EMPLOYMENT TRIBUNALS

Claimant: **Ms S Akande**

Respondent: **Barking Havering and Redbridge University Hospitals NHS Trust**

Heard at: **East London Hearing Centre (by CVP)**

On: **2 & 3 April 2024**

Before: **Employment Judge Barrett**

Representation
Claimant: Ms A Pitt (Counsel)
Respondent: Mr C Adjei (Counsel)

JUDGMENT

The judgment of the Tribunal is that: -

1. **The Respondent has permission to withdraw the partial concession at paragraph 24 of its Grounds of Resistance to the Claimant's second claim;**

2. **The audio recording and transcript of discussions of the Respondent's disciplinary panel convened on 11 November 2022 are admissible in these proceedings; save that**

3. **The parts of the audio recording and transcript of discussions indicated by red highlighting on the transcript are privileged and inadmissible.**

REASONS

Introduction

1. This hearing was listed to determine the following matters:

   1.1. The Respondent's application to withdraw its partial concession in relation to the admissibility of a transcript of private deliberations at a disciplinary hearing on 11 November 2022;

1.2. If the Respondent is permitted to withdraw its partial concession, whether the transcript of private deliberations is admissible in principle; and

1.3. If the transcript of private deliberations is otherwise admissible (whether by concession or in general), whether any parts of the private deliberations are privileged and so inadmissible.

2. Following a housekeeping discussion on the morning of the first day of the hearing, I spent the remainder of the morning reading the relevant documents. I was provided with a preliminary hearing bundle numbering 364 pages which contained: the pleadings in the Claimant's two claims, previous case management orders, the transcript of a recording of the disciplinary hearing on 11 November 2022, the disciplinary outcome letter following that hearing, a draft list of issues marked up to cross-refer to the transcript, two skeleton arguments submitted on behalf of the Claimant, and a skeleton argument for the Respondent. I was further provided with a helpful authorities bundle numbering 134 pages.

3. On the afternoon of the first day, I heard submissions from the parties in relation to the first matter, namely whether to permit the Respondent to withdraw a partial concession. On the morning of the second day, I heard submissions from the parties in relation to the second matter, the admissibility of the transcribed recording of private deliberations, and the third matter, legal advice privilege. We took regular breaks throughout the hearing, both to assist concentration and on request to allow the Claimant to give instructions to her counsel from time-to-time. I was much assisted by the well-researched and well-presented submissions of both counsel.

4. This is the reserved decision on all three matters. The parties agreed that because the issues under consideration were capable of finally disposing of parts of the Claimant's second claim (namely, those allegations founded solely on the disputed parts of the transcript), in accordance with rule 1(3)(b)(ii) of the Employment Tribunal Rules of Procedure, my decision should be set out in the form of a judgment rather than a case management order.

The factual and procedural background

5. The Claimant commenced employment as a Programme Manager at the Respondent NHS Trust on 1 April 2019. Following a period of early conciliation between 1 November and 12 December 2021, she presented her first claim to the Tribunal on 11 January 2022. In it, she raised complaints of direct race discrimination, harassment related to race and victimisation. Meanwhile, she had also submitted a grievance to the Respondent on 4 November 2021. I have not seen the grievance but understand it covered similar matters to those raised in the first claim. The Respondent accepts that both the grievance and the first Tribunal claim are capable of amounting to protected acts for the purposes of s.27 Equality Act 2010.

6. On 8 December 2021, the Claimant attended an operating theatre in the Respondent's hospital during a surgical procedure. This gave rise to a disciplinary allegation, disputed by the Claimant, that her attendance was unauthorised and amounted to a misuse of her position and work pass. A disciplinary hearing took place over two days on 27 September and 11 November

2022 and an outcome letter, issuing a final written warning and demoting the Claimant, was sent on 1 December 2022. The Claimant appealed the disciplinary outcome on 15 December 2022.

7. On 11 November 2022, the second day of the disciplinary hearing, the Claimant recorded what took place on her mobile phone. There is a dispute between the parties as to whether it was agreed that the Claimant could record the hearing. The hearing was also recorded by the Respondent. The Claimant left her phone, still recording, in the hearing room during three adjournments. During these adjournments, the members of the Respondent's disciplinary panel discussed her case. At points they discussed taking legal advice and consulted a solicitor by telephone. It is not disputed that the panel members were unaware that they continued to be recorded during the adjournments. The Respondent did not record these parts of the day. The Claimant says that she had inadvertently captured the adjournment discussions and only discovered these parts of the recording when preparing for her disciplinary appeal hearing.

8. The Claimant presented a second claim to the Tribunal on 10 February 2023, bringing further complaints of direct race discrimination, harassment related to race and victimisation. The allegations in the second claim concerned the disciplinary process and decision. An overarching allegation is that the HR representative who dealt with the disciplinary process, Ms Idrees, was implicated in the Claimant's prior grievance and was therefore hostile towards her, and so subverted the process to the Claimant's detriment in various ways. The Claimant's Grounds of Claim in her second claim quoted extensively from the recording of the adjournment discussions on 11 November 2022.

9. The Respondent presented its ET3 response to the second claim on 6 April 2023. In the appended Grounds of Resistance, the Respondent wrote at paragraphs 22-25:

'Covert Recording

22. Within her Grounds of Claim, the Claimant relies upon and extracts alleged comments from a covert recording made of the two disciplinary hearings, and specifically the Panel's private deliberations. It is not admitted that the Claimant had express permission to record any part of the hearing, let alone the Panel's deliberations.

