THE INDUSTRIAL TRIBUNALS AND FAIR EMPLOYMENT TRIBUNAL

CASE REFS: 13313/18
10226/19
14925/19

CLAIMANT: **Dr Martin Shields**

RESPONDENT: **Belfast Health and Social Care Trust**

JUDGMENT ON A PRELIMINARY ISSUE

The judgment of the tribunal is that the respondent is not required to disclose any legal advice/communications which had passed between Mr Lyttle QC, Ms Finnegan, Barrister-at-Law, the instructing solicitor and the client in relation to the making of concessions about the four alleged public interest disclosures or in relation to the purported withdrawal of those concessions.

CONSTITUTION OF TRIBUNAL

Vice President (sitting alone): **Mr N Kelly**

APPEARANCES:

The claimant was represented by Mr I Skelt QC and Ms R Best, Barrister-at-Law, instructed by MKB Law.

The respondent was represented by Mr P Lyttle QC and Ms A Finnegan, Barrister-at-Law, instructed by the Directorate of Legal Services.

BACKGROUND

1. This is a long running series of claims, which commenced some three years ago and which have been bedevilled by case management difficulties and by the inevitable delays caused by the Covid pandemic. They are nowhere near completion.

2. Currently, the major preliminary issue to be determined in this matter to enable the claims to be finally heard, is whether concessions made on behalf of the respondent in relation to the alleged public interest disclosures can be withdrawn by the respondent.

3. That preliminary issue is listed separately for a Preliminary Hearing (Preliminary Issue) (PHPI) on 29 October 2021.

4. To enable that PHPI to proceed, one further interlocutory issue needs to be determined at this stage; namely whether an Order for Discovery should issue against the respondent requiring that respondent to disclose any legal advice/communications which had passed between Mr Lyttle QC, Ms Finnegan, Barrister-at-Law, the instructing solicitor and the respondent, or between any of them, in relation to the making of the concessions in relation to the four disclosures and also any legal advice/communications which had passed between those parties, or between any of them, in relation to the application by the respondent to withdraw those concessions – ("*the Discovery issue*").

5. There had been a Preliminary Hearing on 29 July 2021 at which submissions had been heard in relation to the Discovery issue. At the conclusion of that Preliminary Hearing, I had urged Counsel to consider whether there could be some agreement about the scope of Discovery in relation to this matter and in particular to consider whether Discovery could be addressed on a counsel-to-counsel basis without undue formality. On 19 August 2021, the parties advised the tribunal that agreement was not possible and that the Discovery issue remains for determination. Given the date of the PHPI on 29 October 2021 and the importance of avoiding any further delay in this matter, the Discovery issue is now urgent.

6. Sometimes, parties and their representatives lose sight of the fact that this is a first instance tribunal set up under statute to resolve specific employment disputes quickly and efficiently and in accordance with the overriding objective. It is a long time since Lord Denning expressed the opinion that tribunals should "*not become a happy hunting ground for lawyers*".

   Esoteric arguments about legal professional privilege and the waiver of such privilege seem sadly out of place in a first instance tribunal of this nature.

RELEVANT FACTS

7. These findings are restricted to those necessary for the determination of this preliminary issue relating to discovery.

8. The claimant relies on four alleged public interest disclosures ("PIDs") in relation to his claim under the Employment Rights (Northern Ireland) Order 1996 ("*the 1996 Order*").

9. Those four alleged PIDs can be numbered PD1, PD2, PD3 and PD4. For the purposes of this preliminary issue, they fall into two groups; PD1 and PD3, and PD2 and PD4.

10. On 22 October 2020, the respondent's solicitor conceded in writing that PD2 and PD4 were protected disclosures for the purposes of the 1996 Order.

11. On 2 December 2020, the respondent's solicitor stated in writing that they were not conceding that PD1 and PD3 were protected disclosures for the purposes of the 1996 Order. At the same time, the respondent's solicitors stated that they were not contesting public interest, good faith or reasonable belief.

12. Further interlocutory disputes continued and a further Preliminary Hearing was arranged for 8 January 2021.

13. At that further Preliminary Hearing on 8 January 2021 before Employment Judge Orr, the claimant was represented by Ms Rachel Best, Barrister-at-Law, instructed by MKB Law. The respondent was represented by Ms A Finnegan, Barrister-at-Law, instructed by the Directorate of Legal Services.

