EMPLOYMENT TRIBUNALS

Claimant: Ms S Brierley & others

Respondent: Asda Stores Limited

HELD AT: Manchester **ON:** 8 January 2018
9 January 2018
(in Chambers)

BEFORE: Employment Judge Sherratt

REPRESENTATION:

Claimant: Mr A Short QC
Respondent: Mr B Cooper QC

JUDGMENT ON PRELIMINARY HEARING

The judgment of the Tribunal is that in respect of the questions asked by the claimants of the respondent on 20 October 2017:

1. The respondent shall answer questions 1, 2 and 4 by 28 February 2018.

2. The respondent need not answer questions 3, 5, 6, 8, 9 and 10.

3. If the answers to either or both of questions 1 and 4 are in the affirmative the respondent shall provide a list of relevant documents to the claimants by 28 March 2018.

REASONS

Background

1. This application is made within the equal pay proceedings brought against Asda Stores Limited involving some 16,000 claimants. Most of the claimants are women employed by the respondent in retail stores. They compare themselves with hourly paid employees at the respondent's depots who are mainly men. It is alleged

that the depot staff are paid more than the retail store staff, and it is alleged that the work involved is of at least equal value.

2. Employment Judge Tom Ryan is the Judge hearing the equal pay claim but there are various applications that are not appropriate for him to deal with and this is one of them.

The Application

3. The claimants made an application for specific disclosure on 5 October 2017. At a preliminary hearing on 11 October 2017 Employment Judge Tom Ryan provided that an amended application was to be served by 20 October 2017 which would be supported by a skeleton argument to be served by 24 November 2017. The respondent's skeleton argument and any evidence was to be served by 18 December 2017.

4. The amended application was made on 20 October 2017 as follows:-

> "The claimants ask the respondent to answer the questions set out below. If the respondent does not answer the questions, the claimants ask the Tribunal to make an order at the hearing on 8 January 2017 requiring them to do so in a document supported by a witness statement.
>
> Should the respondent answer some of the questions, the claimants will consider whether to pursue this application and/or to seek substantive orders for disclosure at this stage.
>
> The respondent is reminded that it could resolve this issue by (i) disclosing copies of job evaluations that are not privileged; or (ii) providing copies of any job evaluations in respect of which privilege is claimed to the Tribunal at the hearing to enable the Employment Judge to determine whether they are in fact privileged.
>
> **Questions**
>
> **Stores**
>
> (1) Did you carry out (i.e. commence or complete) any job evaluation (including any assessment or analysis of the tasks carried out by particular job groups) in relation to any hourly paid store role or work before 1 January 2008 (or, if the 2008 claims had been intimated or raised as a grievance before that date, before the date on which those claims were first intimated or grievance raised)?
>
> (2) In the event that such an alternative date is relied upon for the purposes of question (1), please also identify that date.
>
> (3) Did you carry out any such job evaluation in relation to any hourly paid store role or work (other than any evaluation of the claimants in the 2008 claims) on or after 1 January 2008 (or such earlier date as

relevant for the purposes of questions (1) and (2) above) but before 11 April 2014?

Depots

(4) Did you carry out any such job evaluation in relation to any hourly paid depot role or work before 1 January 2008 (or such earlier date as relevant for the purposes of questions (1) and (2) above)?

(5) Did you carry out any such job evaluation in elation to any hourly paid depot role or work (other than any evaluation of any of the individuals named as comparators in the 2008 claims) on or after 1 January 2008 (or such earlier date as relevant for the purposes of questions (1) and (2) above) but before 11 April 2014?

(6) Did you carry out any such job evaluation in relation to any hourly paid depot role or work at any depot other than Skelmersdale on or after 1 January 2008 (or such earlier date as relevant for the purposes of questions (1) and (2) above but before 11 April 2014)?

Documents

(7) In respect of any question answered in the affirmative, please provide a list of the documents produced in relation to that evaluation and any subsequent consideration of that evaluation.

Privilege

(8) Insofar as privilege is claimed in respect of the existence of any such evaluations and documents, please set out the basis of that claim.

(9) Insofar as privilege is claimed in respect of the inspection of any such documents, please set out the basis of that claim.

(10) Insofar as privilege is asserted in respect of any evaluations which may have been carried out in part of any particular period referred to above, please identify the period for which answers can be given and answer the questions set out above in respect of each such period."

5. The skeleton argument on behalf of the claimants was prepared by Andrew Short QC and Keira Gore. The skeleton argument on behalf of the respondent was prepared by Ben Cooper QC.

6. The evidence produced by the respondent was an affirmation of Ms Osma Hudda, a solicitor and partner at the law firm Gibson, Dunn and Crutcher LLP who represent the respondent. She is one of the partners with the conduct of the proceedings. The following paragraphs from the affirmation are relevant to the application:-

"(4) Now shown to me and marked Exhibit 1 to this affidavit is a paginated bundle comprising documents authored by the parties to these Proceedings, their legal representatives, and the Manchester Employment Tribunal between December 2007 (when equal pay issues involving the Respondent's retail and distribution businesses were first intimated by the GMB on behalf of their members) and July 2014 (when the first multiple claim form was filed by Leigh Day, the solicitors with present conduct of the Proceedings on behalf of the Claimants).

<u>The Respondent's Claim to Legal Professional Privilege</u>

(5) Having reviewed the material annexed at Exhibit 1, I am satisfied that the equal pay grievances as well as the threatened or actual equal pay litigation against the Respondent has been broad in scope, invoking a national comparison between the work undertaken by the Respondent's hourly paid retail colleagues on the one hand, and its hourly paid depot colleagues on the other.

(6) Between January 2008 and April 2014 the Respondent undertook work to understand equal value issues within its business for the purposes of informing the conduct of the litigation. Having reviewed documents relating to this work I am satisfied that they were produced for the dominant purpose of preparing for or conducting the litigation and are properly protected from disclosure by legal professional privilege.

(7) In giving this affidavit, I make no representation as to the existence or otherwise of any documents responsive to the questions posed by the Claimants in the Application. To answer the questions posed by the Claimants would require me to reveal the nature and scope of the work undertaken by the Respondent as described in paragraph 6 above, in breach of the Respondent's right to legal professional privilege."

Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Limited [2017] EWHC 1017 (QB)

7. On 8 May 2017 the Honourable Mrs Justice Andrews handed down her judgment in this case which concerns legal professional privilege. Although this was not mentioned before me, I have subsequently become aware that the defendant hereinafter referred to as "ENRC" has been given permission to appeal the decision to the Court of Appeal.

8. ENRC and its subsidiaries operated in the mining and natural resources sector which was said to involve a high risk of public sector bribery and corruption. The company instructed solicitors and forensic accountants to carry out investigations into its own activities. The investigations were carried on over two years during which the company was in communication with the claimant hereinafter referred to as "SFO". The SFO commenced a criminal investigation and issued notices under section 2(3) of the Criminal Justice Act 1987 compelling ENRC, to

produce various documents which had been generated during the company's own investigations. ENRC resisted production of the documents on the ground that they were privileged, contending that the documents were subject either to (1) litigation privilege, in that they had been made with the sole or dominant purpose of conducting adversarial litigation, namely criminal prosecution by the Serious Fraud Office that was in progress or reasonably in contemplation, or (2) legal advice privilege, in that they were communications which had passed between the defendant and its lawyers, acting in their professional capacity, in connection with the provision of legal advice. The SFO brought a claim in the High Court seeking a declaration that the documents were not so privileged.

