



EMPLOYMENT TRIBUNALS

Claimant: Mrs A L Lazkano Agerre

Respondent (1): Freespee Limited

Respondent (2): Darian Sims

Respondent (3): Stephanie Duprat Nee Toubol-Lazarus

Heard at: London South Employment Tribunal via remote link

On: Friday 15th September 2023

Before: Employment Judge Frazer

Representation

Claimant: Mr D Brown (Counsel)

Respondent: Mr I Rees Phillips (Counsel)

JUDGMENT AND REASONS

JUDGMENT

The Claimant's application for specific disclosure is dismissed.

REASONS

1. Reasons were given orally at the hearing and are provided below, having been requested by Counsel for the Claimant.
2. I read the Claimant's application for specific disclosure dated 30th May 2023 and the Respondent's response dated 9th June 2023 prior to the hearing.
3. It was agreed by the parties that the way to dispose of the issue was for me to first consider whether the Third Respondent had the capacity to provide legal advice for the purposes of legal advice privilege. Thereafter it was agreed that if so, I would consider the bundle of privileged documents and make a decision on dominant purpose.

The Capacity of the Third Respondent to Give Advice

4. As a preliminary point in this application the parties agreed that as a matter of principle it would be sensible for me to consider whether the Third Respondent could in fact be acting in the capacity as a lawyer or giving legal advice on an in-house basis to the First Respondent.
5. The Claimant's case is also that in effect the Third Respondent was giving HR advice. It seems to me that to ascertain the nature of the advice as distinct the capacity in which the advice was given I need to look at the privileged documents.
6. However at this juncture I am dealing only with capacity to provide that advice. Mr Brown bases his submission on the fact that the Third Respondent was suspended from the register in France in 2013 and has not since been registered as a solicitor, barrister or legal executive in England. Mr Brown submits that **PJSC Tafnet v Bogolyubov [2020] EWC 23437** is distinguishable as the Claimant was in-house in the UK and not acting as an in-house lawyer based overseas. I was taken to the First Respondent's certificates of qualification in 2013 and good standing in 2014. The Claimant voluntarily suspended herself and from 2014 worked in the UK. She has worked for the First Respondent since 2019.
7. Mr Rees Phillips submitted that having regard to **R (Prudential Plc) v Special Commissioner of Income tax [2013] UKSC 1** legal advice privilege applies to communications with an in-house lawyer. The Court held that having to make a granular assessment of qualifications would be inconvenient and may lead to courts having to take evidence about standards of advice given. The test as set out in **R(Jet2.com Ltd) v Civil Aviation Authority [2020] EWCA Civ** was that the individual had to be acting in the functional capacity as a lawyer. The Third Respondent was acting in the functional capacity as an in-house lawyer.
8. I considered the authorities. In **PJSC Tafnet v Bogolyubov [2020] EWHC 23437** it was held that legal advice privilege extends to communications with foreign lawyers whether or not they are in house provided they are acting in the capacity as a lawyer. There is no additional requirement that they be appropriately qualified, recognised or regulated as professional lawyers.
9. The Third Respondent is a foreign qualified lawyer (not currently registered in France) and an in-house lawyer but is not based overseas.
10. In **R (Prudential Plc) v Special Commissioner of Income tax [2013] UKSC 1** applying **R(Jet2.com Ltd) v Civil Aviation Authority [2020] EWCA Civ 35** the judge noted that legal advice privilege applies to communications with an in-house lawyer.
11. In my finding, it must be the case that if the Third Respondent had been employed as an in-house lawyer to give advice to the Respondent in such a

capacity that in principle the advice that she gave, if the dominant purpose was legal advice, was covered by privilege. The fact that she does not have an English qualification cannot be relevant. Having regard to **PJSC** it was held that the qualifications of a foreign lawyer giving advice in-house but from abroad were not relevant. As a parity of reasoning I cannot see why there would be an additional requirement for the Third Respondent to be English qualified in those circumstances in order for her to have capacity to give legal advice. The same principle would almost certainly apply and she would therefore have the capacity as an in-house foreign qualified lawyer to give legal advice. Otherwise the Tribunal would have to engage in an exercise of ascertaining whether the standard of advice was correct, which was the sort of ill that the court in **PJSC** wanted to avoid.

Submissions – Dominant purpose

1. I was guided to consider the principles concerning both legal advice privilege and litigation privilege. Mr Brown reminded me of the guidance in paragraph 23 onwards of **R (Jet2.com Ltd) v Civil Aviation Authority [2020] EWCA Civ** that claims for legal advice privilege must be the subject of a dominant purpose test. He reminded me that this was relevant in the circumstances of in-house counsel because they could be consulted on a commercial or executive basis, which could mean that the dominant purpose test could fail to apply. Mr Brown had been provided with the index of the privileged bundle and made the point that there was some consultation of external lawyers on 28th January 2021. It was queried whether the advice given by the Third Respondent could really be legal in nature if in fact advice was being sought externally. It was submitted that the Third Respondent wore a number of hats and that if a grievance were raised, it did not mean to say that all conversations about the grievance were necessarily privileged. I was guided to paragraph 69 of **R (Jet2.com Ltd)**. If there were communications which were both legal and non-legal to provide privilege to the whole document the Tribunal would have to be satisfied that the communication could be severed.
2. Mr Rees Phillips submitted that the Tribunal must conduct the assessment on a broad spectrum basis. There are drafts of letters where the Third Respondent was being asked for advice. It was submitted that the privilege prior to the grievance was legal advice and that afterwards it was litigation privilege. Any communications provided about fair practice, procedure, redundancy, maternity rights and how to approach matters would be privileged as it was advice given on employment law. Having regard to **Starbev GP Ltd v Interbrew Central European Holding BV [2013] EWHC 4038 (Comm)** the test for litigation privilege was whether it was reasonably in prospect. On 26th January the Claimant sent in a lengthy grievance letter and said that she had instructed lawyers. It was reasonably contemplated at that point in time.
3. I was reminded briefly of the principles that applied in the case of the iniquity exception and the dicta in **Curless v Shell International Ltd [2019] EWCA Civ 1710** wherein the Court upheld the tribunal judge's finding that the content was *'the type of advice employment lawyers give day in day out.'* It was

submitted by Mr Brown that if there was evidence of a clear cover-up the principle should apply and the document should be disclosed. The Tribunal should take care to consider that at the point that the grievance was raised was the discussion about litigation or was it really about how to deal with the grievance.

Priveleged Documents Bundle

4. Having read the bundle of privileged documents, I determined that up to the point of the Claimant putting in her grievance the Third Respondent was giving advice to the First Respondent in her capacity as legal counsel. The dominant purpose was legal advice and therefore those documents were protected by legal advice privilege. After the grievance had been raised the documents in the bundle also fell to be protected by legal advice privilege both in communications between the Third and First Respondent internally but also as between the First and Third Respondent and the company's external lawyers. The dominant purpose was legal advice. The nature of the correspondence suggested that litigation was reasonably in contemplation so it would also be protected by litigation privilege. There was nothing in the documentation that could form any basis for a finding that there was any iniquity.

Employment Judge A Frazer
Dated: 15 September 2023