14. At a point in the Preliminary Hearing, counsel for the respondent was given time to take instructions. There was a brief period during which she consulted with her instructing solicitor. Counsel then conceded in open tribunal that all four alleged disclosures were *qualifying* disclosures for the purposes of the 1996 Order.

15. It was recorded in the record of the Preliminary Hearing by Employment Judge Orr that:

> "*For the avoidance of doubt, the respondent accepts that the claimant disclosed information which in reasonable belief the claimant, was made in the public interest and tends to show a relevant failure under Article 67B of the Employment Rights (Northern Ireland) Order 1996. The respondent accepts that the disclosures were made in good faith and made in the public interest."*

16. Leaving aside the apparent confusion between "*protected*" and "*qualifying*" disclosures for the purposes of the 1996 Order, it is plain that significant concessions were made by counsel for the respondent in relation to the four alleged public interest disclosures on 22 October 2020 and 8 January 2021 and that the concessions had been recorded by Employment Judge Orr in the record of the Preliminary Hearing which was then issued to the parties.

17. On 28 January 2021, shortly after the record of the Preliminary Hearing had been sent to the parties, the respondent's solicitor sent an email which sought to withdraw all concessions made in relation to the alleged PIDs.

18. The respondent's solicitor's email was sent to both the solicitor for the claimant and to the tribunal and it stated:

> *"I refer to the above case and to the Preliminary Hearing on 8 January 2021. At that hearing, the protected disclosures referred to as PD1 and PD3 were being considered. As noted in the Record of Proceedings, counsel for the respondent accepted on behalf of the respondent that each of those protected disclosures identified by the claimant, amounted to a qualifying disclosure pursuant to the Employment Rights (Northern Ireland) Order 1996.*
>
> *I am writing today to notify the tribunal that the concession has been withdrawn on the basis of no authorisation or instruction to concede had been received from the client respondent."*

19. It is therefore clear that the stated basis for the purported withdrawal of the concessions is that no authority or instruction to make the concession had been

received by counsel for the respondent. There is no suggestion that the purported withdrawal is sought on the basis of changed legal advice; the only basis addressed is the absence of authority or instruction from the claimant.

20. The respondent lodged a skeleton argument in relation to the purported withdrawal of the concessions in relation to the PIDs. That skeleton argument states in relevant part:

> *"Paragraph 10 – Counsel did not seek a consultation with the respondent's witnesses at this time as she did not wish to divert their attention from the demands on their time and resources as a result of the pandemic. Up until October 2020 discussions were ongoing between the respondent's solicitor and counsel on the issue as to what exactly the claimant was asserting to be a protected disclosure and whether the alleged protected disclosures met the legal test for qualifying disclosures. On receipt of the clarification, referred to at paragraph 6 above (exhibited at tab 2), junior counsel discussed the matter with instructing solicitor and indicated that, given the clarification that had been provided in the 28 September 2020 document from the claimant's solicitor, she did not think that there was any basis to resist the assertion that PD2 and PD4 as clarified, constituted PDs. She felt that it would have been more appropriate to contest the claim on the basis that none of the alleged detriments had arisen as a consequence of the making of the disclosures. She felt that the clarification provided by the claimant in relation to PD1 and PD3 was still insufficient to make any concessions. Junior counsel had no direct contact with any of the respondent's personnel at this time. Furthermore, there was no obvious good faith issue arising from the respondent's ET3 or from instructions up to that time.*
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> *Paragraph 12 – This hearing was listed for 8 January 2021. During this hearing EJ Orr made it clear that she did not accept the basis of the respondent's refusal to concede that 1 and 3 were protected disclosures. After some time, junior counsel for the respondent asked the judge to rise and counsel and solicitor discussed the matter and whether it would simply be better to concede as a matter of law that 1 and 3 were PDs and contest the detriment aspect of the claim only. It was agreed that this was probably the best course, and the concession was therefore made. The respondent's junior counsel accepts and takes responsibility for the fact that it would have been more appropriate to seek an adjournment at that juncture in order to have a formal consultation with the Trust personnel and to fully explore/explain and take firm instructions from the client in relation to the making of such concessions, but given the pandemic situation, regrettably, that did not occur.*
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> *Paragraph 13 – Both instructing solicitor and junior counsel spoke to a member of senior management in the Medical Director's Office immediately after the conclusion of the hearing and explained what had occurred. Instructing solicitor wrote to the relevant senior management personnel on 14 January 2020, setting out in detail what had occurred at the 8 January hearing. On 26 January, senior management of the respondent took issue with the fact that any concessions had been made. At that point senior counsel was briefed and he directed that instructing solicitor should write to the tribunal and the claimant's solicitor indicating withdrawal of the*

concessions on the basis that the client had not granted authority to make them.