9. From the head note prepared for the Weekly law Reports it was held, allowing the claim:

> "(1) That a criminal investigation by the SFO was not to be treated as adversarial litigation for the purposes of a claim to litigation privilege, since such an investigation was a preliminary step taken, and generally completed, before any decision to prosecute was taken; that the fact that a criminal investigation was reasonably contemplated did not necessarily mean that litigation, in the form of a prosecution, was also reasonably contemplated, although it might do so if the person who anticipated the investigation was aware of the circumstances which, once discovered, made a prosecution; that, on the facts, the prospect of criminal proceedings being brought against the defendant had never been anything more than speculative; that, further, litigation privilege did not extend to third party documents created in order to obtain legal advice as to how best to avoid contemplated litigation, even if that entailed seeking to settle the dispute before proceedings were issued; and that, accordingly the claim for litigation privilege failed in respect of all the documents for which it was made.
>
> (2) That where the party asserting privilege was a corporate entity, legal advice privilege attached only to communications between the entity's lawyer and those individuals who were authorised as the entity's agent to communicate with the lawyer for the purpose of obtaining legal advice on that entity's behalf; that if an employee was only authorised to provide the lawyer with information that would help the lawyer to give legal advice to others within the company, that was not a communication for the purpose of obtaining legal advice; that the requisite authority to obtain legal advice on a company's behalf would usually be vested in the company's Board of Directors and it might be persuasively argued that the company's in-house lawyers or general counsel would have such authority by virtue of their office, but whether they or any other individual employee or group of employees had such authority in a given case was a question of fact to be determined on the evidence…"

10. I was referred by leading counsel to various paragraphs within the judgment of Andrews J as follows:

"*The claim for legal professional privilege" ("LPP")*

(37) LPP is a fundamental human right guaranteed by the common law, and a principle which is central to the administration of justice. Once a document is subject to privilege, the privilege is absolute: it cannot be overridden by some countervailing rule of public policy. Although it is possible for LPP to be waived, this case is not concerned with any arguments about waiver.

(38) It is common ground that the evidential burden of establishing that a document or communication is privileged lies on the party claiming privilege, regardless of whether that party is the claimant or the defendant in the action: see *West London Pipeline v Total UK Ltd* [2008] 2 CLC 258, paras 50 and 86(1), and *Westminster International BV v Dornock Ltd* [2009] EWCA Civ 1323 at [36].

(39) The question whether a document or communication is privileged is to be determined by the court in the light of the evidence taken as a whole. The mere assertion of privilege, or statement of the purpose for which the document was created, is not in itself determinative, even if the person making the statement is a lawyer, and even if the assertion is made on oath. Whilst an affidavit of documents will generally be treated as conclusive on the question of privilege, it will not be treated as such if it appears from the affidavit itself that the deponent has erroneously mischaracterised the documents, or if it is reasonably certain from the other evidence before the court that it is incorrect or incomplete on the material points: see the *West London Pipeline* case at para 86 and the authorities there cited.

(40) A claim for privilege is an unusual claim, in the sense that the party claiming privilege and that party's legal advisers are (subject to the power of the court to inspect the documents) the judges in their or their own client's cause. Because of this, the court must consider very carefully the nature, quality and content of the evidence supporting the claim for privilege. The evidence should be specific enough to show something of the deponent's analysis of the documents and the purposes for which they were created, preferably by reference to such contemporaneous material as it is possible for him to refer without disclosing the very matters which the claim to privilege is designed to protect…

(41) In most cases in which LPP is claimed, the evidence in support will come, as indeed it should, from the person whose motivation and state of mind is in issue, namely the client or, if the client is a company, those individuals who were responsible for giving the relevant instructions to the lawyers on the company's behalf. It is only the person (or persons) who was or were ultimately responsible for the coming into existence of the document or documents in question who could explain, for example, why they contemplated litigation, or why

they were seeking legal advice. There may also be, and often is, evidence from the lawyers, though that will be of secondary value.

(45) The best evidence of what ENRC's senior management foresaw at the time and what impelled them to instruct lawyers and forensic accountants was always going to be the contemporaneous documents, against which their recollections could be tested. Mr Spendlove has stated in his latest witness statement that he and his colleagues reviewed 'tens of thousands of documents in relation to the 2011 and 2013 period'. Despite this, I have not been taken by Mr Lissack to any record of discussions either at Board level or within any group within ENRC which was responsible for giving instructions to the lawyers and forensic accountants, which might have shed light on what ENRC contemplated, and why, in the key period up to and including 19 August 2011. Most of the relevant contemporaneous documents in respect of that crucial period that have been adduced in evidence are internal emails, and a handful of newspaper reports.

(48) In the *West London Pipeline* case [2008] 2 CLC 258 Beatson J referred to the options open to the court (other than concluding that the claim to privilege fails) where it is not satisfied on the basis of the evidence before it that the claim to privilege has been made out. These include ordering a further affidavit to deal with matters which the earlier affidavit does not cover, or on which it is unsatisfactory; ordering cross-examination of the deponent; or (as a last resort) inspecting the 'privileged' documents itself. Beatson J indicated that inspection should not be undertaken unless either there is credible evidence that those claiming privilege have either misunderstood their duty or are not to be trusted with the decision-making, or there is no reasonably practical alternative.

(50) At the end of the day, and regardless of whether there is justification for the failure by ENRC to provide better evidence, the court has no choice but to decide whether the Disputed Documents are privileged on the basis of the evidence before it. It can draw reasonable inferences, but it cannot supply evidence to make up any deficiencies in the evidence that has been adduced, regardless of the reasons why those deficiencies exist.

The relevant legal principles

Litigation privilege

(51) Communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation attract litigation privilege when, at the time of the communication in question, the following conditions are satisfied: (1) Litigation is in progress or reasonably in contemplation. (2) The communications are made with the sole or dominant purpose

of conducting that anticipated litigation. (3) The litigation must be adversarial, not investigative or inquisitorial. See the *Three Rivers (No 6) case* [2005] 1 AC 610, para 102, per Lord Carswell.

(52) The rationale behind litigation privilege was described by Lord Rodger of Earlsferry in the *Three Rivers (No 6)* case, at para 52:

"Litigation privilege…is based on the idea that legal proceedings take the form of a contest in which each of the opposing parties assembles his own body of evidence and uses it to try to defeat the other, with the judge or jury determining the winner. In such a system each party should be free to prepare his case as fully as possible without the risk that his opponent will be able to recover the material generated by his preparations."

Likewise, in *Wheeler v Le Marchant* (1881) 17 Ch D 675, which concerned reports obtained by solicitors from surveyors and estate agents in the course of earlier proceedings unconnected with the relevant litigation, Cotton LJ said, at pp 684-685:

"Hitherto such communications have only been protected when they had been in contemplation of some litigation, or for the purpose of giving advice on obtaining evidence with reference to it. And that is reasonable, because then the solicitor is preparing for the defence of bringing the action, and all communications he makes for that purpose, and the communications made to him for the purpose of giving him the information are, in fact, the brief in the action, and ought to be protected."

(53) Thus it is clear that the purpose of the privilege is to enable someone to prepare for the conduct of reasonably anticipated litigation. Such preparation will obviously include taking legal advice pertaining to the conduct of that litigation; but it is important not to blur the lines between litigation privilege and legal advice privilege.

(54) The general trend has been towards strictly confining, rather than extending, the ambit of litigation privilege. In *Waugh v British Railways Board* [1980] AC 521, 543, which is still the leading authority, Lord Edmund-Davies said:

"In my judgment we should start from the basis that the public interest is, on balance, best served by rigidly confining within narrow limits the cases where material relevant to litigation may be lawfully withheld. Justice is better served by candour rather than suppression."

That was the basis for the requirement that the communication or document should be for the "dominant purpose" of the contemplated litigation. In *Balabel v Air India* [1988] Ch 317, 332A Taylor LJ spoke of the need to "re-examine the scope of legal professional privilege and

keep it within justifiable bounds". Lord Scott of Foscote in the *Three Rivers (No 6)* case [2005] 1 AC 610 suggested at para 29 that in the light of developments in civil procedure that encourage more openness between the litigating parties, it may be time for a new look at the policy justification for this limb of LPP. That review has not yet taken place, but those judicial observations underline the need for the court to be vigilant to avoid extending the ambit of the privilege beyond its current recognised confines.

