that privilege is more generally waived. The question of fairness does arise, however, in the context of the Findings of Fact and I address that below.

Discussion and Decision

Previous Witness Evidence and Hostile Witness

76. The respondents have sought to argue that previous evidence given in the March Preliminary Hearing and which was not the subject of Findings of Fact may be adduced. In practical terms, beyond the Findings of Fact, there is no formal record of Mr Obi's evidence before that Tribunal.

77. The respondents did not seek to rely upon Rule 41 of the Rules in support of this proposition. Similarly, I was not directed to any authority, however I am reminded that in Ravelston Steamship Co. v Sieberq Brothers 1946 SC 349 the Inner House permitted, in exceptional wartime circumstances, notes of a Judge who had passed away before the conclusion of hearing to be treated as evidence taken on commission, in order to allow the hearing to conclude before a separate judge.

78. In the present case, the respondents do not seek to rely on judicial notes, which would not be in any event recoverable, but rather their own written

transcript prepared by them during the March Preliminary Hearing. While a relevant statement which a party asserts was previously made by a witness may be put to a witness, it Is not considered that this Tribunal can accept the respondent's notes of a witness in an earlier hearing as having being determinant of that witness' previous evidence even, in the same ongoing litigation.

79. On the question of treating a witness as a *"hostile witness"* subject again to the comments on Rule 41 of the Tribunal Rules, and again while not referred to specific authority I have reminded myself that as Lord President (Normand) described in Avery v Cantilever Shoe Co Ltd 1942 SC 469 leading questions on matters in dispute are permitted in examination-in-chief of a witness where a party displays a reluctance or unwillingness to give evidence to the party calling them and they may be treated as a hostile witness without the leave of the court, and am I reminded that this approach was subsequently approved by Lord Johnston in Brennan v Edinburgh Corp 1962 SC 36.

Discussion and Decision

Relevancy

80. In Wright it was confirmed that the primary issue is whether the asserted breach played a part in the resignation, although it is not necessary to show that a particular breach was the effective cause of the resignation.

81. There may be more than one reason why an employee leaves a job. While it is enough that the repudiatory breach was an effective cause with no requirement that it be the most important cause, it must be a cause. Thus, if there is a separate or ulterior reason for the employee's resignation, such that he or she would have left anyway irrespective of the employer's conduct, then there has not been a constructive dismissal.

82. Thus, it is considered relevant to explore in evidence the claimant's decision making process including the impact of the advice in the specific

circumstances of this case against the background of the existing Findings in Fact set out above.

Discussion and Decision

Litigation Privilege

83. The claimant argues that respondent does not know, as a matter offset, what the discussions between the claimant and Mr Obi were in the period leading up to her decision to resign. At this stage of the Final Hearing that is correct. The claimant in submissions goes further to argue at para 3.3 of the written submissions *"logically... such advice... must have been with the dominant purpose of litigation".* The claimant does not address the existing Findings of Fact set out above, namely that the claimant left employment with the respondent and started within an identified and limited period of time with Mr Obi. The adviser was operating not for profit when providing advice to the claimant and the claimant was paid a defined sum while she worked for the adviser. It is not considered in the circumstances that it can be concluded at this point that logically such advice must have been with the dominant purpose of litigation.

84. It is not considered that the respondent is seeking to carry out what amounts to a fishing exercise in seeking to adduce evidence relating to communications between the claimant and Mr Obi in the period leading up to and including her resignation against the background of the existing Findings in Fact.

85. While the claimant is entitled to argue that she only requires to establish that the respondent's actions were a (as opposed to the principal) reason for the resignation, the claimant does require to establish the reason.

86. In contrast with the existing Findings of Fact in the present case, if a respondent was seeking to adduce in evidence support for a proposition that a claimant in comparable circumstances had left employment, not because of the acting of a respondent, but simply to join a different business it would be

open for them to do so. In the present case, in essence the claimant is seeking to argue, that as the claimant had joined her adviser rather than an unrelated business the respondent cannot seek to explore this in evidence.

87. While the communication between Mr Obi and the claimant including advice would ordinarily be protected by litigation privilege, there are existing Findings of Facts demonstrating a temporal proximity between the claimant's resignation and her commencement of employment with Mr Obi. Against that background and having regard to the Scottish Lion and Brennan (and Howes and National Center) it is not considered that a claimant may seek to exclude evidential consideration of their own actings by calling upon litigation privilege in these circumstances. It has been suggested that public policy issues arise in the present case. The specific circumstances of the case are exceptional, and as such, it is not considered that the factual matrix gives rise to wider public policy considerations.

88. While the respondent sought to argue that as an Order had been granted at an earlier stage in proceedings, it should not be revoked that is clearly inconsistent with the position in HSBC set out above. A decision on relevancy of evidence may appropriately be reached at a Final Hearing given the caution which is necessary on a pre-hearing ruling on admissibility.

89. The claimant refers to Starbev above. Starbev establishes that the onus to establish and maintain litigation privilege is on the claimant. Against the existing Finding of Facts set out above the respondent is entitled to seek to adduce evidence to establish whether there was a different purpose to communications. The claimant is required to establish that a breach on the part of the respondent played a part in the resignation. It is not considered in all the circumstances that the claimant has established at this stage that the dominant purpose of communications between the claimant and Mr Obi was litigation in light of the existing Findings of Fact.

90. As it is conceded that legal professional privilege does not apply here, much of the recent decision of the English Court of Appeal decision in SFO v

Eurasian Natural Resource Co (201 8] EWCA Civ 2006 does not directly impact. However, and in relation to litigation privilege the Court of Appeal accepted that the correct approach was to consider when proceedings were in reasonable contemplation, and the exercise of determining dominant purpose in each case is a determination of fact. In the present case, it can be said applying this approach, that proceedings were in reasonable contemplation when the claimant sought advice from Mr Obi and indeed the dominant purpose of communications between the claimant and Mr Obi could ultimately be determined to be the claim.

91. That is not however the final assessment. As set out in Scottish Lion regard requires to be had to whether the conduct of the person entitled to the benefit of privilege has been inconsistent with the maintenance of confidentiality. Given the existing Findings of Fact it is considered that the privilege is not maintained given the potential for unfairness.

92. As set out above, the respondent argues that, if there was litigation privilege, this had been waived by the Preliminary Hearing. As set out in Scottish Lion above that is not the correct analysis; disclosure of some information at the Preliminary Hearing in the context of a Tribunal considering a cost application does not create a general waiver in the Final Hearing. The absence of a general waiver does not however assist the claimant in maintaining an argument for litigation privilege in the circumstances set out above.

Discussion and Decision

Confidentiality and Privacy

93. The respondent argues that Article 8 does not apply. That is not correct. The constitutional right to privacy is set out in Article 8 which has indirect horizontal effect in Scots private law but more straightforwardly by its incorporation into the HRA. The claimant argues that the absence of existing direct authority on the operation of Article 8 in the present context is not significant. That may be so. However, WF can be distinguished beyond any issue arising from it dealing with criminal rather than, what may broadly be described as, civil law,

the point of significance here is the claimant has been given a right to be heard on the relevancy of evidence which the respondent seeks to adduce to any final judgement and will continue to be given this right throughout this hearing. Unlike the position in WF it cannot be said that they have been deprived of a right to be heard.

94. The EAT in Scotthorne concluded, having reviewed the papers which were withheld from inspection, that they were subject to litigation privilege. The EAT, on the facts of that case, concluded that it was not appropriate to disclose the documents and although not expressed it is considered that examination of the documents did not give rise to a concern that it was necessary to disclose to create fairness between the parties. Given the existing Findings of Fact such a conclusion, on excluding evidence as to communications between the claimant and Mr Obi, would not be appropriate in the present case.

95. In National Centre the claimant had sought to argue, in summary, that they could defeat the effect of (what was then) a compromise agreement by arguing that appropriate advice on the effect was not given and by not waiving privilege their former employer was prohibited by litigation privilege in seeking to explore in evidence what advice had been given. It was concluded that fairness required disclosure.

96. If a respondent was seeking to adduce evidence supporting a proposition that a claimant in comparable circumstances had left employment to join a different business they would not be prohibited from doing so. In the present case, in essence the claimant is seeking to argue, against the background of the existing Finding in Facts, that as the claimant had joined her adviser rather than an unrelated business the respondent, cannot seek to explore this in evidence. That would not appear to strike an appropriate balance having regard to the issue of fairness.

Discussion and Decision

Tribunal Rules of Procedure

97. The claimant sought to draw an analogy with the terms of ET 1996 s18 A. However, and if the claimant's approach were correct it is considered that s18A would not be required as the issue would not arise.

Conclusion

98. As set out above the respondents argue that as evidence was given at the Preliminary Hearing, the claimant has waived any litigation privilege. This is not considered to be the correct approach. While, in effect, some disclosure of otherwise privileged information (for the purpose of litigation privilege) was made in relation to the March Preliminary Hearing, that was in the context of permitting the Tribunal to consider the correct approach to the question of costs.

99. As Lord Reed set out above comprehensively in Scottish Lion above disclosure of otherwise privileged information does not, of itself, create a general waiver where no waiver is given. Thus, the respondent's arguments under this heading do not succeed.

100. While recognising the requirement for anxious scrutiny of evidence in relation to the question of privilege, having regard to the issues at this stage of relevancy, fairness and the overriding objective, I am satisfied that that the respondent should be permitted to cross examine the claimant on matters relating to communications between the claimant and Mr Obi including advice provided in the period prior to her resignation.

101. Further, and for the reasons set out above, I am satisfied that the existing Order for Mr Obi's attendance as a witness should not be revoked and the Final Hearing should proceed to the dates already set down being 29 October 2018 to 2 November 2018.

5

Employment Judge: R McPherson
Date of Judgment: 18 October 2018
Entered in register: 25 October 2018
and copied to parties