Paragraph 15 – A consultation was arranged for 24 February 2020 with senior and junior counsel, solicitors and relevant Trust senior management. At this meeting, there was discussion in relation to the case generally and as to the way forward. A further consultation was scheduled for 10 March 2020.

Paragraph 15 – On 8 March, the recordings referred to at paragraphs 16 and 17 below came to light. The first witnesses having had sight of the claimant's witness statement and heard the recorded conversation referred to below, expressed the strong view at the 10 March consultation that the claimant's disclosures were neither made in good faith or in the public interest–. The respondent now believes indicates an absence of good faith and that the said disclosures were not made in the public interest."

21. Although the email of 28 January 2021 refers to the discussion at the Preliminary Hearing being about the PD1 and PD3, it seems clear that the respondent wishes to withdraw the concessions in relation to all four alleged disclosures ie that the purported withdrawal of the concessions includes the concessions made in relation to PD2 and PD4, whether those concessions were that the alleged disclosures were "*protected"* or "*qualifying*" disclosures or both.

RELEVANT LAW

22. The right to legal professional privilege is an absolute right and requires no individual balancing exercise on the part of the Tribunal. In ***R v Derby Magistrates Court Ex Parte B [1996] 1AC487***, the House of Lords considered a situation where Magistrates and the Divisional Court had both ordered legal advice to be disclosed for the purposes of a civil action. The Divisional Court had held that the Court had to perform a balancing exercise as to whether or not to order disclosure in these circumstances and had ordered disclosure. The House of Lords set aside that order. It stated:

"*The principle that runs through all (the authorities) is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells the lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests.*"

"–If a balancing exercise was ever required in the case of legal professional privilege, it was performed once and for all in the 16th century, and since then has applied across the board in every case, irrespective of a client's individual merits." -

23. It is therefore clear that legal professional privilege is of fundamental importance, particularly in the context of industrial tribunal litigation, where many cases are resolved by alternative means, with the assistance of legal advice freely given and taken in the knowledge that that legal advice may not be disclosed elsewhere. Any dilution of the principle of legal professional privilege would have an adverse and

substantial effect on industrial tribunal litigation. I make no comment on the effect on other areas of law.

24. Therefore, advice which is subject to legal professional privilege may only be disclosed where that protection has been either expressly or impliedly waived. There is no question in the present case that there has been any express waiver of that privilege. No such express waiver has been made by or on behalf of the respondent in respect of any relevant legal advice/communications. The only viable argument in relation to this matter is that in some way the respondent had impliedly waived its right to legal professional privilege in relation to any advice which passed between counsel, solicitor and client, or between any of them, in relation to both the concessions and the purported withdrawal of those concessions.

The claimant argues that the email of 28 January 2021 and the respondent's skeleton argument in relation to the withdrawal of the concessions amounted to such an implied waiver.

25. The Queen's Bench Divisional Court in ***Belhaj and Boudchar v DPP and Others [2018] EWHC 977*** considered a preliminary issue in ongoing litigation which essentially was whether or not documents released in error should be amended in interlocutory proceedings to allow the defendants to reassert privilege in respect of those documents. The Court determined that the documents had initially been disclosed by mistake and that the defendants should be allowed to reassert privilege in respect of those documents. The Court stated at paragraph 15:

> "*We remind ourselves that the test is objective, and that the evidence concerning what the lawyers in a given case actually thought and did may be of help, but cannot be determinative: see* ***Serdar Mohammed v Ministry of Defence [2013] EWHC 4478 -"***

26. In ***Bullough v Royal Bank of Scotland [2009] CSOH 24***, the outer house of the Court of Session stated:

> "*Whether conduct gave rise to implied waiver is to be determined objectively -"*
>
> *"Waiver of legal professional privilege is determined on an objective analysis of the conduct of the person asserting that privilege."*

27. The case of ***Serdar Mohammed v Ministry of Defence [2013] EWHC 4478***, like the case cited above, is an extreme case where the relevant legal advice had already been furnished to the other party to the litigation and where that other party to the litigation retrospectively sought to assert privilege in respect of that legal advice. In the present case, no legal advice has been disclosed and it is clear there never was any express intention to disclose that advice or any express waiver of legal professional privilege in respect of that advice.