(55) The test as to the extent to which litigation must be anticipated in order for the privilege to attach, is notoriously difficult to express in words. In *Waugh v British Railways Board,* Lord Simon of Glaisdale and Lord Edmund-Davies referred with approval to a passage in the (minority) judgment of Barwick CJ in the High Court of Australia in *Grant v Downs* [1976] 135 CLR 674 in which he referred to documents produced at a time when litigation was "in reasonable prospect". In *AXA Seguros SA v Allianz Insurance plc* [2011] Lloyd's Rep IR 544, para 14, Christopher Clarke J stated: "Whether or not litigation is reasonably in prospect is an objective question on which, again, the views of any deponent are not necessarily conclusive: see *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 1 WLR 1027". That approach is consistent with the test as set out by Lord Carswell in the *Three Rivers (No 6)* case referred to above.

(56) Although the test is an objective one the court must also consider the actual state of mind of the party claiming privilege. As Millett J put it in *Plummers v Debenhams plc* [1986] BCLC 447, 454, "there must be a real prospect of litigation. Where it is neither pending nor threatened, it must be in active contemplation of the party". That person must "show that he was aware of circumstances which rendered litigation between himself and the particular person or class of persons a real likelihood rather than a mere possibility": *United States of America v Philip Morris Inc* [2003] EWHC 3028 (Comm) at [46].

(57) The party claiming privilege is not required to show that it is more likely than not that adversarial litigation will ensue; on the other hand, it is insufficient to demonstrate that there is a "distinct possibility" that sooner or later someone might make a claim; or there is a general apprehension of future litigation: *Morris,* at para 68. In *AXA Seguros SA v Allianz Insurance plc* Christopher Clarke J rightly observed at para 43 that the dividing line is not entirely clear.

(58) It follows from the rationale underlying the privilege that if a document is created with the express purpose of showing it to the prospective adversary, or with the intention or understanding that it will be shown to him (such as, for example, a position statement prepared for the purposes of a mediation) it cannot be subject to litigation privilege. It may be subject to obligations of confidentiality, but they would arise for other reasons.

(60) As that case illustrates, advice given in connection with the conduct of actual or contemplated litigation may include advice relating to settlement of that litigation once it is in train. The conduct of ongoing proceedings embraces litigation tactics, and must include bringing them to an end by agreement short of trial. It would make no sense to deny litigation privilege to, for example, a report of an actuary or accountant dealing with quantum which is intended to assist solicitors to advise their client whether to accept or reject an offer made under CPR Pt 36.

(61) However, I reject ENRC's submission that by parity of reasoning, litigation privilege extends to third party documents created in order to obtain legal advice as to how best to *avoid* contemplated litigation (even if that entails seeking to settle the dispute before proceedings are issued). There is no authority cited in support of that proposition, and it self-evidently contradicts the underlying rationale for the privilege. Equipping yourself with evidence to enable you to conduct your defence free from the risk that your opponent will discover how you are preparing yourself, and to decide what evidence you are planning to call if the case goes to court, and what tactics to employ, is something entirely different from equipping yourself with evidence that you hope may enable you (or your legal advisers) to persuade him not to commence proceedings against you in the first place).

Legal advice privilege

(62) Legal advice privilege attaches to all communications passing between the client and its lawyers, acting in their professional capacity, in connection with the provision of legal advice, which "relates to the rights, liabilities, obligations or remedies of the client either under private law or under public law": see the *Three Rivers (No 6)* case [2005] 1 AC 610, para 38, per Lord Scott; *R (Prudential plc) v Special Comr of Income Tax* [2013] 2 AC 185, para 19, per Lord Neuberger of Abbotsbury PSC. There is no need for litigation to be contemplated.

(160) However, the situation is rather different where the investigation is into suspected criminality. One critical difference between civil proceedings and a criminal prosecution is that there is no inhibition on the commencement of civil proceedings where there is no foundation for them, other than the prospect of sanctions being imposed after the event. A person may well have reasonable grounds to believe they are going to be subjected to a civil suit at the hands of a disgruntled neighbour, or a commercial competitor, even where there is no properly arguable cause of action, or where the evidence that would support the claim has not yet been gathered. Criminal proceedings, on the other hand, cannot be started unless and until the prosecutor is satisfied that there is a sufficient evidential basis for prosecution and the public interest test is also met. Criminal proceedings cannot be reasonably contemplated unless the prospective defendant knows

> enough about what the investigation is likely to unearth, or has unearthed, to appreciate that it is realistic to expect a prosecutor to be satisfied that it has enough material to stand a good chance of securing a conviction."

Matters leading up to this application

11. On 19 June 2017 solicitors for the claimants wrote to solicitors to the respondent stating that they had previously asked the respondent about the existence of a job evaluation study, or any other similar method of determining the relative value of jobs (collectively, "JES"). They referred to an equal pay questionnaire dated 17 September 2014 where the respondent had stated that "no job evaluation study has been carried out" but not whether any other exercise had been conducted that would determine the value of jobs relative to each other. They noted the recent decision in **SFO v ENRC** holding that litigation privilege does not apply to: (1) documents produced for advice and/or assistance in relation to litigation but not for the actual conduct of that litigation; or (2) documents created for the dominant purposes of avoiding litigation. In the light of the decision would they please confirm: (1) whether a JES was undertaken in relation to any of the claimant or comparator jobs that form the subject matter of the claim; and, (2) the nature of any privilege asserted, if any, over any JES.

12. In a reply sent on 6 July 2016 it was stated that:

> "We have previously informed you of certain evaluations commissioned by Asda (see our letter of 14 June 2016). You have asked *'whether a JES was undertaken in relation to any of the claimant or comparator that form the subject matter of this claim'*. We understand this question to mean whether Asda has undertaken a job evaluation study in order to asses the comparative value of the claimants' and comparators' jobs. In answer to that question, there is no job evaluation study to which you are entitled. This response should not be taken to confirm one way or the other whether Asda has conducted such an analysis on a legally privileged basis."

13. On 22 September 2016 solicitors for the claimants wrote again stating why they concluded that one or several JES existed and then they gave examples of the respondent's previous shortcomings regarding privilege which was the subject of a hearing before the North West's then Regional Employment Judge Robertson on 17 May 2016. They referred again to the scope of litigation privilege following **SFO v ENRC** which made clear that litigation privilege does not apply to (1) documents produced for advice and/or assistance in relation to litigation, but not for the actual conduct of that litigation; or (2) documents created for the dominant purposes of avoiding litigation. They went on to say that they had not received a satisfactory answer to the questions in their letter of 19 June with the lack of a denial in relation to the existence of a JES being striking. They inferred, and asked the respondent to confirm, that a JES had been conducted but that the respondent was asserting privilege. They asked for confirmation as to the dates when any JES was conducted and to explain how it was covered by privilege. The dates would be relevant to enable them to see when any JES took place in relation to both the 2008 and the

2014 claims. They said that if a JES had been conducted by the respondent it would clearly be necessary for the effective disposal of some or all of the issues surrounding equal value. If the information was not provided on a voluntary basis they would seek an order from the Tribunal.

14. The response on 4 October was that they had nothing to add to their letter of 6 July. The persistent requests for further information were inappropriate and misconceived, there being no proper basis for them to question the response that had been given or to press the point further.

15. The claimants' application set out at paragraph 4 above was made on 5 October and amended on 20 October.

Mr Short's Submissions

16. In addition to his written skeleton argument Mr Short made oral submissions.

17. In the 2008 Equal Pay questionnaire the respondent had stated that there were no documents which directly addressed the difference in pay or the reason for it, and the company had not carried out a factor based job evaluation study comparing hourly paid staff in stores and distribution centres in terms of their roles and demands.

18. The respondent had now accepted there was no question of privilege before 2008 but asked for the extent of any search and enquiry to be referred to Employment Judge Ryan. In the view of the claimants there was no reason to do this.

19. Most matters would be post 2008 after proceedings had been issued in respect of Wigan/Skelmersdale.

20. In his submission there were five questions –

(1) Whether the respondent had proven litigation beyond Wigan/Skelmersdale was a reasonable prospect, not just a possibility, at the time of the relevant JES being carried out.