23. At present, while the Respondent has access to the recording, it does not yet have a full transcription and therefore it is neither accepted nor denied that the Claimant's transcripts or extracts within her Particulars of Claim are accurate or a true reflection of the discussions. It is not admitted that the full context of the comments has been provided by the Claimant.

24. Whilst the Respondent objects to the Claimant's covert recording, given it is directly relevant to the Claimant's case and the Tribunal will be assisted by having access to all relevant evidence, it does not object to sections of the recording being used for the purposes of this Employment Tribunal claim. However, the Claimant also covertly recorded elements of the Panel's private deliberations where they were being advised by a solicitor and those discussions are covered by legal privilege. The Respondent does not waive privilege with respect to those parts of the covert recording. The Respondent's position is that the Claimant is not permitted to rely on any aspect of the recording that is covered by legal

professional privilege, encompassing discussions between the Panel members arising out of receipt of that legal advice.

25. The Respondent has been provided with a copy of the recording and is arranging for it to be transcribed. It will then endeavour to agree with the Claimant which sections on the transcript can and cannot be relied on in these proceedings. If agreement cannot be reached then the Respondent will seek a Preliminary Hearing to decide this issue. Following that, the Respondent proposes to provide an Amended / Additional response setting out its full response once it has had the opportunity to consider the transcript fully.

10. The Claimant's two claims were consolidated by an Order dated 19 May 2023. At a telephone preliminary hearing convened for the purpose of case management on 21 August 2023, Employment Judge Burns queried whether any parts of the recorded adjournment discussions would be admissible as evidence. He suggested that the parties review an EAT judgment, *Andrews v Argent (Property Development) Services LLP* UKEATPA/0707/20/AT, dated 17 June 2021. He made the following Order:

'By 21 September 2023 the Claimant must produce and serve on the Respondent a full typed transcript of the whole of the disciplinary hearing (the subject of her second claim) including the deliberations of the panel and the telephone call to the Respondent's legal advisor. The Respondent must by 21 October 2023 provide to the Claimant a copy of the transcript showing which parts of the transcript the admission in evidence it objects to and the reasons for any such objection/s. If the parties have not agreed in writing which parts are inadmissible then the Claimant must apply to the Tribunal by 4 November 2023 for a 3hr PH by CVP to determine the matter.'

11. Following the 21 August 2023 preliminary hearing, the Respondent contacted the EAT to request a copy of the unpublished *Andrews* judgment. It took some time for this to be retrieved from off-site archive storage. In the meantime, the Respondent reviewed its position on whether the record of deliberations was admissible by reference to the case law that was available.

12. On 6 November 2023, the Claimant wrote to the Tribunal applying for a preliminary hearing to be listed to determine the question of admissibility of the recording and transcript, stating:

'We have been informed that the Respondent objects to the use of the parts of the transcript/recording that cover the Disciplinary Panel's private deliberations and the conversation between the Respondent's legal advisor and the Disciplinary Panel.'

13. On 11 December 2023, the Respondent applied to amend its ET3 response to the second claim by withdrawing the partial concession made at paragraph 24 of the Grounds of Resistance. The amendment sought is as follows (with text proposed to be deleted struck through and text sought to be added underlined):

'~~Whilst the Respondent objects to the Claimant's covert recording, given it is directly relevant to the Claimant's case and the Tribunal will be assisted by having access to all relevant evidence, it does not object to sections of the recording being used for the purposes of this Employment Tribunal claim.~~ <u>The Respondent objects to the Claimant's covert recording of the Disciplinary Panel's private deliberations (between themselves) being admitted and referred to as part of this claim.</u> ~~However, t~~<u>T</u>he Claimant also covertly recorded elements of the Panel's

private deliberations where they were being advised by a solicitor and those discussions are covered by legal privilege. The Respondent does not waive privilege with respect to those parts of the covert recording. The Respondent's position is that the Claimant is not permitted to rely on any aspect of the recording that is covered by legal professional privilege, encompassing discussions between the Panel members arising out of receipt of that legal advice.'

14. By this time, the Respondent had not yet received the *Andrews* judgment so its application was based on its review of other case law.

15. The Claimant wrote to the Tribunal on 14 December 2024 objecting to the Respondent's application to amend.

16. A preliminary hearing was listed for two hours on 11 March 2024. Employment Judge Massarella conducted that hearing. He realised that 2 hours was an insufficient listing to determine the three issues outlined at paragraph 1 above, and therefore listed this two day hearing for these issues to be properly determined.

Whether the Respondent should be permitted to withdraw its partial concession

The law on amendment and withdrawing a concession

17. In deciding whether to exercise its discretion to grant leave for amendment, a Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it (*Vaughan v Modality Partnership* [2021] ICR 535). Relevant circumstances include those set out in *Selkent Bus Co Ltd v Moore* [1996] IRLR 661: the nature of the amendment; the applicability of statutory time limits; and the timing and manner of the application. However, these are not the only factors that may be relevant and the crucial issue is the balance of prejudice between the parties (*Vaughan*).