The court in ***Serdar*** described the relevant legal principles in the following manner:

> *"14 The term "waiver of privilege" is an imprecise one, which is capable of referring to at least 5 legally distinct ways in which a right to assert privilege may be lost:*

(i) What might be called a "true" waiver occurs if one party either expressly consents to the use of privileged material by another party or chooses to disclose the information to the other party in circumstances which implies consent to its use. Such a waiver may be either general or limited in scope.

(ii) Where a party waives privilege in the above sense by deliberately deploying material in court proceedings, the party also loses the right to assert privilege in relation to other material relating to the same subject matter – . The underlying principle is one of fairness to prevent cherry picking –

(iii) Similarly, a party who by suing its legal adviser puts their confidential relationship at issue cannot claim privilege in relation to information relevant to the determination of that issue. Again the governing principle is one of fairness: -

(iv) Because privilege only protects information which is confidential, if the information concerned ceases to be confidential, privilege cannot be claimed. Where a party does an act which has the effect of making the information public, this has sometimes been described as a waiver of privilege – but it is more accurate to say the privilege cannot be claimed because confidentiality has been lost.

(v) Where a party comes into possession of privileged material by any means, even if without the knowledge or consent of the other party, the receiving party is free to use such material subject to the equitable jurisdiction of the Court to restrain a breach of confidence."

28. In the ***Serdar Mohammed*** case, the Court determined, on the particular facts of that case, that the Court would not determine whether or not the information in question met the standard disclosure test of relevance. It did so on the basis that the claimant's solicitors already had the documents in their possession in un-redacted form and had been allowed to inspect them. The other relevant issue in that case was whether the Court should make an Order to preclude their use on grounds of confidentiality.

In the present case, it is clear that the relevant legal advice sought by the claimant has not been disclosed and therefore it is of critical importance to this Tribunal to determine whether and to what extent that legal advice would pass the standard disclosure test of relevance in relation to the PHPI listed in October to consider whether the concessions can be withdrawn and, if so, on what basis.

29. In ***Scottish Lion Insurance Company Limited v Goodrich Corporation [2011] CSIH 18***, the inner house of the Court of Session stated:

"44 Legal professional privilege is undoubted importance: see for example a discussion in Three Rivers District Council v Governor and Company of the Bank of England (No 6) (2005) 1AC610. It can however be overridden by statute, and it can be waived by the person entitled to assert it.

45 *As Lord Keith of Kinkel remarked in **Arnia Limited v Daejan Developments Limited [1979] SC (HL) 56**, at page 72, the topic of waiver may arise in a number of guises in a variety of contexts. The term connotes the giving up or abandonment of a right. The abandonment may be express, or it may be inferred from the facts and circumstances of the case." There was no expressed waiver in the present case. The question that we have to determine is whether waiver is to be inferred [Tribunal's note: This is the position in the present case.]*

46 *In order to answer that question, it is necessary to begin by understanding the nature and purpose of privilege. Privilege is the name given to a right to resist compulsory disclosure of information (B v Auckland District Law Society [2003] 2AC736) – It exists in order to maintain the confidentiality of the information in question. It follows that privilege would be lost if the information in question ceases to be confidential. Waiver of privilege can be distinguished from loss of privilege – It will arise, as we have explained, in circumstances where it can be inferred that the person entitled to the benefit of the privilege has given up his right to resist the disclosure of the information in question, either generally or in a particular context. Since circumstances will exist where the persons conduct has been inconsistent with his retention of that right: inconsistent, that is to say with the maintenance of the confidentiality which the privilege is intended to protect.*

47 *There are two further points which are important to understand. First, waiver does not depend upon the subjective intention of the person entitled to the right in question, but is judged objectively -. Waiver of legal professional privilege, in particular, is determined on an objective analysis of the conduct of the person asserting the privilege -. Secondly, privilege may be taken to have been waived for a limited purpose without being waived generally: in other words, the right to resist disclosure may be given up only in relation to a particular context.*

48 *Whether within the conduct of a person entitled to the benefit of privilege has been inconsistent with the maintenance of confidentiality, either generally or for a limited purpose, is dependent upon the relevant circumstances. The question has most often arisen in circumstances which are different from those of the present case. One such circumstance is where a person sues his legal advisers and seeks to rely on the privilege to prevent them from producing evidence relevant to their defence. In such a case, the privilege is taken to have been waived because of the unfairness of both opening the relationship by asserting the claim and seeking to enforce the duty of confidence covered by the defendant –.*

As these dicta indicate, where proceedings require to be conducted fairly, considerations of fairness may bear on an assessment of whether a person's conduct in relation to those proceedings has been

inconsistent within the maintenance of confidentiality, and whether he must therefore be taken to have waived privilege."