(2) Was the sole or dominant purpose of any JES in the period done for the purpose of the conduct of the proceedings? Was the purpose of avoiding proceedings sufficient? The claimant would say it was not. The general trend was that the assertion of privilege should be scrutinised more carefully than previously. A mere statement by the respondent was not sufficient.

(3) Whether privilege attached to the question of the existence and not just the content of any JES.

(4) If satisfied that the respondent had proven points (1)-(3) was there any waiver as to the existence of a JES on the basis of the response in the questionnaire?

(5) What should be done if the existence of a JES was not privileged for the whole of the period? Also there was the question of costs on both sides.

21. Mr Short referred to the response to the equal pay questionnaire given on 28 November 2014 by the respondent to the effect that they had not conducted any job evaluation comparing roles in retail with roles in Asda Logistics which operated as independent businesses. No job evaluation study had been carried out comparing hourly paid staff in retail stores and distribution centres, and no job evaluation or equal pay audit had been carried out for any part of the organisation.

22. Mr Short then went to the **SFO v ENRC** case making reference to various paragraphs set out above. He referred to the evidential burden of establishing that a document or communication is privileged being on the party claiming it, and this is a matter to be determined by the court in the light of the evidence. The affidavit will not be treated as conclusive if it appears from the affidavit itself that the deponent has erroneously mischaracterised the documents or if it is reasonably certain from the other evidence before the court that it is incorrect or incomplete on the material points. The person claiming privilege becomes the judge in their or their own client's cause. The affidavit in this case was done by the solicitor and not done by anyone from the respondent. Different solicitors were involved at the time of the response to the equal pay questionnaire. There was no evidence as to what might have been contemplated by the respondent in terms of proceedings. There were no notes or instructions to lawyers.

23. It was for the court to decide whether privilege could be claimed on the basis of the evidence before it.

24. He went on to refer to the relevant legal principles with the following conditions needing to be satisfied –

(1) Litigation is in progress or reasonably in contemplation;

(2) The communications are made with the sole or dominant purpose of conducting that anticipated litigation; and

(3) The litigation must be adversarial, not investigative or inquisitorial.

25. He referred to the test as to the extent to which litigation must be anticipated – this was an objective question on which the views of the deponent were not necessarily conclusive, but there must be a real prospect of litigation. Where it is neither pending nor threatened it must be in the active contemplation of the party. The party claiming privilege is not required to show that it is more likely than not that adversarial litigation will ensue. In this case if litigation had been a reasonable prospect but was no longer a reasonable prospect at the time a JES was done then it was not privileged. A single threat did not last forever.

26. Whilst the conduct of ongoing proceedings embraced litigation tactics and must include bringing them to an end by agreement short of trial, he noted Andrews J rejecting ENRC's submission that litigation privilege extended to third party

documents created in order to obtain legal advice as to how best to avoid contemplated litigation even if that entails seeking to settle the dispute before proceedings were issued. In his submission this had not been addressed by the respondent in either correspondence or the skeleton argument.

27. If work was carried out with the end in mind of avoiding future litigation beyond that commenced in the North West, then it was not within the protection of litigation privilege.

28. In his submission the court should be sceptical given the way in which the respondent had previously redacted documents when it should not have done.

29. The court would not be bound by the lawyer's own assessment.

30. He referred to **USA v Philip Morris Inc** in the Court of Appeal on 23 March 2004 [1 CLC 811] looking at the judgment of Lord Justice Brooke on the question of anticipated litigation where, by reference to an Australian case, it was concluded that:

> "As a general rule at least, there must be a real prospect of litigation as distinct from a mere possibility, but it does not have to be more likely than not."

31. In his submission the respondent did not need to show that litigation would ensue on the balance of probabilities. It was more nuanced.

32. As regards any JES, was it sought at the time with a view to preparing a notional brief for trial, or was the purpose likely to be very different?

33. Mr Short referred me to **Westminster International v Dornoch [2009] EWCA Civ 1323** in the Court of Appeal on 4 September 2009. The case concerned an application for specific disclosure. The affidavit in support in that case seemed to have come from the solicitor rather than the party claiming privilege. According to Lord Justice Etherton, as he then was:

> "Each case turns on its own facts and will be judged in the light of the facts as a whole. Neither a statement on behalf of the insurer as to its state of mind nor the mere fact of retaining solicitors will separately or together necessarily be sufficient to satisfy the requirements for litigation privilege. The onus of establishing the existence of the privilege lies on the party that asserts it and is to be determined in the light of the evidence as a whole."

34. In **Waugh v British Railways Board [1980] AC 521** there had been a fatal accident on the railways and this resulted in a brief report to the Railway Inspectorate on the day of the accident and thereafter a joint internal report also sent to the Railway Inspectorate. Subsequently there was a report made by the Inspectorate to the Department of the Environment. It was held that the internal enquiry report would almost certainly be the best evidence as to the cause of the accident and should be disclosed. For that important public interest to be overridden by a claim of privilege the purpose of submission to the party's legal advisers in

anticipation of litigation must be at least the dominant purpose for which it had been prepared. In the present case the purpose of obtaining legal advice in anticipation of litigation had been of no more than equal rank and weight with the purpose of railway operation and safety. The claim for privilege therefore failed. The fact that the report stated that it had to be sent to the Board's solicitor to enable him to give advice could not be conclusive as to the dominant purpose for which it was prepared.

35. Whilst equal pay was not the same as a fatal accident, any work done by an employer to find out if there was a possibility of sex discrimination in pay should have this as its dominant purpose – avoiding discrimination. Asda might say they did not care – their only interest was to find out how to resist the proceedings, but there would need to be evidence which was not there.

36. He referred to his skeleton argument. It was not enough for Asda simply to assert there may be a claim for privilege. In Birmingham & Midland Motor Omnibus Company Limited v London & North Western Railway Company [1913] KBD 852, it was said that a claim for privilege, even if made in an affidavit, is not "a spell which, once uttered, makes all the documents taboo".

37. Mr Justice Simon in **National Westminster Bank PLC v Rabobank Nederland [2006] EWHC 2332** was dealing with an application for specific disclosure and claims of privilege. In the learned Judge's view the court should not inspect documents unless there was credible evidence that the lawyers had either misunderstood their duty or were not to be trusted and where there was no reasonably practical alternative. In the present case, Mr Marshall (leading counsel for the defendant) has said that he has looked at the documents and that in his view the claim for privilege is properly made out. This view is shared by his instructing solicitor. Mr Philips QC for the claimant quite properly drew back from making an allegation of bad faith and focussed on his argument that Rabobank's lawyers had misunderstood the law, at least in relation to legal advice privilege.

38. Mr Short referred to the judgment of Beatson J in **West London Pipeline v Total UK [2008] 2 CLC 258** and paragraph 53 –

> "Affidavits claiming privilege whether sworn by the legal advisers to the party claiming privilege as is often the case, or, as in this case, by a director of the party, should be specific enough to show something of the deponent's analysis of the documents or, in the case of a claim to litigation privilege, the purpose for which they were created. It is desirable that they should refer to such contemporary material as it is possible to do so without making disclosure of the very matters that the claim for privilege is designed to protect."

39. In his submission this was quite a high test and the affidavit produced on behalf of the respondent should be considered against this.

40. Later in the case Beatson J distilled the following propositions from the authorities on challenges to claims to privilege:

"Summary of Law

86. It is possible to distil the following propositions from the authorities on challenges to claims to privilege:

    (1) The burden of proof is on the party claiming privilege to establish it: see *Matthews & Malek on Disclosure* [2007] 11-46, and paragraph [50] above. A claim for privilege is an unusual claim in the sense that the party claiming privilege and that party's legal advisers are, subject to the power of the court to inspect the documents, the judges in their or their own client's cause. Because of this, the court must be particularly careful to consider how the claim for privilege is made out and affidavits should be as specific as possible without making disclosure of the very matters that the claim for privilege is designed to protect: *Bank Austria Akt v Price Waterhouse; Sumitomo Corp v Credit Lyonnais Rouse Ltd* (per Andrew Smith J).

    (2) An assertion of privilege and a statement of the purpose of the communication over which privilege is claimed in an affidavit are not determinative and are evidence of a fact which may require to be independently proved: *Re Highgrade Traders Ltd; National Westminster Bank plc v Rabobank Nederland.*

    (3) It is, however, difficult to go behind an affidavit of documents at an interlocutory stage of proceedings. The affidavit is conclusive unless it is reasonably certain from:

        (a) the statements of the party making it that he has erroneously represented or has misconceived the character of the documents in respect of which privilege is claimed: *Frankenstein v Gavin's House to House Cycle Cleaning and Insurance Co,* per Lord Esher MR and Chitty LJ; *Lask v Gloucester Health Authority.*

        (b) The evidence of the person who or entity which directed the creation of the communications or documents over which privilege is claimed that the affidavit is incorrect: *Neilson v Laugharne* (the Chief Constable's letter), *Lask v Gloucester HA* (the NHS Circular), and see *Frankenstein v Gavin's House to House Cycle Cleaning and Insurance Co,* per A L Smith LJ.

        (c) The other evidence before the court that the affidavit is incorrect or incomplete on the material points: *Jones v Montevideo Gas Co; Birmingham and Midland Motor Omnibus Co v London and North Western Railway Co; National Westminster Bank plc v Rabobank Nederland.*

(4) Where the court is not satisfied on the basis of the affidavit and the other evidence before it that the right to withhold inspection is established, there are four options open to it:

(a) It may conclude that the evidence does not establish a legal right to withhold inspection and order inspection: *Neilson v Laugharne; Lask v Gloucester Health Authority.*

(b) It may order a further affidavit to deal with matters which the earlier affidavit does not cover or on which it is unsatisfactory: *Birmingham and Midland Motor Omnibus Co Ltd v London and North Western Railway Co; National Westminster Bank plc v Rabobank Nederland.*

(c) It may inspect the documents: see CPR 31.19(6) and the discussion in *National Westminster Bank plc v Rabobank Nederland* and *Atos Consulting Ltd v Avis plc (No. 2).* Inspection should be a solution of last resort, in part because of the danger of looking at documents out of context at the interlocutory stage. It should not be undertaken unless there is credible evidence that those claiming privilege have either misunderstood their duty, or are not to be trusted with the decision making, or there is no reasonably practical alternative.

(d) At an interlocutory stage a court may, in certain circumstances, order cross-examination of a person who has sworn an affidavit, for example, an affidavit sworn as a result of the order of the court that a defendant to a freezing injunction should disclose his assets: *House of Spring Gardens Ltd v Waite; Yukong Lines v Rensburg; Motorola Credit Corp v Uzan.* However, the weight of authority is that cross-examination may not be ordered in the case of an affidavit of documents: *Frankenstein's* case; *Birmingham and Midland Motor Omnibus Co Ltd v London and North Western Railway Co* and *Fayed v Lonrho.* In cases where the issue is whether the documents exist (as it was in *Frankenstein's* case and *Fayed v Lonrho*) the existence of the documents is likely to be an issue at the trial and there is a particular risk of a court at an interlocutory stage impinging on that issue.

41. In the submission of Mr Short, if the affidavit had the details then the court could not go behind it, but if there was no specificity, if matters were not made out the affidavit, as in this case, was just incomplete.

42. Mr Short referred me to the Code of Practice on Equal Pay (2011) produced by the Equality and Human Rights Commission. Paragraph 163 refers to the Commission recommending all employers to carry out regular equal pay audits.

43. Mr Short then moved on to the factual matrix in this case. Some claims had been issued in the North West in 2008 relying upon named comparators at the Wigan and Skelmersdale depots. These claims were stayed shortly before a preliminary hearing in 2010. All but 23 of the 2008 claims had been discontinued by the time of the 2014 claims. The claimants and comparators in the 2014 claims were not limited to the North West. The original claimants sought arrears of pay for six years prior to issue of the claims went back from 2008 to 2002.

44. There had been substantial correspondence between solicitors with regard to disclosure and privilege running up to the hearing in 2016. Hundreds of redactions were removed by the Tribunal. The issue was considered again by the claimants following the handing down of the **SFO** judgment. If there had been studies, whether in depots or in retail, they would be relevant to the questions before the Tribunal. Evidence of what had been done in 2006/7/8 would be relevant to the start of the period. Any Job Evaluation Scheme prior to 2008 would be relevant. He referred to the 2017 correspondence and then previous correspondence in 2016 on the question of job evaluation. In the past disclosure had not been done carefully. Documents were wrongly redacted.

45. I was then taken to various matters within the 730 page bundle showing items that had been wrongly redacted. This made the claimants sceptical as to the claim for privilege. In particular, there had been redacted a statement at a national forum meeting on 24 January 2008 to the effect that they did have a job evaluation system and did not envisage an equal pay issue within the company. They had a job evaluation process that underpinned the structure. There was a document concerning pay in 2011 showing the level of pay in retail as being lower than that in distribution.

46. In January 2011 a document had been prepared by the respondent for an incoming manager showing slides marked “private and confidential” and “legally privileged” when this was not the case. There was a reference to Hay point ranges with all roles having a Hay point value. This had been redacted, although it was alleged to relate to salaried staff only. There was abundant evidence that evidence had been withheld and that job evaluation work had been carried out.

47. As to the proceedings, he submitted that the company had not reasonably anticipated proceedings outside the North West between 2008 and 2014 other than possibly between September 2008 and February 2009.

48. The affidavit was very broad in scope. It was not clear what documents had been looked at and who had caused the documents to exist. It was not clear whether some or all documents had been looked at or how many there were and whether all this was done at the behest of the solicitors or the respondent. No document was exhibited, for instance, showing a request for a particular task to be done. In this case a simple assertion of privilege was not good enough.

49. In his submission the North West litigation was only contemplated for a short period. On 11 December 2007 Gary Smith of GMB had referred, in an email to the respondent’s People Director Caroline Massingham, to a potential equal pay/equal

value issue in the business. The response from the respondent to this was that they were currently considering the specific grievances that had been raised within distribution concerning equal pay, but they saw no potential for an equal pay/equal value issue in the business. The affidavit did not say if the deponent had considered things that had gone on in 2009, 2010 and 2011. One might have expected to have an affidavit from someone who had considered all of the documents and who gave an explanation with specific reasons.

50. On 11 December 2007 there was reference to a possible issue. At this time all grievances were from the North West. However, on 23 January 2008 the GMB sent out equal pay advice for all Asda Store employees saying immediate action was required. The union had told management that there could well be potential issues of equal pay/equal value within the business. Most women (and some men) working for Asda could be awarded compensation up to a maximum of six years' back pay if a claim was successful, but any claim would need to have legal merit to be successful. The law as it was at that time required that before complaints were issued they must first be raised by going through the grievance procedure. A pro forma document was provided to enable grievances to be raised to store managers and copied to the GMB.

51. A Liverpool employee raised a formal grievance on equal pay on 25 January 2008.

52. The GMB National Secretary sent an email to the respondent on 18 February 2008 thinking there may be an equal value issue between stores and distribution staff. The only way he could see it being addressed or quantified was to carry out job evaluation. Earlier on 14 February Caroline Massingham of the respondent had written to Gary Smith stating that the issue was a national one, making local resolution inappropriate. She was proposing it was dealt with as a national level collective grievance.

53. On 16 April 2008 Gary Smith of the GMB said that they were not pursuing Tribunals at that time. People were less concerned about time limits.

54. It was on 13 August 2008 that the Employment Tribunal in Manchester accepted the first relevant claim against Asda Stores Limited, and the statement of claim referred to the claimant claiming that she was entitled to be paid equal pay for work of equal value comparing herself to distribution and warehouse staff. She named comparator employees employed either by Asda Storage Limited or by Asda Stores at their Wigan Distribution Centre as warehouse operatives or holding similar positions. They were hourly paid employees. An Equal Pay Act questionnaire was also done around this time.