18. Where the proposed amendment involves withdrawing a concession, relevant circumstances are likely to include those factors drawn from CPR r.14.5 and set out in *Braybrook v Basildon & Thurrock University NHS Trust* [2004] EWHC 3436 QB, as applied in *Nowicka-Price v Chief Constable of Gwent Constabulary* UKEAT/0268/09 at §24:

'(1) In exercising its discretion the court will consider all the circumstances of the case and seek to give effect to the overriding objective;

(2) Amongst the matters to be considered will be:

(a) the reasons and justification for the application which must be made in good faith;

(b) the balance of prejudice to the parties;

(c) whether any party has been the author of any prejudice they may suffer;

(d) the prospects of success of any issue arising from the withdrawal of any admission;

(e) the public interest, in avoiding where possible satellite litigation, disproportionate use of court resources and the impact of any strategic manoeuvring;

(3) The nearer any application is to a final hearing the less chance of success it will have even if the party making the application can establish clear prejudice. This may be decisive if the application is shortly before the hearing.'

The parties' submissions

19. The Respondent submitted that:

19.1. In fact, it had never been conceded that all parts of the recording save those in relation to which privilege had been asserted were admissible in evidence, only that 'sections' of the recording could be admitted – and that partial concession was made at a time when the Respondent did not have the full transcript. Therefore, the application did not represent a complete change of position by the Respondent.

19.2. Its application was made in good faith following the direction of Employment Judge Burns that the parties should look at the decision in *Andrews* and review their positions.

19.3. The application was made on 11 December 2023, six months before the final hearing was listed to commence on 4 June 2024. The reason why the application was not made earlier was because the Respondent was seeking to obtain the *Andrews* case from the EAT.

19.4. Should the recording and transcript of deliberations be excluded from evidence, prejudice to the Claimant would be limited because (i) she would still be able to rely on the transcript of the open parts of the hearing, and (ii) the transcript amounted to only weak evidence of discrimination, harassment or victimisation. Mr Adjei described it as at best, ambiguous, such that the Claimant's prospects of succeeding in her claim would not be materially weakened by its exclusion.

19.5. In comparison, the Respondent would suffer the greater prejudice should its concession not be withdrawn because comments made by its panel that were intended to be kept private would be aired publicly.

19.6. There were no issues of satellite litigation or strategic manoeuvring by either party that would give rise to a public interest in refusing the application. Neither could either party be described as the author of any prejudice they may suffer.

20. The Claimant submitted that:

20.1. She would be prejudiced by the Respondent being permitted to withdraw its concession because her second claim was in large part based on the recorded deliberations; not only the allegations which specifically cited those parts of the discussion, but also the strength of other allegations which could be supported by the evidence of what was said and the attitude evinced towards the Claimant in the adjournments. The annotated draft list of issues showed that extensive reliance was placed on the disputed parts of the transcript. Further, the loss of the allegations relating to the deliberation discussions could impact on the Claimant's time limit arguments on whether there was a continuing act of discrimination.

20.2. In relation to the strength of the evidence the recorded deliberations provided in support of the Claimant's claims, Ms Pitt asked me to consider the tenor of the adjournment discussions in their entirety, and in particular the passages cited in the annotated list of issues as being relevant to the allegations at paragraphs 4(r), 8(k), 8(q) and 12(r) of that list.

20.3. By contrast, prejudice to the Respondent would be limited because it would still be able to mount a defence to the claims in the Tribunal even were the recorded deliberations to be admitted. The Tribunal would hear the evidence in full and in context.

20.4. There was a public interest in the Tribunal having access to the best evidence available, given that the disciplinary decision-making process (including the deliberation discussions) would form part of the claim in any event. Further, it would be difficult for the Respondent's witnesses to give evidence about their discussions, knowing that a recording of those discussions was in existence but not in evidence.

20.5. The Claimant had been clear from the outset that the second claim relied on a recording of the deliberations and Respondent had conceded that the transcript (other than parts in relation to which privilege had been asserted) could be admitted into evidence. The Claimant had understood there was no challenge to the admissibility of the deliberation discussions, until the Respondent changed its position at a late stage in the proceedings. Further, the delay of four months from the preliminary hearing before Employment Judge Burns until the application was made on 11 December 2023 was inexcusable; *Andrews* was not the sole authority on the issue. It was too close to trial now (just eight weeks) for it to be fair that the concession be withdrawn, when the Claimant's case to date was predicated on the deliberation discussions being admissible.

20.6. It was submitted that the Respondent's application was not made in good faith; however, on exploring that submission with Ms Pitt, she explained that the Claimant put it no higher than saying that the Respondent had been opportunistic in taking advantage of Employment Judge Burns' discussion at the preliminary hearing to change its position.

20.7. The Respondent was professionally represented by competent lawyers throughout, and changing its view on the application of the law to the facts subsequent to the pleading stage was not a good reason to permit an amendment. There was no change in the applicable law between the time the ET3 was submitted and the time when the Respondent applied to withdraw its concession. The Respondent was the author of any prejudice it might suffer.

Discussion and conclusion

21. I have considered what factors or circumstances may be relevant to the balance of prejudice between the parties should the Respondent's application to withdraw its partial concession be granted or refused. Some of the factors listed in *Nowicka-Price* do not arise on the facts of this case. I do not consider there to be any question of bad faith on the part of the Respondent. Neither is there likely to be a problem with satellite litigation or misuse of the Tribunal's resources. Further,

in relation to the *Selkent* list, there is no applicable statutory time limit to consider. The matters which do strike me as relevant are the following:

21.1. The nature of the amendment is significant, in terms of the reliance the Claimant places on the deliberation discussions for the purposes of her second claim. However, the concession which the Respondent seeks to withdraw was made in less than absolute terms by saying that 'sections' of the recording could be admitted, without specifying which sections. The implication was that the sections not specifically objected to on privilege grounds would not be challenged, but this was not stated explicitly. The partial concession was made at a time when the Respondent had access to the recording but not a full transcript, and therefore had not had the opportunity to review the transcript. It would be prejudicial for the Respondent to be held to a concession made in these circumstances, when later on a full review of the transcript in the context of the case law resulted in it taking a narrower view of admissibility.