DECISION

30. It is clear that legal professional privilege is an absolute right and that it is fundamental to the maintenance and smooth running of litigation generally and that of Employment Tribunals in particular. That privilege can only be diluted if there is either an express waiver or a clearly implied waiver. There has been no express waiver in the present case. The only question therefore, at this stage, is whether there has been an implied waiver of that absolute and fundamental principle. That question has to be assessed objectively on the basis of the conduct of the respondent in this matter. The question of whether or not the respondent's conduct in any particular respect, or cumulatively, amounted to implied waiver of legal professional privilege has to be construed strictly; to determine whether the actions of the respondent have been inconsistent with the maintenance of confidentiality.

31. The respondent in its skeleton argument has been open in relation to the manner in which the concessions were made in respect of all four PIDs. The skeleton argument discloses that there had been discussion between junior counsel and the respondent's solicitor in relation to the concessions in respect of PDs 2 and 4. It is also clear that that skeleton argues that proper instructions were not taken from the Trust in respect of those concessions and that that failure had been, at least in part, due to the ongoing pandemic situation and the desire not to divert Trust personnel unnecessarily from their duties in respect of that pandemic. Importantly, the skeleton argument does not indicate that legal advice had been given to Trust personnel; in fact the reverse. It states simply that junior counsel felt it was more appropriate to contest the claim on the basis of causation.

32. The skeleton argument also deals with the concessions which were made in respect of PDs 1 and 3. Again, it simply states that there had been discussions between junior counsel and instructing solicitor and that proper instructions had not been taken from the Trust. It states that junior counsel and the instructing solicitor felt that at that time it would be better.to make those concessions and to pursue the argument in relation to detriment, and presumably causation.

33. It is clear that the essence of the respondent's application to withdraw the concessions, (without any indication as to how successful that application might or might not be in due course) is simply that instructions were not taken in a proper manner from the respondent organisation. The skeleton argument sets out in some detail the reaction of senior management to the concessions once they had been made aware that those concessions had been made. It is apparently to be argued by the respondent that the concession had been an ill-considered *"solo run"* by junior counsel without instructions. The making of that argument and the determination of that argument does not require the disclosure of any documents that might be subject to legal professional privilege. It may require however evidence from the junior counsel and from the Trust.

34. The application for an Order for Discovery as set out previously is refused. The reasons for that refusal are:

    (i) This is, on its face, an extraordinary application which, in my experience, is

unprecedented. It seeks disclosure of any confidential and privileged legal advice/communications between not just senior counsel and junior counsel but between those counsel and their instructing solicitor and with their client. Clear and compelling arguments would be required to depart from the principle of the legal professional privilege and to make such an Order.

(ii) The ordinary test in relation to granting an Order for Discovery is that of relevance. The forthcoming PHPI will deal with the respondent's application to withdraw the concessions in relation to all the PIDs. That application is based on the alleged failure to obtain proper instructions from senior management in the respondent organisation. That application does not require the disclosure of any legal advice and communications. The question of whether or not proper instructions were taken is a matter to be determined by evidence but it does not require the disclosure of legal advice or communications. If the respondent is correct to assert that proper instructions were not taken, whether or not that amounts to a proper basis for the withdrawal of the concessions is a matter to be determined at that separate PHPI.

(iii) There is no significant disclosure of the content of any legal advice in the skeleton argument. As indicated above, the basis of the skeleton argument is that proper instructions were not taken and that the original decisions were made simply between junior counsel and instructing solicitor. That is a matter to be investigated further in the forthcoming Preliminary Hearing.

There is nothing in the respondent's skeleton argument or in the respondent's email of 28 January 2021 which was inconsistent with the maintenance of confidentiality or which results in the implication that legal professional privilege has been waived.

(iv) At this stage it is far from clear whether the respondent's application to withdraw the concessions would be successful. However, on the basis of the papers before me, I do not see how the content of whatever passed between junior counsel and the instructing solicitor in relation to the two occasions on which the concessions were made and when they were withdrawn could be relevant to the issue to be determined in the PHPI on 29 October 2021.

35. The PHPI will proceed as directed on 29 October 2021. Whatever the outcome of the PHPI, the parties are encouraged to proceed to a final determination in this matter at the earliest date possible.

Vice President:

Date and place of hearing: 29 July 2021, Belfast.

This judgment was entered in the register and issued to the parties on: