

WHAT MANAGEMENT SHOULD KNOW ABOUT LITIGATION IN THE EMPLOYMENT TRIBUNALS

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1. The Employment Tribunal system is intended to provide a readily accessible and informal forum for resolving disputes which is appropriate for lay representatives. The reality is very different and employment litigation contains plenty of traps for the unwary. This paper focuses on four areas which are likely to cause concern for managers facing the prospect of litigation:
 - a. Duty to disclose documentation during proceedings;
 - b. Legal professional privilege;
 - c. Waiving legal professional privilege; and
 - d. Status of without prejudice communications within an ongoing employment relationship.
2. We will start by examining the general position in relation to disclosure and then consider the most common exceptions to the obligation, namely privilege and without prejudice communications.

A) Disclosure and inspection of documentation

3. Disclosure of documentation is the process within litigation whereby the parties provide to one another all documents which are relevant to the proceedings and which are not exempt from disclosure. Inspection is the process by which parties physically examine the disclosed documentation.
4. An order requiring a person other than a party to grant disclosure and inspection may only be made where the disclosure is necessary to dispose fairly of the claim or to save expense.¹

¹ Rule 10(5) of Schedule 1 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2004 (“the Employment Tribunal Rules”).

What material should be disclosed?

5. The nature of the disclosure process is governed by rule 10(2) (d) Employment Tribunal Rules which stipulates that an Employment Judge may require any person in Great Britain to disclose documents or information to a party to the litigation or to allow such a party to inspect the material as might be ordered by a County Court.
6. Part 31 of the Civil Procedure Rules 1998 sets out the County Court's powers and is complemented by the Practice Direction 31A on Disclosure and Inspection. See Appendices 1 and 2.
7. In *Science Research Council v Nasse*², the House of Lords stated that the ultimate test as to whether a document should be disclosed is whether it is necessary to dispose fairly of the proceedings.
8. This dovetails neatly with the requirement under the CPR to disclose all documents that:
 - (i) The party relies on or which support another party's case³;
 - (ii) Adversely affects his own case or another party's case⁴;
 - (iii) Are or have been in the party's control which means that it is or was in its physical possession, it has or has had a right to possession of it or it has or has had a right to inspect or take copies of it⁵.
9. The requirement that documents should be disclosed which a party had a right to access (even if it had never seen or possessed the document) is often overlooked by advisors.
10. For example, in disability discrimination claims, employers often limit their expectations of the medical evidence which they will receive from employees to medical records and letters from treating practitioners. However, in some cases,

² [1979] IRLR 465.

³ CPR, r 31.6.

⁴ CPR, r 31.6.

⁵ CPR, r 31.8.

it may be appropriate to ask for a much wider class of documentation e.g. notes taken by counsellors in the course of seeking medical treatment for depression. The information contained in those types of documents might be critical to a claim where an employee is arguing that she suffered personal injury, namely depression, as a result of her treatment at work.

11. As in other litigation, discovery is limited to documents which are relevant to an issue in the case. It is not ordered so as to enable the claimant to discover whether there is an issue which he can raise.⁶

12. Also, a document should be disclosed if its non-disclosure would distort the meaning of a document which must be disclosed or has already been disclosed.⁷

Where do electronic documents fit into the duty to disclose?

13. The duty to disclose applies to all electronic documents including⁸:

- (i) Emails, word processed documents, information in databases which are readily accessible from computer systems and other electronic devices and media;
- (ii) Documents that are stored on servers and back-up systems and electronic documents that have been 'deleted'; and
- (iii) Additional information stored and associated with electronic documents known as metadata, e.g. the date and time of creation or modification of a word-processing file or the author and the date and time of sending an e-mail.

14. It is absolutely crucial that as soon as litigation is contemplated that parties act to preserve electronic documentation. It is very common for organisations to periodically delete data or dispose of PDA devices. However, in order to ensure

⁶ *British Aerospace plc v Green* [1995] ICR 1006.