21.2. The timing of the application was later than would be desirable; the partial concession was made in the ET3 response on 6 April 2023 and the application to withdraw it was not made until 11 December 2023. During that time, the Respondent was professionally represented and well able to take advice on issues relating to admissibility of evidence. I accept the Claimant's submission that she is prejudiced to an extent by the timing of the Respondent's application, because for a period of time she was pursuing litigation on the basis that the admissibility of evidence she relied upon was not challenged and that turned out not to be the case. However, that prejudice is limited because from the 21 August 2023 preliminary hearing, the Claimant was aware from the discussion before Employment Judge Burns that admissibility might be put in issue. She was aware of the Respondent's objection to the admissibility of the recorded deliberations as at the time of her application of 6 November 2023 for a preliminary hearing, which pre-dated the Respondent's formal amendment application. Although the application was heard before me some eight weeks before the final hearing is due to commence, the Claimant has known for a considerably longer period that the admissibility of the recording and transcript is a live issue.

21.3. The impact on the prospects of success of the Claimant's claims were the concession to be withdrawn is usually a relevant consideration. However, in this case the effect of the concession being withdrawn is not that the recording and transcript of the deliberation discussions will necessarily be excluded from evidence. Rather, the withdrawal of the concession would mean that the Respondent has the opportunity to argue that the recording and transcript of the deliberation discussions should be determined inadmissible. I have reached the view that it would be more appropriate to consider the content of the transcript when determining the issue of admissibility. In relation to the Respondent's amendment application, I note that the Respondent would be prejudiced if not given the opportunity to have its arguments on admissibility considered.

21.4. Has either party been the author of their own prejudice? The Respondent might have challenged the admissibility of all the sections of the recording

relating to the panel's private deliberations in its ET3 response, or by way of a prompter application to amend. (The *Andrews* decision was not decisive and the Respondent was able to make its application without having sight of it.) The Claimant is in the position where part of the evidence on which she relies in her claim is of disputed admissibility because she (whether inadvertently or not) recorded the discussions of the disciplinary panel without their knowledge. The parties' respective conduct of the litigation is a relevant factor but not one that swings the balance in either direction in this case.

22. Overall, weighing the relevant circumstances, I consider that the prejudice to the Respondent were I to refuse the application outweighs the prejudice to the Claimant of granting it. If the application were to be refused, the Respondent would be held to a partial concession made at an early stage of the proceedings without sight of the full transcript, and its arguments on the proper application of the law on admissibility to the facts of the case could not be considered. By contrast, allowing the application does not necessarily prejudice the Claimant's ability to pursue her claims; rather, what she faces is a risk that the evidence of deliberation discussions on which she relies might be excluded if determined to be inadmissible. It would be in accordance with the overriding objective for the Tribunal to be able to consider that issue. I therefore grant permission for the Respondent to withdraw the partial concession made at paragraph 24 of its Grounds of Resistance to the Claimant's second claim, and to make the amendment set out at paragraph 13 above.

Whether the recording and transcript of the disciplinary panel's deliberations are admissible

23. The parties cited the following cases on admissibility of recordings: *Chairman and Governors of Amwell View School v Dogherty* [2007] ICR 135, *Williamson v Chief Constable of Greater Manchester* UKEAT/0346/09/DM, *Vaughan v Lewisham LBC* [2013] IRLR 713, *Punjab National Bank (International) Ltd v Gosain* UKEAT/0003/14/SM, *Fleming v East of England Ambulance Service NHS Trust* UKEAT/0054/17/BA and *Andrews v Argent (Property Development) Services LLP* UKEATPA/0707/20/AT.

The balancing of interests test in Amwell

24. The *Chairman and Governors of Amwell View School v Dogherty* case concerned a teaching assistant whose representative recorded her disciplinary and appeal hearings, without telling the panel members conducting the hearings. On one occasion, the recording captured not only the part of the hearing Mrs Dogherty and her representative attended but also the panel's deliberations which took place in their absence. Mrs Dogherty pursued a claim of unfair dismissal, during the course of which the recordings were put before the Employment Tribunal. The respondent school objected to their admission and, having not persuaded the Tribunal to exclude them, appealed to the EAT.

25. Mr Recorder Luba QC sitting in the EAT held that "*the obvious first question to be asked on any decision relating to the admission of evidence is whether the evidence in question is relevant to an issue between the parties*" (§27) and that "*an Employment Tribunal would normally be bound to admit evidence that it had found to be relevant to the issue before it*" (§30).

26. The respondent school argued that the recordings should nonetheless be excluded on a variety of grounds, including that their admission would infringe the panel members' right to privacy under Article 8 of the European Convention on Human Rights ('ECHR'). This was rejected by the EAT on the basis that the governors were putting themselves into the public domain when volunteering to undertake school governance work (§38).

27. The school also argued that the recordings should be excluded as a matter of public policy. The EAT did not accept that the Employment Tribunal ought to have excluded recordings of the 'open' parts of the hearings on public policy grounds given that these were also minuted and Mrs Dogherty could have taken notes at them had she wished to (§69-70). However, they did accept that there were public policy grounds for excluding the recording of the deliberations (§73):

> **'In our judgment there is an important public interest in parties before disciplinary and appeal proceedings complying with the "ground rules" upon which the proceedings in question are based. No ground rule could be more essential to ensuring a full and frank exchange of views between members of the adjudicating body (in their attempt to reach the "right" decision) than the understanding that their deliberations would be conducted in private and remain private. How, otherwise, could a member of that body confidently expose for discussion a doubt concerning some evidence about which he or she was unsure? The failure to maintain respect for the privacy of "private deliberations" in this context would have the important consequences of (1) inhibiting open discussion between those engaged in the task of adjudicating and (2) giving rise to a good deal of potential satellite litigation based on "leaks" by particular members of the adjudicating body or from the clandestine or unauthorised recordings of such proceedings.'**

28. However, the case did not set out a universal rule excluding deliberations recorded without the participants' knowledge in every case, as noted at §74:

> **'We are far from suggesting some new broad class of common law public interest immunity in the law of evidence. Rather we confine ourselves to the particular circumstances of this case: a claim for unfair dismissal of an employee which raises issues as to the reasonableness of (and the conduct of) the procedures leading to that dismissal and the confirmation of it. More particularly, a case in which, in the course of those procedures, the employee has agreed in advance (with no suggestion of any prejudice or duress) to withdraw whilst the relevant panel deliberated in private, that panel having undertaken to give (and having subsequently given) full reasons for its decision. The balance between the conflicting public interests might well have fallen differently if the claim had been framed in terms of unlawful discrimination, where the decision was taken by a panel which gave no reasons for its decision, and where the inadvertent recording of private deliberations (or the clear account of one of the panel members participating in those deliberations) had produced the only-and incontrovertible-evidence of such discrimination.'**

Application of the Amwell test in subsequent case law

29. The decision in *Amwell* was applied in *Williamson v Chief Constable of Greater Manchester* UKEAT/0346/09/DM, to exclude a covert recording and transcript made by the claimant of a discussion about him following a capability meeting. At a preliminary hearing, Employment Judge Coles (cited at §8 of the EAT judgment) described the nature of the recording as follows:

'The parties to the meeting believed that they were taking place in private and it is perfectly understandable, in my judgment, that things will be said that would not be said in public. For example, participants could put one end of the merits of the claimant's case forcibly and the other end of the case equally forcibly so as to test the judgments of the people concerned, if necessary by putting "devil's advocate" arguments before themselves. In the privacy of such a situation it should, in my view, be permissible for wide-ranging discussions to take place without there being the obligation thereafter for those parties involved to explain why it was that they said one thing or another. It is also, as occurred here, understandable that on occasions in a serious situation, degrees of levity creep in. Having read the transcript and listened to the relevant parts of the tape and, whilst there was a degree of levity on occasions, I do not regard it as being in any way malicious to the claimant or indicative in an obvious way of any discriminatory attitude on the part of the participants towards the claimant.'

30. Employment Judge Coles considered that "*in order to override the general principle that such discussions should be excluded from the evidence as a matter of public … there has to be some very cogent reason why the normal principle of excluding it should be overruled*". He gave as examples of the type of evidence that would not be excluded: "*some obvious statement or statements made by one or other of the parties to the discussion which made it clear that they, or some of them, were thinking or acting in a discriminatory way or making statements which provided incontrovertible evidence of that*" and concluded that there was no sufficient reason of this kind in Mr Williams' case to justify the general principle being overturned. HHJ Birtles held at §25 that this was a correct application of the balancing test in *Amwell.*

31. In *Vaughan v Lewisham LBC,* covertly recorded evidence was also excluded, but in that case the reason for the exclusion was that no transcript had been provided, and so it had not been possible for the Employment Judge to form a view as to their relevance.

32. Covertly recorded evidence was admitted in the case of *Punjab National Bank (International) Ltd v Gosain* UKEAT/0003/14/SM. Ms Gosain recorded both public and private conversations connected with her grievance and disciplinary hearings and sought to rely on the recordings in her claim for sexual harassment, sex discrimination and unfair dismissal. Employment Judge McNeill QC (cited at §7 of the EAT judgment) decided that the recordings were admissible, and the circumstances were distinguishable from the *Amwell* case, because "*the comments which are alleged to have been recorded, if said, fall well outside the area of legitimate consideration of the matters which fell to be considered by the grievance and disciplinary panels respectively*". They included: a comment that the Managing Director had given an instruction to dismiss Ms Gosain; the grievance manager saying he was deliberately skipping key issues raised by the grievance letter; and the disciplinary manager making a crude sexual comment about Ms Gosain. Employment Judge McNeill concluded that these were "*not the sort of comments which fall within the 'ground rules' principle set out in Dogherty because they did not constitute the type of private deliberations which the parties would understand would take place in relation to the specific matters at issue at the grievance and disciplinary hearings*".

33. The bank's appeal to the EAT did not succeed. HHJ Peter Clark held that in *Amwell:*

'the EAT were not laying down any firm rule of practice, as is plain from paragraph 74 of Mr Recorder Luba's Judgment. The fact that the recordings were made covertly is not, of itself, a ground for ruling them inadmissible. Where the Tribunal fell into error in *Amwell* was in failing to carry out the balancing exercise, setting the general rule of admissibility of relevant evidence against the public policy interest in preserving the confidentiality of private deliberations in the internal grievance/disciplinary context. Here, Judge McNeill was acutely aware of the need to strike the balance, and in my judgment she did so permissibly.'

34. Covertly recorded discussions were also held to be admissible in *Fleming v East of England Ambulance Service NHS Trust*, because in the particular circumstances of that case the decision to dismiss could not be properly assessed without reference to the content of the recording, which had been shared and discussed in the course of the internal disciplinary process. HHJ Shanks at §17 summarised the relevant legal principles as follows:

'(1) The fact that such evidence is the product of a covert recording is not in itself a ground for not admitting it.

(2) There is however an important public interest in preserving the privacy of such deliberations; otherwise, full and open discussion may be inhibited and the integrity of the outcome may be undermined.

(3) When a party seeks to rely on such evidence a balance must be struck between that public interest and the public interest in litigants being able to avail themselves of any relevant evidence.

(4) The balance must be struck having regard to the particular circumstances of the case; that may involve a consideration of the nature and quality of the deliberations on the one hand and the value and weight of the evidence on the other.

(5) In a discrimination case where a panel gives no reasons and the only (and incontrovertible) evidence of discrimination comes from a recording (or evidence from one of the panel members) of the panel's private deliberations, or where such deliberations show that the panel are simply acting under instructions from management, it is likely that the evidence will be admitted but there are no hard and fast rules and a balance must be struck in each case.'

35. Lastly, in *Andrews v Argent,* a decision by Employment Judge Burns to exclude a covert recording and transcript of panel members' discussions during a break in the claimant's redundancy consultation meeting was upheld by the EAT. Gavin Mansfield QC, Deputy Judge of the High Court, sitting in the EAT, noted at §25 that the consideration in the *Gosain* case of whether the content of a covertly recorded discussion fell outside legitimate consideration of the matters which fell to be considered by the panel, did not introduce any new gloss on the *Amwell* balancing test. He also warned against *"a close examination of deliberations (or what was not said in deliberations) to assess whether or not the Panel members were doing their job properly or effectively"* given the important public interest identified in *Amwell* of respecting the private deliberations of the panel (§27). He observed at §33 that it would have been an error to set the bar for admissibility as 'incontrovertible evidence of discrimination' (i.e., to elevate an example given by Mr Recorder Luba QC in the *Amwell* case to a legal test) but as that was not what Employment Judge Burns had done, his decision was permissible.

The allegations based on the private deliberations

36. The Claimant makes a number of allegations in her second claim which specifically relate to the private deliberations. In the Grounds of Claim appended the Claimant's second ET1 ('GOC'), all these allegations are brought as claims of direct race discrimination, harassment and victimisation (§46) but in the draft list of issues not all allegations appear under all three headings. The allegations are that:

    36.1. Ms Idrees divulged sensitive information relating to the Claimant's grievance (§12 GOC). This is allegation is categorised in the list of issues, by reference to the GOC paragraph number, as victimisation.

    36.2. Ms Idrees was given responsibility to nominate other panel members that would support a predetermined outcome, as evidenced by her comment to Ms Jinadu, *"That's why I put you on the panel"* (§13 GOC). This is listed as direct discrimination, harassment and victimisation.

    36.3. Ms Idrees attempted to discredit the Claimant during the first adjournment by saying that every time the Respondent attempted to manage her performance, *"it becomes about race"* and that *"every time anyone has tried to challenge her it's about race",* whereas the Claimant was unaware of any process related to her performance (§§14-15 GOC). This is listed as harassment and victimisation.

    36.4. Ms Idrees told the panel that the Claimant had brought a claim in the Employment Tribunal, and that it was *"deflection"* and a *"smokescreen"* which the Claimant had positioned herself to bring instead of being *"exited via the performance route"* (GOC §16). This is listed as harassment and victimisation.

    36.5. Ms Idrees told the panel that the Claimant had submitted her claim on the same day as her grievance (GOC §17), discussed how much money it was costing the Respondent (GOC §19) and said that the Claimant had requested a 15-day listing (whereas the Claimant says it was the Respondent that requested 15 days – GOC §20). This is listed as harassment and victimisation.

    36.6. Ms Idrees overstepped her role as HR advisor by making comments to encourage the panel to find against the Claimant (GOC §21) and demote her (GOC §25). It is similarly alleged that Ms Idrees herself was the decision-maker (GOC §26) and introduced the option of demotion to serve the interests of the Claimant's current managers named in her grievance (GOC §28). The disciplinary outcome, including demotion, is listed as direct discrimination and victimisation, and the relevant discussions during the hearing are listed as harassment.

    36.7. The panel Chair, Ms Hepworth, disregarded concerns raised by panel member Ms Jinadu that would have balanced the panel's approach (GOC §23). This is listed as direct discrimination and victimisation.

    36.8. Ms Hepworth had predetermined the outcome and did not want to listen to what the Claimant had to say (GOC §24). This is listed as direct discrimination and victimisation.

37. Further, the Claimant says that the private deliberations provide support for other allegations not specifically based on their content. For example, in relation to the allegation that Ms Hepworth did not afford the Claimant fair airtime to put her defence (§6 GOC), the Claimant relies on comments recorded during an adjournment in which Ms Hepworth expressed dissatisfaction with the time it was taking for the Claimant to go through her case. Another allegation that witness evidence in the Claimant's favour was disregarded, is said to be supported by the recording of a discussion during an adjournment about the evidence that witness was expected to provide (see paragraph 41.3 below).

The parties' submissions

38. The Respondent conceded that the recorded deliberations were relevant to issues raised in the Claimant's second claim. Therefore, the starting point (applying Mr Recorder Luba QC's judgment in *Amwell*) was that they would usually be admissible.

39. Mr Adjei did not place any reliance on Article 8 ECHR. After I asked whether I was required to balance Convention rights, he brought the relevant passages in *Amwell* to my attention (see paragraph 26 above) and confirmed the Respondent did not consider that the panel members' private deliberations engaged Article 8.

40. However, the Respondent contended that the public interest in preserving the privacy of the deliberations (the 'ground rules' principle) outweighed the public interest in placing relevant evidence before the Tribunal. The essential thrust of this submission was that the private deliberations were of weak probative value to the Claimant's case and provided insufficiently cogent evidence to outweigh or displace the ground rules principle. Mr Adjei argued that the recordings were of a similar nature to those in the *Williamson* case, in that on occasion a degree of levity crept in but there was nothing indicative in an obvious way of any discriminatory attitude on the part of the participants towards the Claimant. He said they fell well short of the kind of comments and instruction held to be admissible in *Gosain.* In particular he submitted that:

    40.1. The private comments were at best ambiguous or double edged and/or made in jest.

    40.2. A panel member who is also black, Ms Jinadu, participated in the discussion the Claimant objects to and herself made criticisms of the Claimant's conduct.

    40.3. The panel did not say that they would mistreat the Claimant because she had made complaints about racial discrimination or make any untoward comments about her race.

    40.4. The parts of the transcript the Claimant had flagged up as supporting her allegations at paragraphs 4(r), 8(k), 8(q) and 12(r) of the list of issues did not in fact support those allegations. For example, the Claimant alleged that systemic failures raised by Ms Jinadu as potential mitigating factors had been disregarded, but they were referred to and discussed in the disciplinary outcome letter.

41. For the Claimant, Ms Pitt submitted that the recordings were of a similar nature to those in the *Gosain* case, in that they contained comments which fell well

outside the area of legitimate consideration of matters which fell to be considered by the disciplinary panel. She relied in particular on the following passages in the transcript:

41.1. A discussion about the Claimant's first claim to the Employment Tribunal during which Ms Idrees discussed how much the proceedings would cost the Respondent, suggested that the Claimant had requested a 15-day final hearing, and speculated about the panel members being called as witnesses. Ms Pitt submitted that this went far beyond the panel's remit of considering the Claimant's alleged misconduct.

41.2. An exchange where Ms Jinadu is recorded as saying, "*Even if I'm called* [as a witness in the Employment Tribunal proceedings] *it would be unfortunate for them because I'm BAME. If I'm BAME and I'm feeling like this, I feel like throwing myself on the floor*…", to which Ms Idrees replied "*This is why I put you on the panel. This is all….because we…I'm totally for Equality…*" Ms Pitt said that showed that the Respondent was trying to throw a veil over race discrimination by putting a token black person on the panel. (For completeness, I note Mr Adjei replied that this comment must have been a joke because Ms Jinadu did not object to it and the panel went on to discuss other matters.)

41.3. A discussion about efforts to secure the attendance of a witness whom the Claimant had said had warned her that she would be treated more harshly for her attendance in the theatre because of the colour of her skin. During this discussion, the Chair of the panel said she wanted the witness to be asked a question about skin colour. Ms Pitt submitted that this was an attempt to discredit the Claimant's evidence, whereas in fact when the witness was dialled in and confirmed that she had made the comment, the panel disregarded it and rapidly moved on.

42. Ms Pitt submitted that without hearing evidence, I should be careful not to draw adverse conclusions about the potential evidential weight of the transcript and suggested that I should take the Claimant's case at its highest. She also drew a parallel with the *Fleming* case by noting that the Claimant had referred to the recorded deliberations in a subsequent grievance and her appeal (albeit those grievance and appeal processes do not give rise to any of the allegations in her claim).

Discussion and conclusion

43. I am grateful for the Respondent's sensible acknowledgement that the recorded private deliberations were relevant to issues in the Claimant's second claim. The starting point is that they would ordinarily be admissible.

44. However, the disciplinary panel members were unaware that their private discussions during adjournment breaks were being recorded. The circumstances therefore give rise to a public interest in excluding the transcribed recordings in order to protect the 'ground rules' for disciplinary proceedings and ensure that private deliberations can be full and frank (*Amwell*).

45. I must balance against that public interest, the countervailing public interest in the Claimant being able to avail herself of relevant evidence (*Amwell*). In order to assess where the balance lies in the circumstances of this case, I am permitted

to have regard to the nature and quality of the deliberations and the value and weight of the evidence contained in the transcript (*Fleming*). I have noted the warning at §27 of *Andrews* and will not undertake a close examination of the deliberations to assess whether the panel were doing their job properly and effectively. However, it is necessary to examine the content of the deliberations and consider to what degree it is capable of supporting the Claimant's claim for race discrimination, harassment and victimisation, in order to assess the weight of the countervailing public interest in allowing her to rely upon it.

46. I cannot see a basis in the case law for taking the Claimant's case at its highest as I undertake that examination (as Ms Pitt invited me to do), but I do bear in mind that I am not the fact-finder in this case. I must consider what the document on its face is capable of evidencing but I cannot know what it may turn out to reveal (or not) in the light of all other evidence that will be considered at the final hearing.

47. I also bear in mind that this is a balancing exercise and there is no bright line test to apply. While 'incontrovertible' evidence of discrimination might tip the balance in favour of admissibility (*Amwell*) that is not to say that evidence must be incontrovertible to be admissible (*Andrews*). The case law is illustrative of the types of evidence that may tip the balance in favour of admissibility (e.g. *Gosain*) or exclusion (e.g. *Williams*).

