Neutral Citation Number: [2022] EAT 37

Case Nos: EA-2020-000592-OO
EA-2021-000277-OO

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 15 October 2021

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

TRENTSIDE MANOR CARE LIMITED	**Appellants**
MR T DHADDA	
MR P DHADDA	
- and -	
MRS M RAPHAEL	**Respondent**

- -
- -

Jake Ellison (consultant, **Citation Ltd**) for the **Appellant**
Tim Shepperd (instructed by **Knights Plc**) for the **Respondent**

Hearing date: 14 & 15 October 2021

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

This matter is ongoing in the employment tribunal. The claimant made a request for flexible working, which, after discussion, was granted on a trial basis. Following a subsequent incident at work, she was suspended and charged with misconduct, leading to her dismissal. She claims that the misconduct charges were a pretext for dismissing her and that the true reasons related to her earlier flexible working request which, in turn, related to disability. There are complaints of unfair dismissal, direct disability and age discrimination and disability-related discrimination. The respondents' case is that this was a genuine dismissal for conduct, which was fair, and unconnected to the claimant's flexible working claim, disability or age.

The claimant applied for disclosure of documents relating to communications between the respondents and their advisors during the period from when she made her flexible working request to when she was dismissed. The respondents claimed that such documents were protected by both litigation privilege and legal advice privilege. The advisers were not a firm of solicitors, but had an HR and Employment Law advice team, headed by solicitors, and in which all but one of the managers was legally qualified. However, the individual client advisers were not. The tribunal initially ordered that, for the purposes of a hearing to determine that dispute, the respondents should provide copies of the disputed documents to the claimant's solicitors and counsel, on the basis that they would not show the documents to the claimant herself.

The respondents' appeal against that order was allowed. The order was not a proper exercise of the tribunal's case management discretion as it was wrong in principle. It would have compromised the very privilege that the respondents were asserting, before the tribunal had determined whether they were entitled to it or not; and, had it been complied with, it would be likely to have placed the claimant's legal advisers in a position of irreconcilable conflict.

In fact the respondents did not comply with that order, and the tribunal subsequently directed them to provide the documents to the tribunal itself for the sight only of the judge deciding the issue. That decision was not itself challenged; but the EAT observed that such an order should be made only as a matter of last resort.

The tribunal went on to decide that documents relating to advice sought in the period from when the respondents decided to suspend the claimant were covered by litigation privilege. But documents relating to the earlier period following the flexible working request were covered by neither litigation privilege nor legal advice privilege. The respondents' appeal in that regard was dismissed. The tribunal was not wrong to conclude, on the material presented to it, that the dominant purpose of seeking advice in the earlier period was not because there was a reasonable prospect of litigation. The tribunal was also not wrong to conclude that the giving of advice by non-lawyers was not covered by legal advice privilege. It was not wrong to conclude, on the evidence presented, and arguments that it heard, that the fact that the advisers were part of a team headed by a solicitor, and in which all but one of the managers were qualified lawyers, and the supervision arrangements in place, did not have the effect in law of extending the privilege to the advice that they gave.

HIS HONOUR JUDGE AUERBACH:

Introduction and Background

1. This matter is ongoing in the employment tribunal, where it has yet to come to a full hearing. I will refer to the parties as they are in the tribunal as claimant and respondents. I have before me two related appeals brought by the respondents. As I will explain, they concern case management orders made by Employment Judge Robin Broughton, sitting in the Midlands West Tribunal, on two occasions, in relation to a specific disclosure application that was made by the claimant.

2. The claimant was employed by the first respondent as the registered care manager of a residential care home from 2011 until August 2018 when she was dismissed for the given reason of conduct. The second and third respondents are directors of the first respondent, with whom the claimant dealt. In December 2018 solicitors representing the claimant, Knights plc, presented a claim form. The claims are defended. The respondents are represented by Citation Ltd, which is not a firm of solicitors but which amongst other things provides to its clients HR and employment law advice.

3. Disputes of fact will of course fall to be resolved by the tribunal at the full hearing of the claims, which has yet to take place. However, in order that the issues raised by these appeals can be understood, I will set out some basic features of the chronology, which are not disputed, and briefly the gist of the parties' respective cases as they stood when the tribunal came to make its decisions under appeal.

4. It is common ground that on 4 May 2018 the claimant, who was at that time working a five-day week, made a request to go down to a four-day week. She considered that this was needed by way of a reasonable adjustment. Meetings and discussion followed. On or around 10 June the respondents agreed to grant the request on a trial basis, and in the week of 18 June the claimant began

to work a four-day week. On Thursday 28 June the claimant took certain actions in relation to arrangements regarding the particular type of mattress and type of bed being provided to a particular resident, and shared this on a management WhatsApp group. The following Monday, 2 July, she was suspended. It was said that there were concerns over her handling of that matter and other matters of alleged conduct that had come to light.

5. There followed an investigation, and then in early July a formal disciplinary process was begun. During the course of that process Knights plc became involved on the claimant's behalf. There was a disciplinary hearing in August, following which the claimant was dismissed. She unsuccessfully appealed against that dismissal.

6. The claimant's case in the tribunal, in summary, is that the matters raised in the disciplinary process were not the true reason for her dismissal but were a pretext. Her case is that the real reason or reasons why she was dismissed have to do with her flexible working request, which was in turn made on account of the impact on her of ill-health amounting to disabilities, and which request, on her case, was not welcomed by the respondents. Her live complaints before the tribunal are of unfair dismissal and of direct and disability-related discrimination and direct age discrimination.

7. The respondents' case before the tribunal is that this was a genuine and fair dismissal by reason of the conduct identified in the disciplinary process and having nothing to do with the claimant's earlier flexible working request. They deny having done anything because of the claimant's age or her disabilities or something arising in connection with them.

History of the litigation and the decisions that are appealed

8. I need to set out in some detail the relevant history of the litigation in the tribunal and how the appeals arose. At a preliminary hearing in August 2019 the issues were clarified and set out. The

matter was at that point listed for a seven-day hearing to open in June 2020. It was flagged up that there was a dispute about whether correspondence between the respondents and Citation Ltd should be disclosed. The judge at that hearing directed the claimant's solicitors to make a specific request for disclosure, which they then subsequently duly did. Citation Ltd declined the request on the basis that the documents requested were privileged.

9. Knights plc then made an application to the tribunal for a specific disclosure order on 13 December 2019. What they sought was:

> **"…all correspondence, advice notes and emails between the Respondents and their HR advisors at Citation relating to the Claimant from 4 May 2018 (when the Claimant made a flexible working request) to 21 August 2018 (when the Claimant was dismissed)."**

10. They set out their case that neither legal professional privilege nor litigation privilege applied.

11. On 30 January 2020 Mr Cater, Advocate at Citation Ltd, responded, resisting the application. He asserted that the claimant's solicitor was making an assumption that the respondent was being advised by "HR advisers", based on the claimant's own experience. He stated that a considerable number of Citation's Employment Law team were solicitors holding practising certificates and said that Citation "holds an SRA Waiver, therefore the Claimant's solicitor is not able to say with certainty that Legal Advice Privilege does not apply." The claimant's solicitor had also asserted that litigation privilege did not apply during the relevant period because legal proceedings had been in reasonable prospect. Mr Cater submitted that whether that was correct was a factual test and that the matter should be listed for a hearing to determine the application.

12. On 8 June 2020 the tribunal wrote to the parties at the direction of Employment Judge Miller. This letter notified them, firstly, that the full merits hearing due to start on 15 June was postponed. I interpose that this appears to have happened partly because of the disruption caused by the Covid

pandemic but also because of the outstanding disclosure application. The letter went on to indicate that the judge directed there be a preliminary hearing on 15 June to determine that application and make further case management orders. The judge directed the respondent for that purpose to prepare a hard and electronic bundle including a number of matters listed in the letter including "the disputed documents". The tribunal's letter continued:

> **"The bundle is to be sent to the Employment Tribunal as soon as possible to enable the hard copy to be sent to the Employment Judge hearing the case in advance of the hearing."**

13. On 10 June Knights plc wrote to the tribunal and Citation Ltd, asking that, if they had not already done so, Citation should provide copies of the disputed documents "for the judge's consideration in advance of the hearing to avoid any further delays. We appreciate that this will be under separate cover which will not be copied to ourselves."

14. On 12 June both representatives tabled skeleton arguments for the purposes of the forthcoming hearing. In his skeleton argument Mr Cater noted that in **Prudential plc v Special Commissioner of Income Tax** [2013] UKSC 1 the Supreme Court had identified that, for the purposes of legal advice privilege, a lawyer means either a barrister, solicitor or a member of the Institute of Legal Executives, and a solicitor must hold a current practising certificate. He went on to state that Citation employed a number of barristers and solicitors holding practising certificates throughout the company. However, he accepted that, whilst the respondents had at certain times received advice from two qualified solicitors and a non-practising barrister in the Employment Law team, no advice was given by those three members of staff during the period from 4 May to 21 August 2018.

15. Mr Cater's submission to the employment tribunal continued:

> **"The Employment Law team does consist of 'Advisers' who are not solicitors or barristers. Their work is, however, supervised by solicitors, including the senior management and Head of Department.**

> **Legal advice privilege also extends to the non-qualified employees, including secretaries, clerks, trainee solicitors, pupils and paralegals who are acting under the direction of a lawyer.**
>
> **Whilst we are unable to say at this stage whether there was any direct supervision of the advice given during the relevant period, it is the Respondent's case that the general level of control, management and supervision of the work of advisers gives rise to Legal Advice Privilege in this case."**

Mr Cater also set out his case that litigation privilege applied because litigation was in reasonable contemplation at the time. He also questioned the relevance of the documents requested.

16. A skeleton argument for the claimants prepared by Mr Sheppard of counsel was also tabled. This maintained that legal advice privilege could not be invoked in this case as it did not apply to advice given by a non-legal adviser, being an adviser who was not a qualified lawyer. Litigation privilege did not apply because litigation was not reasonably anticipated at the relevant time.

17. On 15 June 2020 the preliminary hearing took place by telephone before EJ Broughton. The privilege dispute was not determined. The judge wrote in the minute of the hearing in part:

> **"The respondent asserted privilege whilst acknowledging that none of the advice given during the relevant period was given by qualified lawyers. The principal issue was agreed to be whether that advice was legal, under the supervision of a qualified lawyer, or more akin to HR advice.**
>
> **It had been hoped that the disclosure issue could be dealt with today, but it became clear that the respondent's representative could not be certain that they had all of the potentially disputed documents. In addition, the claimant's representative had not seen the documents and there was a need for witness evidence about the way in which such advice was offered."**

18. The orders made were described in the following way:

> **"I made the following case management orders by consent. Insofar as they are not made by consent, reasons were given at the time and are not now recorded."**

19. As to the orders themselves, order no 1 was as follows:

> **"Restricted disclosure.**
>
> **1.1 The claimant is ordered to provide the respondent's representatives with a full set of the disputed documents by no later than 31 July 2020. In the event that there are relevant documents not before me today which the respondent maintains should not be disclosed even on the strictly limited basis detailed below, they should be identified alongside the disclosure together with the respondent's submissions as to why they have been withheld.**
>
> **1.2 The requirement to disclose the advice log and any ancillary drafts and documents is on the strict understanding that these may only be viewed by the claimant's solicitor and counsel who must not disclose their contents to the claimant or any other third party unless and until a concession or determination as to their admissibility is made."**

20. I observe that in line one the parties have obviously erroneously been transposed. The judge also ordered oral evidence from the respondents' witnesses addressing the privilege issue to be given by reference to typed witness statements.

21. I pause to observe that Judge Broughton therefore took the approach there of requiring the disputed documents to be provided to the claimant's representatives, that is to say solicitors and counsel, but on the basis that they must not disclose the contents to the claimant.

22. On 26 June the respondents sought a reconsideration of that order, contending that they had not consented to it, that it was not necessary, in order for the issue to be determined, for the claimant's lawyers to have sight of the documents themselves, and that the effect of providing them to the lawyers would itself undermine and destroy the very privilege that the respondents were seeking to assert.