⁷ *Birds Eye Walls Ltd v Harrison* [1985] ICR 278.

⁸ PD 31A, para 2A.1 in Appendix 2.

that vital data is retained, electronic documents which may be relevant to litigation should be proactively retained.

15. Interestingly, PD 31B which relates to the disclosure of electronic documents in multi track cases places a specific duties on advisors to inform parties to retain electronic documentation. See Appendix 3. It is probably only a matter of time before an analogous duty arises in the Employment Tribunal.
16. Most electronic information is stored or backed up. However, some forms of communication such as text messages and messaging from PDA's are not usually retained anywhere other than on the device itself. This can cause difficulties, for example, in *Tullett Prebon plc and ors v BGC Brokers LP*⁹ a startling number of Blackberries went missing over the relevant period leading Jack J to conclude that one individual had "lost" his devices on purpose whenever he thought that it might contain inconvenient material.¹⁰
17. Outside the Employment Tribunal it is common in high value claims to use the extensive powers contained in the CPR such as search orders to ensure that electronic devices are confiscated before data can be removed. These types of powers aren't presently used in the Employment Tribunal system which arguably reveals a significant gap in its effectiveness. If one party is genuinely concerned that electronic data might become unavailable during the litigation process, the best course of action is to ask for early disclosure or, prior to proceedings place the opposing party on notice that the data will become disclosable during future proceedings. This should place pressure on the opposing party to ensure that the data is preserved.

When does the duty to provide disclosure arise?

18. Disclosure and inspection is usually ordered by the Employment Tribunal at an early stage during the proceedings. There is no obligation on a party to provide disclosure until the Employment Tribunal has made an order to that effect.

⁹ [2010] IRLR 648.
¹⁰ See [65].

However, there is an on-going duty to provide disclosure once it has been ordered.¹¹

What is the extent of the duty to look for documents?

19. A party is only under a duty to undertake a reasonable search for relevant documents.¹² Guidance is contained within the CPR as to the factors which determine the reasonableness of any search¹³:

- (i) The number of documents involved;
- (ii) The nature and complexity of the proceedings;
- (iii) The ease and expense of retrieval of any particular document; and
- (iv) The significance of any document which is likely to be located during the search.

20. The nature of a “reasonable” search in the context of electronic documentation is not always clear cut. In this regard, very detailed and technical guidance is provided within PD 31B which is set out at Appendix 3 to this document. This is essential reading for any advisor who becomes involved in a disclosure process where there is a significant amount of electronic data regardless of the forum.

How to approach ‘excessive’ requests for documentation?

21. There is some litigation which genuinely requires a significant amount of disclosure. Equal pay claims are a good example of where large numbers of documents will be relevant. However, it is not uncommon for parties, especially claimants, to use the disclosure process as a means of achieving settlement by requesting a significant amount of information so as to overburden the respondent and make an early compromise of the litigation attractive.

22. Crucially, the duty to disclose documents in the Employment Tribunal is subject to the Overriding Objective which states that¹⁴:

¹² CPR, r 31.7.

¹³ CPR, r 31.7.

¹⁴ Reg 3 in the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2004.

- (1) *The overriding objective ... is to enable tribunals and Employment Judges to deal with cases justly.*
- (2) *Dealing with a case justly includes, so far as practicable:-*
 - (a) *ensuring that the parties are on an equal footing;*
 - (b) *dealing with the case in ways which are proportionate to the complexity or importance of the issues;*
 - (c) *ensuring that it is dealt with expeditiously and fairly; and*
 - (d) *saving expense.*

23. In other words, the relevance of a document is not determinative of whether it should be disclosed; the Employment Tribunal must ensure that disclosure is proportionate to the issues in dispute.¹⁵ A useful example of the balancing exercise which Employment Tribunals must undertake is *Perera v Civil Service Commission*¹⁶. In that case, the claimant sought over 16000 documents to prove his discrimination case however the end result was a “half-way house” whereby selections of documents were ordered for disclosure which allowed the claimant to test his thesis but did not place an excessive burden on the respondent.