55. There was a case management discussion held in Manchester on 17 December 2008 with reference to 331 claims. It was the respondent's submission that all claims should be stayed either because of an appeal to the Employment Appeal Tribunal or because there was an indication that a further 400 cases were going to be presented to the Tribunal and a short stay was ordered to ascertain whether or not the further claims were to be presented. This, therefore, was a

reference to 340 claimants actual and 400 anticipated, a total less than 800, for a company which had more than 100,000 employees. The further claims did not materialise at that time.

56. On 22 January 2009 Gary Smith, National Secretary of GMB, Commercial Services Section, wrote to Caroline Massingham, People Director, Global George and Distribution, suggesting a sensible way forward would be for the company to agree a job evaluation exercise to look at the relative values of jobs in distribution and stores. Her response was to invite clarification on the union's concerns about equal pay and a response to the proposal for a single national collective grievance. The company had to deal with grievances individually in the absence of agreement with the GMB on the alternative approach by way of a collective grievance. The union's response on 29 January said that:

> "If a company was serious about resolving or trying to resolve the issue of equal pay/equal value then we should meet as a matter or urgency to discuss the process of job evaluation."

57. He referred to litigation taking place in the North West region on the issue of equal pay/equal value. Further grievance hearings in cases where there was litigation were now unnecessary. He would continue to provide members in GMB regions with advice on the best way forward, but their preference would still be to deal with these issues on a national basis, but that would have to involve a commitment by the company to a process of joint working on a job evaluation exercise.

58. On 12 February 2009 a further four claims were received in the Manchester Employment Tribunal. All claimants worked in the North West.

59. On 11 February 2009 the solicitors acting for the claimants referred to the stay which expired on 11 February 2009 in a letter to the Employment Tribunal. They referred to the further four cases issued but "as far as we are aware, and as far as the GMB union is aware, there are no prospects of other claims being lodged for the foreseeable future". In the circumstances they asked for a short CMD.

60. There was a Case Management Discussion on 26 March 2009 and it was agreed that all claims would remain stayed awaiting a determination in the Suffolk case and provision was made for the hearing of a preliminary issue in October 2009.

61. In the submission of Mr Short at this stage the respondent would no longer expect there to be any national litigation. At this stage in his submission people were working to reach a resolution of the claims, to settle them and to avoid the other 400 anticipated claims. The respondent was not carrying out privileged work at this stage. Their work must have had as a significant purpose finding out whether the overall pay scheme was discriminatory.

62. In the first part of 2008 there was nothing beyond a possibility of claims beyond the North West. From the end of 2008 to February 2009 there was a broader anticipation but once it was clear that no further proceedings were anticipated the

respondent could not use the cloak of privilege forever. Proceedings were repeatedly adjourned with a view to resolution. This was the dominant purpose – resolution.

63. As to the assertion in the affirmation, it was the wrong deponent. The solicitors had not been involved at the time of the work being done by other solicitors. There could have been similar evidence from elsewhere as to what work was intended to be done, but we do not know. We do not know how many documents Ms Hudda looked at or about timings. Anything done in 2008 might not necessarily be relevant to things done in 2009, 2010, 2011 or 2012 when proceedings were stayed. The respondent could not prove what it needed to prove. In particular paragraph 61 of **SFO v ENRC** concerning documentation created in order to obtain legal advice as to how best to avoid contemplated litigation which work would not be protected by privilege. The dominant purpose would not be the litigation.

64. On the question of the fact of a JES – is it privileged? The claimants say whether or not it exists is not privileged. The existence of it is simply an underlying fact which is not of itself privileged.

65. Before 2008 the respondent should be asked to answer the questions. There is no claim for privilege. At this stage the claimant was not requiring documents. It can answer the questions. It is not appropriate that the matter should be referred back to Employment Judge Tom Ryan. It cannot be doubted that the questions are relevant to the proceedings going back to 2002. It is simple for the respondent to say whether or not they exist.

Mr Cooper's Submissions

66. In the submission of Mr Cooper this was a unique application. You would search in vain for any case where the issue of privilege was sought to be unravelled where litigation was on foot and which was not different litigation but more of the same.

67. In an equal pay claim, a multiple claim such as this with different broad categories of jobs, it would be unsurprising if both parties were doing privileged work. The claimants were not providing information as to what work they were doing. It was surprising they should seek such information from the respondent.

68. The GMB were involved on behalf of their members. It was a broad claim which might require analysis. Mr Cooper made it clear that he made no representations as to what was or was not done by the respondent; or that he accepted the premise of the application, that the cases must have been limited to the North West only, and so the respondent ought to be able to say if anything was done over and above the North West region was a false premise.

69. The claimants were not simply seeking information as to a formal Job Evaluation Scheme but asking about any work done to analyse work done, any hourly paid store or warehouse work and then in the period after the claims were lodged. They do not just ask the respondent to say if work had been done but they

ask for a list of what has been done. What they ask for is disclosure which amounts to telling the claimants what you have. Asking for a log of privileged documents was not right. In the real world of litigation it would be no surprise if a large amount of work had been done, including work on equal value, but to encapsulate it by redacted documents of instruction on all work done would be simply fanciful. The White Book was clear. It is not required that the dates of the document should be specified nor the names of the makers. How could any information be given without breaching the privilege it was sought to protect?

70. This is not like other cases where questions arose as to documents before proceedings and where the purpose was questionable. There is no case where after proceedings have started the assertion of privilege, without describing the work done, is not regarded as sufficient. The simple answer in this case is the affidavit from the solicitor who has looked at the material and satisfied herself as to the privilege asserted. The dominant purpose was the extant proceedings. He too had looked at the same documents. They could not be described in greater detail without giving away things. Where there was an affidavit and counsel had made a similar statement, unless there was powerful evidence that they had not understood the law or the documents then this would be sufficient. It is not just that the documents are privileged, to describe them would itself breach privilege.

71. He made reference to the earlier responses to the equal pay questionnaire to the effect that no job evaluation exercises had been carried out. In no case in answering questions is a party required to spell out its position in relation to privilege. It would not be for the respondent to have replied “and by the way we might have done some privileged work that we are not going to tell you about”.

72. As to job evaluation, he referred to a letter from his solicitors on 14 June 2016 confirming that there had been no comprehensive job evaluation study across all hourly paid retail roles; neither had there been a comprehensive job evaluation study across all the comparator roles in distribution; and neither had there been a comprehensive job evaluation study comparing all hourly paid retail roles and all of the comparator roles. There had been from time to time assessments of the value of certain specialist hourly paid roles, the information in respect of which had been disclosed. Specifically it confirms no job evaluations were done.

73. In response to that information being provided in June 2016 the claimants made no application for further searches to be carried out for documents. Employment Judge Tom Ryan had been involved in what needed to be done by way of disclosure. The nature and extent of the searches. The time periods.

74. With regard to question 1, any such exercise would not be straightforward and would need to be dealt with by Employment Judge Tom Ryan.

75. The letter prompted by the case of **SFO v ENRC** was a speculative approach on behalf of the claimants. They were trying to get questions answered in respect of documents where the respondent asserted privilege. The claimants were attacking privilege.

76. It is for this Tribunal to decide whether it is appropriate to go behind the respondent's claim to privilege. Not to decide what should be done more generally.

77. As to the pre 2008 period, prior to the issue of the complaints, it does not raise a general privilege point. This question only became apparent when reformulated. It was only put as part of this application. The question of how any search should be managed should be dealt with by Employment Judge Ryan.

78. After 2008 the dominant purpose was work done on the question of equal value which arose after the 2008 proceedings in respect of which privilege is asserted. It was done for the dominant purpose of conducting the litigation. This was the complete answer as set out in the affidavit of Ms Hudda and his viewing of the documents. A subsidiary purpose would be to address litigation not yet in train but reasonably contemplated. These issues were addressed by the respondent.