23. In July 2020 the respondents also instituted an appeal to the EAT against that decision. The grounds are somewhat discursive, but they include the following. Firstly, the effect of such an order was to fundamentally compromise the principles of privilege being asserted by allowing an unfair

advantage to the claimant, by way of her representatives. In this regard, reference is made to **Scotthorne v Four Seasons Conservatoires (UK) Ltd** UKEAT 0178/10, wherein the EAT had sight of the disputed documents but the opposing representatives did not. It was also asserted that if the documents were not protected by legal advice privilege, then they were protected by litigation privilege.

24. On 19 August, in further correspondence with the employment tribunal, the claimant's solicitors opposed the reconsideration application. On 2 November Citation Ltd wrote to the tribunal explaining that they had not complied with the order because their application for a reconsideration of it, and their appeal to the EAT against it, were both outstanding.

25. On 4 November the tribunal wrote at the direction of EJ Broughton that the original order was made by consent and that consideration was being given to a strike-out. Citation replied, amongst other things, disputing that this particular order had been made by consent.

26. The further preliminary hearing that was due to take place on 6 November 2020 remotely did not happen because of technical problems on the day. Instead, EJ Broughton caused a letter to go that day to the parties, reading in part as follows.

> **"At the previous hearing the respondent was unable to confirm whether full disclosure of the disputed documents had been provided to the tribunal, nor the supervision structure that applied to the various advices.**
>
> **The claimant is asked to confirm whether they understood this to be the position and whether the ensuing order was made by consent within 7 days.**
>
> **The respondent is asked to confirm whether all outstanding (disputed disclosure and supervision) documentation has now been provided to the tribunal also within 7 days.**
>
> **The respondent should then update their submissions on admissibility (accompanied by a sworn affidavit) based on this full information by 23 November 2020.**

> **The claimant should update their submissions in response by 1 December 2020.**
>
> **Employment Judge Broughton will then consider the position on disclosure and the reconsideration application on the morning of 7 December 2020 and will inform the parties of the outcome by telephone at 2 pm on 7 December 2020 at a preliminary hearing with a time estimate of 2 hours when further directions may be given."**

27. I pause to observe that EJ Broughton at this point was no longer pursuing the approach of his previous order, that these materials should be provided to the claimant's legal team, but was instead now requiring that they be provided to the tribunal.

28. An affidavit of Gillian McAteer was tabled by the respondents. She stated that she was the Head of Employment Law at Citation and a qualified solicitor holding a current practising certificate. As such, she headed the HR and employment law department. She described herself as the manager of the team of advisers in that department. She described the work of the team providing employment law advice to clients who had issues relating to their staff and she gave a number of examples. She said that this involved advice over the telephone and preparation of draft correspondence. She set out that the team had approximately 47 advisers and 7 managers at the time, two of whom job-shared. Therefore each manager was responsible for supervising a team of approximately eight members.

29. The managers had responsibility for overseeing the work of the members of their teams and, if there were any queries relating to ongoing cases or support needed, these would be raised with the manager. At the time six of the seven managers were qualified solicitors with a current practising certificate. There was no formal auditing of team members' work, but managers worked on individual cases with advisors on a day-to-day basis, dealing with their queries and undertaking case reviews or providing second opinions. There was supervision and performance review meetings. Ms McAteer led training sessions each month, and a legal update bulletin was also provided. Managers would identify when there were specific training needs for individual team members, and this would be

undertaken, where identified, by way of regular reviews, feedback and so forth.

30. Ms McAteer also stated in her affidavit:

> **"I cannot emphasise enough that although case supervision relied to an extent on team members raising any concerns or issues they had, the vast majority of this was undertaken by qualified solicitors who held a current practising certificate."**

She confirmed that the records provided to the tribunal were of conversations, summary advice, notes and draft correspondence arising from advice taken by the respondent and given by the ELT member.

31. It is apparent that, as that affidavit states, the respondents did around this time provide copies of the disputed documents to the tribunal itself.

32. The minute of the employment tribunal hearing which took place on 7 December 2020 starts, under the heading: "Reconsideration/Specific Disclosure", with the following order:

> **"The respondent's representatives must disclose the advice notes and enclosures of all advice given by citation [sic] between 4 May 2018 and 29 June 2018."**

33. The reasons follow in nine numbered paragraphs:

> **" 1. I considered the advice notes that were subject to the claimant's application for specific disclosures and the parties' evidence and submissions on privilege on the papers.**
>
> **2. Having done so, I am satisfied that the advice notes attract litigation privilege from the date that matters had come to light that could result in the claimant's dismissal. All advice, therefore, on or after 30 June 2018 is privileged.**
>
> **3. In that regard, I follow the decision of the EAT in Scotthorne v Four Seasons Conservatories (UK) Ltd UKEAT/0178/10/ZT.**
>
> **4. The advice prior to that date, however, could not be said to have had the dominant purpose of contemplated litigation. Whilst wise to take advice on flexible working requests and possible reasonable adjustments there was no reason to assume that litigation was any more than a possibility at that stage.**

> **5. Moreover, in the absence of any evidence that any of the specific advice in this case was provided under the necessary level of supervision of a qualified lawyer, legal advice privilege had not been shown to apply. The respondent had acknowledged that this particularity was required in their application but had not provided it, instead providing a generic overview of the department.**
>
> **6. It was acknowledged that none of the advice was provided by a qualified lawyer and that not all of the supervision, which in any event relied on the unqualified advisers seeking it, was from qualified lawyers.**
>
> **7. As a result, whilst there may have been more qualified supervision than in Scotthorne, the assertion of legal advice privilege failed for similar reasons to those given in that case. The advice was more akin to which would have been provided by an internal HR department.**
>
> **8. The claimant's application for disclosure of the advice from 4 May 2018 to 29 June 2018 is, therefore, granted.**
>
> **9. Neither the claimant, nor her representatives shall be entitled to disclosure of the subsequent advice notes and so, to that extent, the respondent's application for reconsideration of my original decision of 16 June 2020 succeeds, notwithstanding my understanding that it had been made by consent."**

34. That decision gave rise to the second appeal to the EAT, challenging the tribunal's decision that, in respect of the period prior to 29 June, disclosure was required because neither legal advice nor litigation privilege applied. I will return to the particular grounds of appeal presently.

The Appeals: Arguments, Discussion and Conclusions

35. The two appeals therefore raise three matters: firstly, in relation to the June 2020 decision, whether the judge erred in directing disclosure to the claimant's solicitors in the particular way that he did, for the purposes of the substantive determination of the privilege issues on a later date; secondly, in relation to the December 2020 decision, whether the judge erred in holding that litigation privilege did not apply to the advice given before the end of June 2018; and thirdly, in relation to the same decision, whether the judge erred in holding that legal advice privilege did not apply to the advice given before that date.

36. At the hearings in the employment tribunal Mr Sheppard of counsel appeared for the claimant and Mr Cater, Advocate, for the respondents. For the purposes of this appeal hearing, respective written skeleton arguments were prepared by Messrs Sheppard and Cater, but at the hearing itself I heard oral arguments from Mr Sheppard and from Mr Ellison, Advocate from Citation Ltd.

37. I shall start with the first appeal, relating to the order made in June 2020. There was a dispute as to whether it had been made by consent. Mr Ellison submitted, however, that it was in any event wrong in principle for that order to have been made, because to comply with it would breach the privilege that was being asserted, at a point in time when the validity of that assertion had yet to be determined. Mr Sheppard submitted that the order had been made by consent, as the minute itself recorded. He also submitted that, given that, and given the particular history of non-compliance by the respondents in this particular case up to that point, it was an appropriate order to make, whether or not orders of that type were necessarily appropriate in all cases.

38. My conclusions are these. As to the question of non-compliance, the original order of EJ Miller was at best ambiguous and, read literally, was for documents to be sent to the tribunal, not to the claimants. Whilst the respondents had not complied with that order, the order made by EJ Broughton was different. If EJ Broughton's order was in principle not an appropriate order for him to make, then in my view the respondents' non-compliance with the previous order made by EJ Miller would not have justified the EJ Broughton order.

39. On the question of consent, the case management minute is less than helpful, because it states that the orders were made by consent, but then also observes that, insofar as they were not made by consent, they were made for the reasons given by the judge at the time. True it is that in the subsequent

letter the judge states that this particular order *was* made by consent, but then he also sought further submissions on the question, and then does not appear to have given a final ruling on that point.

40. Whether or not this order was made by consent, in my judgment it was not a proper exercise of the tribunal's case management discretion to make it at all. That is for two reasons. Firstly, I agree with Mr Ellison that the effect of such an order, if complied with, would have been to compromise the very privilege that was being asserted, by requiring the respondents to share the contents of the documents in question with the claimant's representatives. That would not be affected by the fact that, according to the terms of the order, they would not be entitled in turn to share the contents with the claimant herself. Privilege, if it applies, protects the party whose privilege it is, from being required to disclose the contents of such documents to anyone at all.

41. Secondly, a point I raised with Mr Sheppard during the course of oral submissions is that it seems to me that the effect of such an order, had it been complied with, and had the documents been then read by the claimant's solicitors or counsel, would have been almost certainly then to place them in a position of immediate and irreconcilable conflict; or certainly there would have been a high risk of it doing so. Mr Sheppard fairly acknowledged the validity of that point. He did not withdraw his opposition to this ground of appeal but submitted that, even it was well-founded, it did not matter to the ultimate application or way forward in this case.

42. For the reasons I have given, the order was wrong in principle and the first appeal relating to it is therefore allowed. As to the implications of this for the way forward in the tribunal, that is a matter to which I will return.

43. I observe, before leaving the first appeal, that neither party challenged the order that was later made, and indeed complied with, which was for the respondents to disclose the documents that were

disputed to the tribunal and only the tribunal itself. But as it may be of wider assistance, I will say a word about that. In **New Victoria Hospital v Ryan** [1993] ICR 201 it is apparent, as discussed at 203E, that in that case the tribunal below did not see the documents at issue, but the EAT judge did. In **Scotthorne** HHJ McMullen QC said this:

> **"Procedure**
>
> **9. The course which has been taken by the Respondent is to provide a file of documents said to be the relevant to the request. It is for my eyes only. This is a rather uncomfortable procedure but recognised as apt for judges not conducting a trial but required to decide issues of disclosure and inspection; see by analogy CPR31.19 and the inherent jurisdiction. Mr Seabrook said that it is correct in the EAT, following New Victoria Hospital v Ryan [1993] IRLR 202 EAT, Tucker J and members from which it appears that the EAT Judge alone had access to disputed materials. Ms Moss's stance is neutral. Faced with an unopposed application that I should read the material I did so, expressly reserving my decision until I had heard argument on the substance."**

44. As HHJ McMullen QC noted, the application for him to read the material in that case was unopposed. Perhaps because of that, when he referred to CPR 31.19 and the inherent jurisdiction, he did not consider that aspect in any further detail. I will, however, say a little more about it.

45. It is well-established that employment tribunals do not necessarily follow the approach taken in the **Civil Procedure Rules** to all matters of procedure, but there are some matters where it is appropriate that they do so. This is an instance where it seems to me the **CPR** approach should in principle in substance be followed. There are a number of authorities, in particular **West London Pipeline Storage ltd v Total UK Ltd** [2008] EWHC 1729 (Comm), which indicate that, whilst there is a power to order disclosure of disputed documents for the eyes of the court only, the use of this power should be treated as a last resort.

46. The appropriate starting point is for the party asserting privilege to be required to provide a sworn statement explaining on what basis it is asserted and including, with as much specificity as can

be provided without compromising the privilege, information about the nature of the documents at issue. Such a statement will not necessarily always be determinative, but it should be treated as such unless, on its face, or from other evidence or material before the court or tribunal, it is reasonably apparent that privilege has been or may have been claimed on a legally incorrect basis, the nature of the documents has been incorrectly represented or the statement is materially incomplete. In a case where the tribunal considers that the statement should not or not yet be treated as conclusive, there are a number of further steps it may take to address that issue. These might include, as appropriate, requiring the party asserting privilege to provide a further statement with more information or clarification, inviting representations and/or requiring the party asserting privilege to provide copies of the documents to the tribunal itself to assist in determining the issue. But the starting point should be the provision of a sworn statement.

47. I turn to the second appeal, relating to the December 2020 decision, and first to the challenge to the effect that the judge erred in holding that litigation privilege did not apply before the end of June 2018.

48. Litigation privilege applies to a document which is created for the dominant purpose of present or contemplated litigation: see, for example, **Waugh v British Railways Board** [1980] AC 521. For these purposes, litigation includes an employment tribunal claim but not, for example, an employer's internal grievance or disciplinary process. In order for litigation privilege to apply, litigation must be reasonably in prospect when the document in question is created: see, for example, **Three Rivers v Bank of England (no. 6)** [2004] UKHL 48 per Lord Carswell at [83]. In **M and W Graysbook Ltd v Wallens** [1973] ICR 256 it was held by the National Industrial Relations Court that litigation privilege might apply in relation to the conduct of litigation in that court, or in what were then called industrial tribunals, by non-legal representatives. The correctness of this was doubted in **Ryan**. But it was approved by Elias P in **Howes v Hinckley and Bosworth Borough**

Council UKEAT 0213/08 on the basis that **Wallens** was concerned solely with litigation privilege, not legal advice privilege, which was considered also in **Ryan**.

49. In his decision in the present case the judge identified the watershed as occurring after the end of June. It is plain that that was broadly speaking on the basis that, prior to that date, all of the interactions between the parties related to the flexible working request, whereas it was only following the incident at the end of June that the respondent at the start of July decided to suspend the claimant and initiate a disciplinary process.

50. I am mindful that the claimant's case before the tribunal is, as I have said, that the disciplinary process was a pretext, the reasons for which went back to her earlier flexible working request, and had to do with disability and age. However, the essential chronology as to when the suspension occurred and the disciplinary process was initiated, to which the tribunal's reasons refer, is not as such in dispute.

51. Mr Ellison, relying on Mr Cater's written skeleton, makes two particular submissions in support of the contention that the tribunal erred by not concluding that litigation privilege applied to the whole period from 4 May 2018. The gist of the first submission is that it was apparent, on the evidence presented to the tribunal, that Citation Ltd does not just provide general advice to its clients on HR matters, by way of general guidance on compliance with legislation and regulations, but also provides specific advice to clients when specific issues arise with particular members of staff, on which they seek advice or assistance. Such advice is plainly sought for two primary reasons, one being to avoid litigation occurring and the other being to ensure that, if litigation does occur, the client is in the best position to defend the claim. In this regard, Mr Ellison relied on **Scotthorne** as illustrative. In that case a client had sought advice at the time when, following an incident, it was decided to initiate a disciplinary process against an employee which resulted in their dismissal; and

the EAT considered that litigation privilege applied.

52. In oral submissions Mr Ellison suggested that it was plain that litigation was reasonably contemplated in this case, particularly where its subject matter was not only a flexible working request but one asserted to be by way of reasonable adjustment, given the complexity of disability discrimination claims and that, where such claims succeed, significant damages may be awarded.

53. The second strand of the argument was to the effect that in this case the tone of the correspondence and meetings between the claimant and respondents during the whole of the period in question was indicative, as Mr Cater put it in his skeleton, of an employee prepared to fight her corner if she felt she was not going to achieve her aims.

54. As to the first strand, Ms McAteer's statement explained that the service provided by Citation to its clients extended to giving advice on particular issues arising from time to time in relation to particular members of staff. The judge plainly accepted that, and observed that it would be wise to take advice on the flexible working and reasonable adjustments request. But I do not think it follows that this should in itself have led the tribunal to conclude that litigation was reasonably in prospect at that point and that this was the dominant purpose for which the advice was sought.

55. I do not agree that **Scotthorne** provides any support for that proposition. In that case a specific event of an altercation at work led to the employer consulting its insurer, RBS Mentor, and making an allegation of gross misconduct which led to the employee's dismissal. The EAT concluded that the insurer had been consulted with the prospect of a dismissal, and litigation ensuing from such dismissal, in mind. That decision, relating to an anticipated dismissal for gross misconduct, went on its own facts. It does not establish any point of law which bound the tribunal in the present case to reach the same conclusion on the different facts of the present case.

56. The mere fact of taking advice on issues which may be said to have a legal context and could in principle be the subject of employment tribunal proceedings is not enough, nor is the fact that the issues may be complex, or that if the employer gets them wrong and there is successful litigation, significant compensation could be awarded. Those may all be good reasons for getting advice, but it cannot be said that the employment tribunal was wrong not to treat these features as by themselves pointing to the conclusion that in this case litigation was reasonably in prospect, still less that the prospect of litigation was the dominant purpose of seeking the advice. Wishing to minimise the risk of litigation occurring, or of being unable successfully to defend litigation if it does occur, is not the same as litigation being reasonably in prospect.

57. As to the second submission, that the correspondence and meetings indicated that the claimant was prepared to fight her corner, Mr Ellison accepted in oral arguments that this was no more than a submission that was made to the tribunal. The only evidence that the tribunal had was the written statement of Ms McAteer, and a statement put in by the claimant about her experience of dealing with the respondent's team in relation to her job. This was not a case where any primary evidence, such as minutes of meetings or emails or other communications tending to show the claimant making threats of litigation, whether express or veiled, or anything of that sort, was placed before the tribunal. For good order, Mr Ellison confirmed it was not the respondent's case at any point that there was anything in the disputed notes themselves that demonstrated that.

58. For all of these reasons, I conclude that the tribunal was entitled to find that litigation privilege did not apply during this period, because the advice was not sought for the dominant purpose of reasonably contemplated litigation.

59. I turn to the question of whether the tribunal erred in holding that legal advice privilege did

not apply to communications between the respondent and Citation Ltd relating to the claimant in the relevant time window.

60. The application of legal advice privilege is not dependent on there being reasonable contemplation of litigation. It applies more generally to protect communications between clients and qualified lawyers for the purposes of obtaining or giving legal advice. In **Balabel v Air India** [1988] 1 Ch 317, it was said that legal advice is not confined to telling the client the law. It must include advice as to what should prudently and sensibly be done in the relevant legal context. That expansive approach was also taken by the House of Lords in **Three Rivers** case: see, in particular, per Lord Scott of Foscote at [38] and following, taking the **Balabel** approach but emphasising that there must be relevant legal context in which the advice is given.

61. It is also well-established that for these purposes "lawyer" means someone with a suitable legal qualification, such as a barrister, solicitor or qualified legal executive. Thus in **Ryan** the privilege was held not to apply to personnel consultants. In **Prudential** the House of Lords, by a majority, declined to extend the privilege to accountants who had given specialist tax advice even though they were a firm of professionals, and the privilege would have attached to precisely the same advice had it been sought from and given by a firm of solicitors. The privilege does, however, apply also to in-house solicitors, providing that they are giving legal advice in their capacity as such, rather than acting in some other capacity that they may hold in the organisation which employs them: see **Alfred Crompton Amusement Machines v Customs and Excise** [1972] 2 QB 102 at 109.

62. In the present case, as I have noted, Citation Ltd is not a firm of solicitors, nor plainly was this a case of an employer consulting its own in-house solicitor. As I have described, the undisputed factual position during the particular time window with which the tribunal was concerned between May and August 2018 was that Citation had an HR and Employment Law department. The head was

Ms McAteer, a solicitor with a practising certificate, and there were seven managers, of whom 6 were solicitors with practising certificates, and 47 advisers divided into teams of roughly 8 per manager or job-share manager. The respondent, as I have noted, also accepted that, during the relevant time window, its actual consultations were not with any of the solicitors or the barrister. The evidence before the tribunal did not state whether the adviser or advisers who they did consult were in a team supervised by a qualified lawyer.

63. I have described already how Mr Cater advanced his case before the tribunal in his original 12 June submission, and it was advanced in essentially the same fashion in a revised written submission presented in the run-up to the December hearing. That way of running the case was also reflected in the case summary of the June hearing from which I have also quoted, and that also captures that the respondents' case focussed not on the issue of supervision, but on the proposition that the advice given by the advisers concerned was not given by qualified lawyers and was effectively given by them in the capacity of HR advisers.

64. The Grounds of Appeal have, in summary, four sub-strands to them. Firstly, the tribunal wrongly relied on **Scotthorne**. Secondly, the tribunal wrongly relied on the decision in **Prudential**. Thirdly, the tribunal erred with respect to the fact that Citation Ltd has what was called an SRA waiver. Fourthly, there is a point relating to SRA standards.

65. I will take these in a different order, starting with the SRA waiver point. As has been noted, it was mentioned by Mr Cater at points before the tribunal that Citation Ltd has a waiver from the SRA. Mr Ellison helpfully explained in oral submissions that the significance of this waiver is that solicitors employed by Citation Ltd are entitled, by virtue of it, to describe and hold themselves out as solicitors, in their dealings with clients. It should be stressed that, in the absence of such a waiver, it is not unlawful for them or any member of Citation Ltd's team to give legal advice on employment

matters to their clients. That is because the giving of such advice is not a reserved legal activity. But, without the waiver, the qualified solicitors on the team could not hold themselves out as solicitors when doing so. Mr Sheppard submitted that it was not open to the respondents to rely on this point before the EAT as the point was not relied upon before the employment tribunal. Further, according to the Notice of Appeal, Citation Ltd did not have a waiver until November 2018; and it was in any event legally irrelevant.

66. Mr Ellison, having checked the position during the course of the hearing before me, confirmed to me that Citation Ltd only had a waiver from November 2018, which was after the time window with which the employment tribunal was concerned. He accepted that, at least for that reason, this proposed ground of appeal was untenable, and he did not pursue it any further.

67. I turn to the distinct strand of argument by reference to SRA standards. The argument in the Notice of Appeal referred to the *SRA Handbook*, second edition of 23 December 2011, which I am told was the one in force in the relevant time window in 2018. The Notice of Appeal refers to the section of the SRA code of conduct within that handbook, which includes mandatory outcomes which those who are regulated by the SRA are expected to achieve. Within a subsection headed "You and your business" is a chapter headed "Management of your business", described as being about "the management of your firm or in-house practice". Within the list of objectives there, Objective 7.8 is that "you have a system for supervising clients' matters to include the regular checking of the quality of work by suitably competent and experienced people." In the course of oral argument Mr Ellison also referred to Objective 7.6, being that "you train individuals working in the firm to maintain the level of competence appropriate to their work and level of responsibility."

68. The argument sought to be advanced is that those objectives do not include a stipulation that the advice given *in each individual case* must be specifically supervised or managed by a lawyer; and

that these objectives are the touchstone for the question of whether there is sufficient general supervision and management of a non-lawyer by a lawyer in order for legal advice privilege to apply. Drawing on that argument, it was contended that the judge had erred, having regard to the uncontested evidence of Ms McAteer, by failing to conclude that the arrangements in place in Citation Ltd's HR Employment law department at the time met those standards, and hence the privilege applied.

69. Mr Sheppard objected that it was not open to the respondents to seek to run this argument in the EAT because it had simply not been run in the tribunal below. The only mention in the tribunal of the SRA was in relation to the matter of the waiver, where it was now accepted that this was irrelevant. The SRA code of conduct had not been put before the tribunal, and it had not been argued before the tribunal that if the supervision of the advisers in the team was consistent with the objectives in it, then legal advice privilege would attach to advice given by them.

70. Mr Sheppard argued that this was therefore an attempt on the part of the respondents to run a new legal argument in the EAT. Applying the guidance in cases such as **Jones v Governing Body of Burdett Coutts School** [1999] ICR 33 and **Slack v Cumbria County Council** [2009] ICR 1217, that was not permissible unless there were exceptional reasons for permitting the argument to be run; and there were none in this case. Mr Ellison responded that this was not a case of the respondents seeking to run a new legal argument in the EAT, but rather of them seeking merely to refer to material that was akin to a further legal authority.

71. As I have described, reliance on the supervision arrangements as a relevant consideration was first advanced in the employment tribunal by Mr Cater in his 12 June 2018 skeleton. This was in the context of a submission that direction and control by a lawyer, including the degree of supervision, was a relevant consideration. There is no reference there to the SRA code as providing a relevant touchstone, nor was this material introduced for the purposes of the June or December hearings. In

my judgment there is a real and material difference between the way the case was advanced in the employment tribunal and the argument that the respondents now seek to advance in the EAT. It involves not only referring to new materials that were not before the tribunal, but the mounting of a specific argument about the legal test being tied to whether an individual who is not a lawyer is being supervised by a lawyer in a manner that meets SRA standards. This material could have been put in front of the tribunal, and this argument could have been mounted before the tribunal. But the respondents did not do so, and so it did not consider or have any opportunity to consider it. Even when a new argument would not require new evidence, it may not be run in the EAT unless there are exceptional reasons for permitting it. I am inclined to think that the SRA materials *are* new evidence, but in any event there are no exceptional reasons for permitting the argument to be run in this case. Therefore it cannot be. Whether the tribunal erred in law must be decided by reference to the argument and evidence that was put before it.

72. But I also observe that, even had this point been run before the tribunal, I am not persuaded that it would have erred in reaching the decision that it did. Mr Sheppard submitted that, as is made clear by **Prudential**, the advice must be given by a qualified lawyer. If the advice, as it were, comes out of the mouth of someone who is not a qualified lawyer, that will therefore only attract legal advice privilege if the circumstances are such that the advice nevertheless falls to be treated as the advice of the lawyer concerned. Where a firm of solicitors is involved, that is so because the client is getting advice from the firm and its qualified partners or directors. Their employees act as their agents. In the present case there was no sufficient basis to say that the non-qualified advisers in the team were the agents of the head of the team or the other solicitors who were managers within the team.

73. Though the following material was not included in the bundle or arguments prepared for this appeal, I drew the attention of the parties to the commentaries in two textbooks, *Phipson on Evidence* and *Privilege* by Colin Passmore. *Phipson*, in chapter 23 concerning legal professional privilege,

section 4, communications with lawyers and non-lawyers, within (c), "What sort of lawyer", at paragraph 23-36 includes the following, by way of commentary on **Dadourian v Simms** [2006] EWCA Civ 399 concerning someone who, unbeknown to the client, was not currently qualified to practise:

> **"But in most cases the client will instruct the law firm, not the individual, and the attributes of the individual may not matter if he is supervised in accordance with regulatory rules. Thus, if Mr Simms was properly working as a paralegal within the law firm because he had been struck off as a solicitor and had disclosed this to the client, no doubt privilege could be claimed for advice given by the firm through him."**

74. Under the subheading (d) "Lawyers working with non-lawyers" at paragraph 23-38, the following appears.

> **"Practical problems may arise where staff who are not legally qualified are involved in the giving of advice in a department supervised by qualified lawyers. The unqualified staff may be paralegals working supervised in a department. So long as the paralegals are properly supervised in accordance with solicitors' regulatory requirements, the advice will be the advice of the firm or the legal department rather than the advice of the paralegals themselves and thus will be privileged."**

75. The authority cited is **Descoteaux v Miershevinsky** [1982] SCR 860.

76. In *Privilege*, fourth edition, in the discussion of **Dadourian**, at paragraph 1-309 there is the observation:

> **"Of course there will be lawyers employed in private practice and in-house who will not have a practising certificate, for example a trainee solicitor, and yet their advice, so long as given under the supervision of a solicitors, will attract privilege."**

77. Mr Sheppard submitted that these passages confirm that the underlying test remains in all cases whether the advice is to be treated as advice *given by* the qualified lawyer. That the advice must be advice *given by* the qualified lawyer emerges, he said, unambiguously from numerous passages of the majority judgments in **Prudential**. As *Phipson* puts it: "Advice from someone else may be covered if it falls to be treated as advice given by the firm through him" or "advice of the firm or the legal department rather than the advice of the paralegals themselves."

78. Further, he suggested, this could only apply where the individual giving the advice was, if not a lawyer, then a quasi or proto-lawyer such as a paralegal. In any event, outside of the environment of a law firm or a designated in-house legal department, such as that of the Borough Solicitor in a local authority, a very tight degree of control and supervision would be required in order for the agency test to be satisfied.

79. Mr Ellison argued that the **Prudential** was not in point, as it was concerned with whether in principle non-lawyers, as a group, are covered by the privilege – and they are not. But it was not concerned with the test of whether advice said to be given under the auspices of a lawyer by someone else will be treated as covered.

80. On this point I am inclined to think that Mr Sheppard is right. The starting point is the discussion in **Prudential**, focussing on the reasons why it was accepted the privilege should be confined to advice by qualified and regulated lawyers unless or to the extent that Parliament decides otherwise. The commentaries in the textbooks situate the issue of supervision in accordance with regulatory rules within the context of an overriding question as to whether the advice given falls to be treated as the advice of the lawyer, whether that is described as being by conventional agency or some analogous route. These are also limited commentaries, with citation only of one authority from the Canadian jurisdiction, which was not available to me at this hearing or further considered.

81. But, for reasons I have explained I do not ultimately need to determine this point, and it may merit further examination and fuller argument on another occasion.

82. I turn to the next strand of appeal, which is that the tribunal erred by reference to what it said about **Scotthorne**. This appears in paragraph 7 of the tribunal's decision, as I have already set out.

Mr Ellison submits that the reference is erroneous because the only reference to legal advice privilege in **Scotthorne** was at [19], where it was said:

> **"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, Mr Carson, and any advice given by him is protected by legal advice privilege. The real issue in this case is litigation privilege."**

Mr Ellison says that there was no discussion or finding in **Scotthorne** about the level of supervision of members of the RBS Mentor team who were not lawyers.

83. However, though its reasoning is rather compressed, I do not think that there is an error in what the tribunal said here. What the tribunal says is that there "may" have been more qualified supervision in the present case than in **Scotthorne**. It seems to me the tribunal is making the very point that there was no information or finding in **Scotthorne** about what, if any, supervision there was of the non-qualified lawyers' team, which is why in the present case there may be a point of distinction that there was greater supervision. In any event, I do not see the reference to **Scotthorne** as being integral to the tribunal's reasons, which are squarely based on its findings about the factual situation in the present case, whether or not there is any useful factual comparison or contrast to be made with **Scotthorne**.