24. Whilst the duty to disclose only relates to pre-existing documents, it is possible for parties to deflect disclosure requests by offering to create documents which provide the salient information. By way of example, in equal pay litigation, there is usually a requirement to provide disclosure of pay information in respect of numerous comparators. If the comparator has variable pay, the duty to disclose could cover a vast number of payslips. However, agreement to produce a table summarising the information will probably be adequate.

25. Finally, in some cases, it may be appropriate to adopt a stage-by-stage approach towards disclosure so as to avoid an onerous and wide ranging requirement upon one party to provide documentation. This process is particularly helpful in complex cases where the issues and nature of the case evolves as the case takes shape, such as equal pay litigation.¹⁷

¹⁵ *British Aerospace plc v Green* [1995] ICR 1006.

¹⁶ [1980] IRLR 233.

¹⁷ *South Tyneside Council v Anderson* (EAT/0002/05) unreported.

How should confidential or sensitive information be treated?

26. It is common for confidential documents or materials of a sensitive nature to become relevant as part of the disclosure process e.g. commercial information or statements taken by employees as part of an investigation which if disclosed could expose the maker of the statement to reprisals. The duty to disclose relevant documentation is not overridden by concerns of confidentiality or the sensitivity of its contents.

27. Moreover, whilst disclosed documents may only be used for the purpose of the proceedings in which it is disclosed, once information is in the public domain as a result of being referred to in the course of a public hearing, the parties to the litigation essentially lose control of the documentation and it can usually be utilised in any context.¹⁸

28. However, it is possible to limit the damage which might flow from disclosure of this type of material in a number of ways.

(i) Redaction of documents so as to conceal information from the public at large

29. Sometimes documents need to be redacted so as to protect information which should be kept out of the public domain rather than to conceal the information from the other parties to the litigation. For example, a claimant may wish to rely on emails sent by him to his line manager which contains sensitive commercial information or investigation reports which were available during an internal misconduct procedure against a care home worker that contain extensive references to vulnerable residents. In those circumstances, the usual and hopefully uncontroversial process is to provide full disclosure of the documents as between the parties and then agree that a redacted form is included in the Employment Tribunal bundle.

(ii) Redaction of documents so as to conceal information from one of the parties

30. The situation is more complicated where one party wishes to conceal information from other parties to the litigation. One of the leading cases in this area is *Asda*

¹⁸ *Knight v Department of Social Security* [2002] IRLR 242.

*Stores Ltd v Thompson*¹⁹ where the claimant sought disclosure of statements made by his colleagues which had been withheld in their entirety during the dismissal process and which contained information concerning allegations against him of the supply and use of hard drugs at company events. The statements had been obtained from witnesses following a promise from the employer that the statements would remain confidential. The EAT concluded that the Employment Tribunal had erred in ordering that the employer disclose to the claimant “in their totality” all confidential witness statements made by other employees during the course of an investigation into the allegation. Three principles emerge from that case:

- (i) It is within the power of an Employment Tribunal to direct disclosure of documents in an anonymous or redacted form, and that is what should have been done in this case in order to conceal the identity of the witnesses and maintain the employer’s promise of confidentiality to those making the statements.
- (ii) If statements have not only to be anonymous but also redacted to achieve this objective, that is what the Employment Tribunal should direct.
- (iii) Moreover, if this approach means that some of the statements have to be excluded in their entirety because it is not possible to conceal the identity of the makers that is what will have to occur and the question of the fairness of the dismissal will have to be judged in due course by the Employment Tribunal on that basis.

31. The correct procedure to follow in this type of scenario is that²⁰:

- (i) The employers should disclose to the Employment Tribunal, on the basis that they would not be disclosed to the claimants in any circumstances, the original witness statements, the employer’s proposals for redaction and their explanation of the proposed

¹⁹ [2002] IRLR 425.

²⁰ *Asda Stores Ltd v Thompson (No 2)* [2004] IRLR 598.

changes and redactions, so that the Employment Tribunal would be put in a position fully to understand those proposals.

- (ii) The Employment Tribunal would then make its decision so to whether or not to permit the witness statements to be redacted.
- (iii) Once the Employment Tribunal has decided on the redactions it proposes to make, the employers should be given a last opportunity to comment before the statements are finally supplied to the claimants. This would permit any misunderstandings or inadequate supply of information by the employer's to the Employment Tribunal, to be addressed at the outside.
- (iv) On condition of giving an undertaking that information would not be passed the claimants or their solicitors, the claimant's counsel should also be provided with the Employment Tribunal's proposals at this stage, together with the original witness statements and the employer's original submissions so that any comments could be made.

(iii) Limiting use of disclosed documents

32. An Employment Tribunal may also order that a disclosed document is only to be used in certain specified ways as envisaged by CPR, rule 31.22 which permits a court to make an order restricting or prohibiting the use of a document which has been disclosed, even where the document has been read to or by the court, or referred to, at a hearing which has been held in public. The authority for that proposition is *Knight v Department of Social Security*²¹ at [10]. This is quite an elegant solution to the problem of preserving confidentiality.

Are covert recordings admissible?

33. Sadly, it is not uncommon for employees to secretly record meetings and then seek to rely on the transcripts during subsequent litigation. As a general rule,

²¹ [2002] IRLR 242.

covert records of meetings which were always intended by the parties to be recorded (albeit in a written form by a note-taker) are admissible. However, private deliberations, for example of a panel of governors during disciplinary proceedings or adjudicators during an internal capability hearing are not admissible on public policy grounds. See *Chairman and Governors of Amwell View School v Dogherty*²² and *Williamson v Chief Constable of Greater Manchester Police*²³.

What are the consequences of failing to adhere to the duty to disclose?

34. In addition to the normal consequences of non-compliance with an interim order such as the possibility of strikeout or a costs order, a party who, without reasonable excuse, fails to comply with a requirement in an order for disclosure and inspection will be liable on summary conviction to a fine.²⁴
35. Indeed, there can be significant consequences for a failure to disclose a relevant document. In the recent case of *Aslam v Barclays Capital Ltd*²⁵, the failure to produce a document during the initial Employment Tribunal hearing led to the EAT ordering a re-hearing of the entire matter.

B) Legal professional privilege

36. The doctrine of privilege has been developed over the centuries to allow individuals and companies to seek and receive legal advice from lawyers as well as prepare for litigation without fear that those communications will become disclosable in any legal proceedings. Indeed, no adverse inference can be drawn from a claim for privilege as it is a fundamental right.²⁶
37. A comprehensive definition of privilege is as follows:

“Certainly, privilege arises most commonly in the case of disclosure and inspection, and entitles a litigant to refuse to produce documents for inspection. It

²² [2007] ICR 135.

²³ EAT/346/09, 9 March 2010.

²⁴ Employment Tribunal Rules, 10 (6).

²⁵ UKEAT/0405/10.

²⁶ *Wentworth v Lloyd* [1984] 10 HLC 589.

*also protects a witness from being required to answer questions in evidence. It follows, therefore, that in one sense, privilege can be described as a rule of evidence. But the wider view is that privilege is more than that: it is a substantive legal right”.*²⁷

38. There are two forms of legal professional privilege: legal action privilege and litigation privilege. There are some common features to both doctrines but in order to fully grasp their scope it is necessary to consider them individually.

(i) Legal advice privilege

39. Documentation which is privileged under the doctrine of legal advice privilege need not be disclosed during litigation. Legal advice privilege concerns communication between lawyer and client for the purpose of giving or receiving legal advice even at a stage where litigation is *not in contemplation*.²⁸ This definition requires unpacking.

Who is the client?

40. This seemingly straight forward question is actually wrought with difficulty following the exceptionally narrow definition of “a client” adopted by the Court of Appeal in *Three Rivers (No 5)*²⁹.

41. The facts were unusual but require consideration in order to understand the decision. Following the collapse of BCCI, the government appointed Bingham LJ to investigate its supervision (“the Inquiry”). The Bank of England created the Bingham Investigation Unit which consisted of three Bank officials to deal with the presentation of the Bank’s case to the Inquiry. The Bingham Investigation Unit appointed Freshfields and counsel to advise it.

42. After the Inquiry had ended, as part of misfeasance litigation against the Bank of England, the liquidators of BCCI sought disclosure of internal documents created

²⁷ Phipson on Evidence, (7th ed) [23-02].

²⁹ *Three Rivers District Council and others v Governor and Company of the Bank of England (No 5)* [2003] QB 1556.

by employees of the Bank of England for the Bingham Investigation Unit which were then used in the context of receiving advice from the external lawyers.

43. The Court of Appeal reached the widely criticised conclusion that the documents passed from the employees of the Bank of England to (i) the Bingham Investigation Unit and (ii) the external lawyers were *not* covered by legal advice privilege because it was the Bingham Investigation Unit which was “the client” and not the employees outside of that unit. In essence the employees outside of that unit were simply third parties.³⁰
44. It is possible to “disregard” the decision in *Three Rivers (No. 5)* as being very much limited to its own unusual facts. However, organisations must be very careful about the identity of individuals who communicate with legal advisors as it is plain from *Three Rivers (No 5)* that simply being an employee of the organisation seeking legal advice may not be adequate. The best way to avoid this problem is to ensure that organisations have clear protocols for seeking and obtaining legal advice so that “the client” is readily identifiable. However, the real issue concerns individuals who simply convey information to lawyers as opposed to seeking advice and giving instructions as any documentation may not be protected.
45. One scenario where this is likely to pose particular difficulties is where lawyers are engaged in order to conduct investigations into internal matters, for example, serious misconduct cases, where it would be inappropriate to appoint an internal investigator or where a formal investigation is required into whistle blowing allegations. In those situations, any final report to the company concerning legal advice will be protected but it is unlikely that transcripts of investigatory meetings with employees would be protected.³¹

³⁰ Please note that the Bank did not claim litigation privilege as it conceded that the Inquiry was not adversarial in nature. For a detailed criticism of the decision in *Three Rivers (No. 5)* and an alternative analysis of “the client” which suggests that anyone within a corporate entity should be classed as “the client”, see *Phipson on Evidence* (17th ed) at [23-81 to 23-84].

³¹ See *Privilege Issues in Investigations* (2011) 18(3) ELA briefing 11 by Jenny Steer & Diya Sen Gupta.

Who is a lawyer?

46. Generally speaking, it is easy to identify lawyers for the purpose of understanding the remit of legal advice privilege. It means a properly qualified lawyer: solicitors, barristers, trainees and pupils³² provided that they are acting in their legal capacity.³³
47. Personnel consultants are not covered. Accordingly, in *New Victoria Hospital v Ryan*³⁴, correspondence between the appellants and a firm of personnel consultants containing confidential legal advice concerning the disciplining and dismissal of the respondent employee was not protected against discovery on the ground of legal professional privilege.
48. Similarly, advice from a trade union representative is not privileged.

Which communications?

49. Privilege only applies to communication created for the purpose of giving or receiving advice e.g. notes to a solicitor outlining a legal problem and their reply.

What is legal advice?

50. Legal advice is not simply telling the client what the law is, rather it must include advice as to what should prudently and sensibly be done in a relevant legal context.³⁵
51. The definition is broad. In *Three Rivers (No. 6)*³⁶ the claimants to the misfeasance litigation against the Bank of England tried a new argument namely that the communication between the Bingham Investigation Unit and Freshfields was also disclosable on the basis that it related to presentational advice as

³² *Alfred Crompton Amusement Machines Ltd v Customs and Excise Comrs (No 2)* [1972] 2 QB 102

³³ Advice from in-house lawyers is covered but there is a tricky exception in respect of advice on EU issues. See *Phipson on Evidence* [23-26].

³⁴ [1993] ICR 201.

³⁵ *Balabel v Air India* [1988] Ch 317

³⁶ *Three Rivers District Council and Others v Governor and Company of the Bank of England (No. 6)* [2005] 1 AC 610.

opposed to legal advice. The Court of Appeal accepted that argument but was overturned by the House of Lords on the basis that any advice where lawyers are being asked to put on his “*legal spectacles*” will be covered. This phrase comes from the well-known passage of Lord Rodgers in *Three Rivers (No 6)* where he said:

*“When, however, the BIU consulted the lawyers ... and through them counsel, about the presentation of their evidence to the inquiry, it was not seeking their comments and assistance as bankers, accountants, rhetoricians or anything else: it was seeking their comments and assistance as lawyers, professional expertise in the field. Either expressly or impliedly, the BIU was asking them to put on legal spectacles when reading, considering and commenting on the drafts”.*³⁷

52. One area where organisations need to be particularly careful is where lawyers give “commercial” as opposed to “legal advice” which is likely to arise in the context of in-house lawyers. Any purely “commercial” advice will not be protected as privileged.

(ii) Litigation privilege

53. Litigation privilege covers a much wider range of communications. It entitles a party to withhold disclosure of:

- (1) Confidential communications between a party and his lawyer, or between the party or his lawyer and a third party, such an expert;
- (2) Where the dominant purpose of the communications is actual or contemplated litigation; and
- (3) Litigation is contemplated or has commenced.

54. This doctrine is much wider than legal advice privilege but only comes into play where litigation is contemplated or commenced. It is the basis for claiming privilege in the proofs of witness statements and communications with experts.

³⁷ See [60].

What is the dominant purpose test?

55. The classic test of dominant purpose is set out in *Waugh v British Railways Board*³⁸ which adopted the following dicta from an Australian case:

*“A document which was produced or brought into existence either with the dominant purpose of its author, or the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection”.*³⁹

56. Ultimately it is the purpose of the person who ordered the creation of the document which is relevant to the test.⁴⁰

57. In the employment context, *Scotthorne v Four Seasons Conservatories (UK)*⁴¹ is a useful case. The EAT concluded that advice received by an employer from its insurer as to how to proceed with a disciplinary process based on a matter which evidently could amount to gross misconduct was privileged as it was contemplating dismissal and the possibility of future litigation arising from it.

58. Another interesting case is *Jones v Great Central Railway*⁴² where the House of Lords concluded that documents sent by a union member to his union for the purpose of persuading them that his case had merits and as such he should be provided with legal support at their expense were not privileged. The basis for this decision is that a solicitor could not be engaged until after a decision had been made which was the purpose of sending the materials to the union.

³⁸ [1980] AC 521.

³⁹ *Grant v Downs* [1976] 135 CLR 674 at p.675.

⁴⁰ *Guinness Peat Properties v Fitzroy Robinson Partnership* [1987] 1 WLR 1027.

⁴¹ [2010] All ER (D) 17 (Sep).

⁴² [1910] AC 4.

When is litigation in contemplation?

59. The modern expression is that litigation must reasonably be in prospect.⁴³ Moreover, it must be adversarial in nature.⁴⁴

C) Waiving legal professional privilege

60. It is well-established that privilege belongs to the client and not to the lawyer. It follows that it can only be waived by the client but a lawyer is under a duty to assert it until it is waived.⁴⁵ This concept is different to loss of confidentiality (e.g. where a document enters the public domain) so that, “*waiver of privilege properly named involves the voluntary production of documents where there would otherwise be a right to object to compulsory production*”.⁴⁶

Disclosure to third parties

61. There is no loss of privilege where a privileged document is shown to a third party provided that it was disclosed on the basis that it was confidential.⁴⁷

Status of partially privileged documents

62. If the whole of a document cannot be classed as privileged but some passages relate to privileged matters, then the document should be disclosed with the relevant sections redacted. This does not have the effect of waiving privilege in the whole document.

Cherry picking privileged communications

63. Whilst a party is entitled to waive its own privilege, it cannot do so in a manner which is misleading or selective by “cherry picking” certain privileged elements.⁴⁸

⁴³ See *Re Highgate Traders* [1984] BCLC 151.

⁴⁴ *Re L* [1997] AC 16.

⁴⁵ See *Wilson v Rastall* [1792] 4 Durn. & E 753 & *R v Central Criminal Court ex parte Francis and Francis* [1989] 1AC 346.

⁴⁶ *Phipson on Evidence* (17th ed) at [26-03].

⁴⁷ *USP Strategies v London General Holdings Ltd* [2004] EWHC 373 (Ch).

⁴⁸ *Nea Karteria Maritime Co Ltd v Atlantic and Great Lakes Steamship Corporation (No 2)* [1981] Com LR 138.

It follows that when privilege is waived in one document or part of a privileged document there may also be “collateral waiver” which arises from the need to produce other documents or the whole document so as to provide a context. However, if the waiver is in respect of separate subject matter then there will be no need to provide a further waiver.⁴⁹

64. In the context of employment litigation, it may be necessary for one party to waive privilege in a document e.g. a letter from a solicitor to the client evidencing the date that the solicitor was instructed in order to support a late application to amend, but there is a very real risk that the opposing party will then be able to ask to see other correspondence relevant to the context.

Referring to legal advice in a non-privileged context

65. This is an issue which frequently arises in the employment context. For example, a solicitor refers to advice from counsel when conducting negotiations, “we have been advised that our client has a very strong claim ...”.

66. This area of law has been comprehensively considered in *Brennan v Sutherland City Council*⁵⁰. In that case, two witness statements produced by the Council and minutes from a meeting referred to legal advice received in respect of issues which were pertinent to an equal pay claim being pursued by the claimants. Elias P concluded that privilege had not been waived and in so doing set out the following principles:

- (i) The overriding test is one of fairness and specifically whether in light of what has been disclosed and the context, it would be unfair to allow the party making the disclosure not to reveal the whole of relevant information because it would risk the court and the other party only having a partial and potentially misleading understanding of the material.
- (ii) Legal advice privilege is sufficiently important that something more than the effect of the advice must be disclosed.

⁴⁹ *Great Atlantic Insurance Co v Home Insurance Co* [1981] 1 WLR 529.

⁵⁰ [2009] ICR 479.

- (iii) There must be a degree of reliance on the privileged material for a waiver to occur.

67. It follows that even detailed reference to legal advice given will not waive privilege unless the party disclosing it is seeking to advance a positive case by disclosing it. For example, in a sex discrimination case, an employer might defend its actions on the basis that it was legally advised to act in a particular way which would have the effect of waiving privilege in the whole of the advice on that matter.

Changing experts

68. An interesting issue arises in respect of “expert shopping”. A report obtained from an expert in the course of litigation will be privileged. In the employment context, expert reports are frequently obtained in respect of matters such as determining whether the claimant is disabled. It is undoubtedly true that such reports are privileged under the doctrine of litigation privilege. However, following the Court of Appeal decision in *Edward-Tubbs v JD Weatherspoon plc*⁵¹ it is perfectly permissible for a court to make it a condition of changing expert within proceedings that the original report which the party wishes to discard must be disclosed. In other words, it can be a condition of “expert shopping” that privilege is waived.

D) Without prejudice communications

69. The Without Prejudice rule is that negotiations made for the purpose of a genuine attempt to compromise a dispute between the parties may not be admitted as evidence in legal proceedings.

70. In the context of the employment relationship, the extent of this rule is hugely important when considering “off the record” discussions with employees concerning the possible termination of their employment.

⁵¹ [2011] EWCA Civ 136.

71. In this area *BNP Paribas v Mezzotero*⁵² is the leading authority. The claimant raised a grievance alleging sex discrimination. Following her grievance, she was told to remain at home whilst the grievance procedure was followed. She was invited to attend a meeting to discuss her position where she was told at the outset that her employers wanted a “without prejudice” discussion. During this discussion it was suggested that her contract could be terminated on generous financial terms. She brought employment proceedings alleging that she had been victimised and subjected to sex discrimination in that the employer sought to terminate her contract after she lodged her grievance. The EAT held that the discussions during the meeting were not covered by the Without Prejudice rule as the lodging of a grievance did not necessarily mean that there was a dispute and in the circumstances the Employment Tribunal had been entitled to find that none existed at the relevant time.
72. The EAT went on to say, in the alternative, that the Without Prejudice rule would not apply in any event and the employer could not hide behind this rule of evidence. One of the exceptional circumstances in which a party is prevented from relying on this rule was set out in *Unilever plc v Proctor and Gamble Co*⁵³, and includes where the exclusion of such evidence “*would act as a cloak for perjury, blackmail or other ‘unambiguous impropriety’*”. The EAT concluded that the facts of this case fell within that exception namely ‘*unambiguous impropriety*’. In reaching that conclusion, the EAT was plainly heavily influenced by the difficulties that women face proving sex discrimination.
73. From an employer’s perspective, this case was a very worrying development as it seemed to severely curtail their ability to have frank and open discussions with employees at an early stage during a grievance. But, it is important to remember that the “facts” in *Mezzotero* were only preliminary findings as there had been no witness evidence or cross-examination before the Employment Tribunal. Moreover, those “facts” were fairly damning of the employer e.g. the claimant alleged that she had been prevented from working in her original job, discouraged from returning to work, humiliated at work, excluded from meetings, initially excluded from her computer account, sent home as soon as her grievance was lodged and then told during the “without prejudice” meeting that it was best for the

⁵² [2004] IRLR 508.

⁵³ [1999] EWCA Civ 3027.

business if she left. In that context, the conclusion of the Employment Tribunal and the EAT is not particularly surprising.

74. *Mezzotero* has been recently considered in *Woodward v Santander UK plc (formerly Abbey National plc)*⁵⁴. In that case, the claimant brought victimisation and direct sex discrimination claims against her previous employers as she alleged that it refused to give any or favourable references when she applied for jobs with new employers and had then rejected an application from her for fresh work. The background to this claim was that she had compromised a claim against her employer in the past which she said was the reason for its treatment of her in respect of her attempts to find new work. She wished to rely on the detail of the negotiations surrounding the compromise of her earlier claim to make good her current allegations.

75. The Employment Tribunal reached a carefully reasoned (and persuasive) judgment in which it concluded that there was no evidence of discrimination in respect of the new matters raised by the claimant and it refused to admit evidence of the negotiations on the basis of the Without Prejudice rule. In so doing, it considered *Mezzotero* was decided on its own facts where the EAT had been right to conclude that the evidence before it was that the employer was attempting to conceal discriminatory conduct whereas there was no such evidence in the present case.

76. There is undoubtedly the right decision. The Without Prejudice rule cannot be used to hide discriminatory conduct but there will need to be compelling evidence that this is the case before an Employment Tribunal will admit evidence which would otherwise be excluded on that basis.

77. Accordingly, employers should have little fear that *Mezzotero* places limits on their ability to have productive Without Prejudice discussions once a dispute arises in the context of the employment relationship.

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⁵⁴ [2010] IRLR 834.



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