79. In his submission the claimant's application does not get off the ground. As to dominant purpose, this was the simple and central answer. Claims were reasonably in prospect beyond those from the North West. Litigation was underway from 2008. In his submission it was, in effect, something like test litigation. There was a known general issue and the same claims, but behind them lay a very large number of claimants who could start their claims at any point if the litigation gained traction.

80. He referred to **USA v Philip Morris** and the judgment of Lord Justice Brooke referred to above.

81. In his submission the North West litigation was a clear precursor to national litigation.

82. He referred to **Westminster International v Dornoch** referred to above. In that case Lord Justice Etherton did not see why the Judge was bound to reject out of hand a claim to litigation privilege in the absence of a witness statement from someone from the defendants, or a statement that such person from the source of the belief of the deponent. That was a case in which the case at first instance was entitled to conclude that litigation was in prospect. There was a relatively low threshold for this.

83. Once litigation was underway it would be wholly unrealistic to suggest an organisation like Asda would not reasonably contemplate the full implications of litigation being advanced. This was a relatively low threshold in prospect.

84. As to what was happening on the ground, he referred to his skeleton argument and the matters referred to above. On 11 December 2007 Gary Smith asserted a general equal pay/equal value issue in the business between groups of employees in stores and those in distribution. In January 2008 the first statutory grievance concerning equal pay was received based on an allegation of an equal value with comparable male workers in distribution depots. Later in January 2008 there was the GMB circular to all regions entitled "Equal Pay Advice for all Asda Store Employees". The national forum meeting on 24 January 2008 referred to potential litigation involving retail and depot workers that would be tested in law if

need be. The GMB then encouraged hourly paid store colleagues to raise a grievance if they wished to do so and then bring equal value claims. There was then the correspondence which followed and the prospect of a national collective grievance prior to the first claims being presented in August 2008 covering a wide range of retail roles, but they and the equal pay questionnaire made clear they were indicative of a more general comparison between hourly paid retail colleagues and distribution and warehouse staff, with the questionnaire asking for information about pay received by workers in distribution depots generally.

85. In September 2008 Mr Smith of the GMB referred to litigation and that it would be likely that more cases would be registered in the coming few weeks. In the case management discussion in December 2008 there was reference to 331 claims issued and an indication of a further 400 cases. In 2009 GMB continued to correspond with the respondent on the basis of national issues. In August 2009 the claimants amended their claims to include further comparators based at Skelmersdale as well as Wigan. In September 2010 the preliminary hearing was vacated and a year long stay was ordered to allow the parties to attempt to settle the litigation. In September 2013 there was to be a working group to consider equal value issues on the basis of which the GMB agreed there was no further need to proceed with the ongoing Tribunal claims, and the GMB would seek and recommend their withdrawal. Claims began to be withdrawn and dismissed in large numbers, but in December 2013 the current solicitors for the claimants started to act for some claimants who did not withdraw their claims, and in March 2014 the solicitors said that the claims had not been settled and so they intended to bring them to a final hearing. Thereafter more than 16,000 claims have been issued, the store staff comparing themselves with hourly paid depot staff thus developing the litigation into precisely the national litigation making a broad comparison between hourly paid retail and depot employees that was first threatened in late 2007/early 2008, and there has been throughout the express overarching nature of the allegations being made and the proceedings both actual and threatened.

86. Arising from this the respondent had been continuously defending actual or threatened equal pay litigation seeking to establish a broad right to equal pay for retail employees based on an assertion of equal value between hourly paid employees in retail and distribution. The contemporaneous documentation is consistent with that being the understanding of all parties as to the scope of the litigation, and when in 2013 the current solicitors for the claimants took over the litigation and issued further claims this reflected the national retail/distribution comparison that had always underpinned the litigation, both actual and threatened.

87. The claimants submit that any work done by the respondent in order to understand the implications of what is going on and to settle the early claims without the dominant purpose being that of the litigation is not privileged. The respondent submits that dominant purpose is the litigation and so the claim to privilege should succeed.

88. The litigation did not stop in 2009. This was the time of the application for the amendment to include the Skelmersdale Distribution Centre comparators.

89. Following the stay the threat of the claims never went away. In his submission it did not matter if the work that was done was predominantly to inform the existing claims.

90. In his submission the claims began and remained national claims. The threat of further claims was always there and in the contemplation of both sides.

91. The reliance of the claimants on the SFO case was misconceived and misplaced.

92. Mr Short placed great reliance on paragraph 61 of **SFO v ENRC** but this should be read in context with paragraph 60. Paragraph 60 referred to advice relating to the settlement of litigation once it is in train, and the conduct of ongoing proceedings embraces litigation tactics and must include bringing them to an end by agreement short of trial.

93. Paragraph 61 refers to documents created in order to obtain legal advice as to how best to avoid contemplated litigation.

94. In this case it was actual rather than potential litigation from 2008. The judgment cannot be read as overruling longstanding authority to the effect that reports prepared and/or work done on a claim to advise on it is covered by privilege. The **SFO** case is far removed from civil litigation and cannot bear the weight Mr Short seeks to put on it.

95. In his submission the litigation was in train once reasonably contemplated. He referred to a part 36 offer under CPR that could be made before proceedings were issued.

96. The **SFO** judgment should be read in the light of the facts of the **SFO** case which were very different from these proceedings. He referred to paragraph 160 where the learned Judge referred to the critical difference between civil proceedings and a criminal prosecution where a person may well have reasonable grounds to believe they are going to be subjected to a civil suit, whereas criminal proceedings cannot be started unless and until the prosecutor there is satisfied that there is a sufficient evidential basis for the prosecution.

97. Drawing all things together the simple answer to the claimants' application is that the material was obtained for the dominant purpose of the litigation following the 2008 claims being commenced. It was absolutely clear that it was always national litigation with those claims underlying it.

98. As to what is privileged, it is the existence of any documents not just their contents. The claimants have asked a question in respect of any analysis of claims/comparators. This has been answered in the affirmation. The claimants are seeking to interrogate the answer given with a view to gaining a privilege log setting out the documents which may or may not have been prepared.

99. Taking from his skeleton:

> "The principle that privilege extends to any record or reproduction of the substance of any privileged communication means that documents, communications or information are privileged if revealing them to the other party would *reveal either directly or indirectly to the other side something which of itself ought to be and is, as a matter of law, the subject of privilege, be it litigation privilege or legal advice privilege,* including the trend of advice or litigation strategy. "Reveal" in this context *does not mean merely patently reveal but also latently reveal."*

100. As to the practice when describing classes of documents in respect of which privilege is claimed, see the White Book reference to which has been made above.

101. Mr Cooper referred to **Derby & Co Limited v Weldon [1991] WLR 1179,** a decision of Vinelott J who said that:

> "Where privilege is claimed for professional communications of a confidential character obtained for the purpose of getting legal advice, it has not in the modern times been the practice to require the party claiming privilege to bundle and number them. The claim for privilege is treated as itself a sufficient description of them."

102. The submission continues that this application seeks to vary the normal rule in disclosure where there does not have to be a log of the privileged documents. All a party says is that work has been done in connection with litigation, and that is all the other side is entitled to know. If further information is provided then it would reveal the litigation strategy adopted by a party. If more was said as to what had been done then privilege would be breached. You could not just package instructions with redactions.

103. Unless there was something to indicate that the respondent's solicitor and counsel had got things wrong then the claimants could not go against it.

104. He referred to the **West London Pipeline v Total UK** case set out above where Mr Justice Beatson summarised the law. He emphasised paragraph 3 as to the difficulty of going behind an affidavit document at an interlocutory stage of proceedings. The affidavit is conclusive unless it is reasonably certain from the statements of the party making it that he has erroneously represented or has misconceived the character of the documents in respect of which privilege is claimed, or the affidavit is incorrect or incomplete on material points.

105. In this case it was obvious that there was litigation ongoing from 2008.

106. If he and Ms Hudda had made their statements it was difficult to go behind them unless they had misled the Tribunal or their statements were incorrect or incomplete. The affirmation was sufficient. It had considered the material; it had referred to the purpose of the litigation.

107. As to waiver, Mr Cooper referred to Brennan v Sunderland City Council 2009 ICR 479 (EAT) before the then President Elias J. It was held that:

> "Given that the disputed material had been exhibited to a lengthy witness statement with no specific reference to the legal advice in the pleadings or in the witness statements themselves and since mere reference to advice, even to its content, was not sufficient to constitute a waiver of privilege and the employer was not seeking to rely on the legal advice to justify the reason for its decision to implement pay protection for a particular period, fairness did not require that the full substance of the advice should be provided. The law should be careful not too readily to find that relatively casual references to legal advice and collective bargaining negotiations constitute a waiver of privilege. In particular if there is no reliance on such references then even if they are relatively detailed that will still not lead to waiver of privilege. If, on the other hand, there is reliance, it is only fair that the full advice should be produced."

108. The Tribunal should find no reference to any privileged material in the questionnaire response.

Discussion and Conclusions

109. The application made by the claimants was made in the light of the judgment of Mrs Justice Andrews in **Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Limited** with the judgment being handed down on May 2017.

110. The claimants rely in particular on paragraph 61 of the judgment which in my judgment needs to be read together with paragraph 60:

> "(60) As that case illustrates, advice given in connection with the conduct of actual or contemplated litigation may include advice relating to settlement of that litigation once it is in train. The conduct of ongoing proceedings embraces litigation tactics, and must include bringing them to an end by agreement short of trial. It would make no sense to deny litigation privilege to, for example, a report of an actuary or accountant dealing with quantum which is intended to assist solicitors to advise their client whether to accept or reject an offer made under CPR Pt 36.
>
> (61) However, I reject ENRC's submission that by parity of reasoning, litigation privilege extends to third party documents created in order to obtain legal advice as to how best to *avoid* contemplated litigation (even if that entails seeking to settle the dispute before proceedings are issued). There is no authority cited in support of that proposition, and it self-evidently contradicts the underlying rationale for the privilege. Equipping yourself with evidence to enable you to conduct your defence free from the risk that your opponent will discover how you are preparing yourself, and to decide what evidence you are planning to call if the case goes to court, and what tactics to employ, is something entirely different from equipping yourself with evidence that

> you hope may enable you (or your legal advisers) to persuade him not to commence proceedings against you in the first place)."

111. I remind myself that the documents which were the subject of the application in the **SFO** case were created prior to any proceedings being commenced, with the contemplated proceedings being criminal rather than civil proceedings.

112. That is to be contrasted with this case where any documents that may or may not have been prepared by or on behalf of the respondent from 2008 onwards were done following the commencement of civil proceedings.

113. In my judgment the actual litigation started in the North West in August 2008 would always have had national consequences. If a female claimant in the North West had succeeded in an equal pay claim by comparing herself with warehouse workers then it seems to me inconceivable that there would not have been national ramifications, particularly given the involvement at the material time of the GMB's National Secretary, Commercial Services Section, who was communicating with the respondent's People Director, Global George & Distribution, with reference to a single national collective grievance concerning pay.

114. Although the number of live cases at the Tribunal was significantly reduced, there was never a time after 13 August 2008 when there were no claims against the respondent.

115. It seems to me that from the date of receipt of the first equal pay claim in 2008 the respondent does not have any documents that would come within paragraph 61 of the judgment of Mrs Justice Andrews-documents created in order to obtain legal advice as to how best to *avoid* contemplated litigation-because the respondent was already the respondent to actual litigation which had potential national consequences for it. In my judgment such documents as may exist are within the category described at paragraph 60-advice given in connection with the conduct of actual or contemplated litigation may include advice relating to settlement of that litigation once it is in train. The conduct of ongoing proceedings embraces litigation tactics, and must include bringing them to an end by agreement short of trial. It would make no sense to deny litigation privilege to, for example, a report of an actuary or accountant dealing with quantum which is intended to assist solicitors to advise their client whether to accept or reject an offer made under CPR Pt 36.

116. Turning now to the claim for privilege in respect of whatever documents there may be, I note from Mr Justice Beatson's summary of the law given in **West London Pipeline v Total UK** in 2008 that:

> "The burden of proof is on the party claiming privilege to establish it. The Tribunal must be particularly careful to consider how the claim for privilege is made out and the affidavit should be as specific as possible without making disclosure of the very matters that the claim for privilege is designed to protect. The assertion of privilege and statement of the purpose of the communication over which privilege is claimed in an affidavit are not determinative and are evidence of a fact which may require to be

independently proved. It is difficult to go behind an affidavit of documents at an interlocutory stage of proceedings. The affidavit is conclusive unless it is reasonably certain from:

(a) the statements of the party making it that he has erroneously represented or has misconceived the character of the documents in respect of which privilege is claimed;

(b) The evidence of the person who or entity which directed the creation of the communications or documents over which privilege is claimed that the affidavit is incorrect;

(c) The other evidence before the court that the affidavit is incorrect or incomplete on the material points.

117. I have set out above at paragraph 6 paragraphs 4-7 from the affirmation of Ms Osma Hudda, solicitor for the respondent in connection with the claim for privilege.

118. The documents referred to above were, together with others, found within exhibit 1 to her affirmation and did indeed consist of documents authored by the parties, their legal representatives and the Manchester Employment Tribunal, between December 2007 when equal pay issues involving the respondent's retail and distribution business were first intimated by the GMB on behalf of their members, and July 2014 when the first multiple claim form was filed.

119. Ms Hudda claims to have reviewed the material annexed at exhibit 1 and to be satisfied that the equal pay grievances as well as the threatened or actual equal pay litigation against the respondent has been broad in scope involving a national comparison between the work undertaken by hourly paid retail colleagues and its hourly paid depot colleagues.

120. Having been taken to many of the documents in the paginated bundle, I am satisfied that they do refer to the issues described by Ms Hudda and that they are broad in scope invoking a national comparison rather than being confined initially to the North West.

121. There can be no doubt that when carrying out the initial disclosure exercise the respondent wrongly redacted parts of many of the disclosed documents. Those that are within exhibit 1 are now all unredacted. Notwithstanding the earlier failure properly to disclose documents, it does not seem to me that there is anything from which I could doubt the sworn affirmation of Ms Hudda in her capacity as a solicitor and partner in a law firm representing the respondent in the current proceedings, particularly where one of Her Majesty's counsel tells me that he too has examined the material and confirms that it rightly is the subject of legal professional privilege.

122. In these circumstances it does not seem to me that there is any error on the part of Ms Hudda or that she has misunderstood matters in connection with the making of the affirmation or that it is either incorrect or incomplete on material points. The affirmation is from Ms Hudda rather than someone from the respondent, but

given the nature of these proceedings and the knowledge of the parties to the case as to how they are run and where they have been ongoing over a period of nine years, it would unlikely that one person would be in a position to swear an oath dealing with the matters that need to be dealt with in an affidavit or affirmation of this nature.

123. As to the extent of the pre 2008 disclosure exercise to be undertaken by the respondent I do not consider it necessary to refer this to Employment Judge Tom Ryan. The respondent has a continuing obligation to disclose relevant documents and should be aware of the extent of the obligation without the need for further judicial guidance.

124. Looking at the claimants' amended application and the numbered questions to the respondent therein, I conclude as follows:-

1, 2, and 4: Questions 1, 2 and 4 shall be answered by 28 February 2018.

3, 5 and 6: Questions 3, 5 and 6 need not be answered as they are matters which are the subject of legal advice privilege and/or litigation privilege.

7: If there are any positive answers to questions 1 and 4, the list of relevant documents shall be provided by 28 March 2018.

8, 9 and 10: These questions need not be answered as they involve going beyond the mere claiming of privilege.

Employment Judge Sherratt

22 January 2018

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

23 January 2018

FOR THE TRIBUNAL OFFICE