84. Next, it is argued that the tribunal erred in relation to its consideration of the decision in **Prudential plc**. With respect, I find the way this is framed in the Notice of Appeal a little hard to understand. It is written there:

> **"Lord Neuberger in refusing the appeal, identified that 'importantly, Parliament has legislated in a way which plainly implies that it assumes legal advice privilege ('LAP') is limited to advice given by lawyers. Thus, there are statutory extensions to LAP …' and therefore the learned Employment Judge has made an error of law here when also applying the ratio of Prudential."**

85. The Notice of Appeal does not explain why that passage shows that the tribunal has made

such an error. If the point is to seek to rely on the fact that there is some limited statutory extension of the privilege to non-lawyers in certain defined circumstances, I cannot see how that assists the respondents in this case. Indeed, this was one of the reasons why the majority in **Prudential** limited the privilege to lawyers. They took the view that, although the privilege is in its origins a creature of the common law, whether or not to extend it beyond its present boundaries of application to lawyers only, either generally or in a particular case, must be a matter left to Parliament.

86. The tribunal in the present case does not in its decision actually cite the **Prudential** decision overtly, but it seems to me that it did apply the correct starting point, being that the privilege only applies to advice given by qualified lawyers. Its conclusion that the advice in the present case was more akin to that which would have been provided by an internal HR department reflects its acceptance of how the claimant put her case on the application of the **Prudential** authority. Even if the advice given in the present case would, in terms of its substance, have attracted legal advice privilege had it been given by a lawyer, it did not because it was not.

87. I come back then to the way in which this matter was argued before the employment tribunal, being that what was said to be relevant was that the non-legal advisors were acting under the direction and general supervision of the lawyers. But the team was an HR and Employment Law department, and the giving of legal advice was not enough. It was not suggested to the tribunal that they were branded as a legal team or a team of lawyers, and indeed they could not have been. For all the ground covered by Ms McAteer's statement, there was no evidence that whoever the respondents spoke to was in fact managed by a qualified lawyer or whether, in relation to the advice given, any such lawyer had any knowledge of, or input into, that particular advice on the particular occasion or occasions.

88. The tribunal was also entitled to take account of its impression, formed by a consideration of the relative numbers of managers and advisers, and notwithstanding that the advisors were grouped

into teams for that purpose. These were all features that the tribunal was entitled to weigh in the balance, given the generalised way in which the case was advanced before it. The challenge to the tribunal's decision on the facts and legal arguments presented to it that legal advice privilege did not apply in this time window and in this case therefore fails. I cannot say that, on the basis of the facts and legal argument presented to the tribunal, it erred in reaching the conclusion that it did.

89. The appeal in the second appeal against the December 2020 decision therefore fails and is dismissed.

Closing observations

90. There are three points I need to address before I conclude this decision.

91. First, it is important to reiterate that the matter is very fact-specific. What I have had to decide is only whether this tribunal decision erred in law in respect of the particular facts presented to it, as to the advice obtained by these respondents from Citation Ltd in this particular matter, during the specific time window during 2018, and having regard to what the arrangements with Citation Ltd were at that time. I have also had to decide only whether it erred having regard to the evidence before it about that, and the way in which the legal arguments were presented to it. Different facts in another case, whether in relation to advice given by this organisation, or some other organisation, may lead to a different conclusion in respect of either privilege. I have also noted that there are some points of law that I have not had to resolve in order to determine this appeal, but that may merit more detailed examination on another occasion.

92. Secondly, whilst the first appeal against the tribunal's June decision has succeeded, as I have described, in the event, the documents were not disclosed to the claimant's team prior to the tribunal determining this question; and the appeal against the latter decision has itself failed. Although the

tribunal erred in its June order, that does not vitiate the December decision, which, in view of the appeal against that decision having failed, therefore stands.

93. Thirdly, I raised with the parties what Elias P said in **Howes** at [21]:

> **"The court should, in my judgment, always consider the relevance of documents with respect to which a party is seeking disclosure, whether the resisting party specifically raises the matter or not. That is the first question that should be addressed in any privilege case. A court should not order disclosure if the documents have no proper bearing on any of the issues in the case."**

94. In referring there to "relevance" Elias P was plainly using that as shorthand for the test borrowed from the CPR, which has been paraphrased in **CIBC v Beck** [2009] IRLR 740 as being a test of necessity, of which relevance is only one component. See the recent useful discussion in **Santander UK Plc v Bharaj** UKEAT/0075/20/LA. The discussion in **Santander** also again makes the point that I have mentioned, that directions for disputed documents to be disclosed, solely to the tribunal itself for the purposes of adjudication of disputes of this kind, should be a last resort, and that the starting point is to direct suitable sworn evidence to address the issue.

95. In the present case, as I have noted, there was, in the submissions made to the tribunal, an issue raised as to the relevance of the disputed documents, whether or not they were privileged. But it does not appear that any particular evidence was required by the tribunal to be provided on the relevance issue, as opposed to the issues to do with the structural organisation of the Citation team. Nor does it appear that the matter of relevance was addressed in the employment tribunal's decision.

96. In view of the observations of Elias P as to the importance of this issue, I did raise this aspect with the representatives. Mr Sheppard's response was that it was not a ground of appeal in this case that the tribunal had erred by failing to consider or determine the question of relevance. Mr Ellison, straightforwardly, accepted that Mr Sheppard was right about that, and did not seek to rely on that as

a ground of challenge at this stage. That being so, I have not considered or determined it. I observe that, as the judge has made a disclosure order limited to the period up to the end of June, and as the challenge to that order in the EAT has failed, it seems to me that it would not be open to the respondents now to seek to reopen that decision in this particular case by revisiting the issue of relevance. But I draw attention to the point made by Elias J because it is an important one. It does need to be borne in mind by tribunals generally when faced with applications of this sort.

Outcome

97. For all of these reasons, the first appeal against the June decision succeeds. The second appeal against the December decision fails. The December decision of the employment tribunal stands.