48. I make the following observations on a review of the transcript of the recorded disciplinary hearing and deliberations:

    48.1. During the private adjournments, the panel members all express frustration with the Claimant for reading aloud a document she had previously submitted in writing. While this may be potentially capable of supporting the Claimant's allegation that the panel Chair, Ms Hepworth, did not want to listen to her, on the face of the document this is not notably linked either to race or to the Claimant having done protected acts.

    48.2. The Claimant asked me to consider paragraph 4(r) of the annotated draft list of issues, which relates to the allegation that Ms Hepworth disregarded Ms Jinadu's concerns, and the parts of the transcript she has cited as supporting this allegation. The Claimant is right in saying the Ms Jinadu raised concerns about process and systems during the adjournments which did not apparently preoccupy Ms Hepworth and Ms Idrees to the same extent; but again, there is no clear link between this and race or protected acts on the face of the document.

    48.3. During the adjournments Ms Idrees is recorded as making comments taking a strong line which is critical of the Claimant and giving a strong steer as to the possible disciplinary outcome. These matters do not in and of themselves necessarily evidence an unlawful motivation. However, Ms Idrees' recorded comment, "*We can even demote her cos we can say she lacked judgement and that would kill her even more*", is potentially capable of supporting the Claimant's contention that Ms Idrees was personally motivated against her. (This comment is referenced at paragraph 8(q) of the draft list of issues and is one of the passages the Claimant specifically invited me to consider.) Further, the transcript records Ms Idrees as referring to the sanction of demotion being *"useful"* as it would allow the

panel to move the Claimant somewhere else. This comment is potentially capable of supporting a causal link between the disciplinary outcome and the Claimant's earlier grievance against her managers.

48.4. The transcript shows a discussion about the Claimant's performance came about in response to a query by Ms Jinadu, to which Ms Idrees replied, "*They were trying to manage her but every time they do it becomes about race*." She suggested that the Claimant had been *"moved around a few times",* including to an EDI brief, and that "*when they tried to instigate about her performance she then called her a racist and then the whole grievance process started so that all got parked and then… So it's about every time anyone has tried to challenge her it's about race*". This passage apparently shows Ms Idrees as the HR representative drawing the disciplinary panel's attention to a previous grievance process in which the Claimant had made a complaint of race discrimination, in terms that were adverse to the Claimant. It is therefore capable of supporting the victimisation allegation at §12 GOC.

48.5. The transcript shows that the panel then went on to discuss the Claimant's Employment Tribunal claim. Ms Idrees was critical of the Claimant's motivation for bringing the claim (for example, making the *"smokescreen"* comment referred to above). She also told the panel that "*it's all going to be about race, essentially it is all about race".* As Ms Pitt submitted, the conversation about the Tribunal proceedings, including the cost and time they would take up, strayed outside the disciplinary panel's remit. As Mr Adjei submitted, at no point did the panel explicitly state that they intended to treat the Claimant worse in her disciplinary process because she had brought a Tribunal claim about discrimination. However, these parts of the transcript are potentially capable of supporting the allegation at GOC §16, namely that Ms Idrees made these critical comments because the Claimant had done a protected act in bringing the Tribunal claim.

48.6. Further, during the part of the conversation about the Employment Tribunal proceedings, Ms Hepworth is recorded as saying, *"in terms of process around all this, we're absolutely solid in terms of process, aren't we?"* to which Ms Idrees replied, "*Yes, we are. Also a lot of this is to prove her as not credible and that will come across put that into… a lot of this because she put in her claim on the first day she put in her grievance*". It is possible that a fact-finding Tribunal could determine that this exchange amounted to a suggestion that the disciplinary panel should try to show the Claimant not to be credible, with a view to her ongoing Tribunal claim.

48.7. Ms Idrees' comment that Ms Jinadu was put on the panel because of her race may, as Mr Adjei submits, be found to have been a joke. However, it is striking that it was made in the context of a discussion about giving witness evidence at the Claimant's forthcoming Employment Tribunal hearing.

48.8. There are points in the transcript where the panel members are recorded as laughing. I accept Mr Adjei's submission that, like the moments of levity noted in the *Williamson* case, this is not unusual or sinister even for a panel considering a serious disciplinary matter.

49. The Claimant also invited me to consider:

    49.1. Paragraph 8(k) of the annotated draft list of issues, which is the direct discrimination allegation that the Claimant was scapegoated for the Respondent's procedural failures whereas other white staff who were culpable for events on 8 December 2021 were not disciplined and was furthermore scapegoated because of her grievance. These are not matters which solely rest on the recorded private deliberations, but I note the references to her grievance in the disciplinary deliberations, as discussed at subparagraphs 48.4 and 48.5 above.

    49.2. Paragraph 12(r) of the annotated draft list of issues, which is the victimisation allegation that Ms Hepworth and Ms Idrees used the disciplinary proceedings to punish the Claimant for her grievance and to arrive at an outcome which favoured the managers whom she had brought the grievance against. Again, the parts of the transcript discussed at subparagraphs 48.4 and 48.5 above are potentially relevant to this allegation.

50. If there is a spectrum between unexceptional discussions that fall well within the 'ground rules' principle, and flagrantly discriminatory statements that come outside it, the recordings in this case are somewhere between *Williamson* and *Gosain* on that spectrum. I do not consider that the transcript provides 'incontrovertible' evidence of discrimination, harassment or victimisation. However, it does include passages which on their face are capable of amounting to good evidence in support of the Claimant's victimisation complaint; see subparagraphs 48.3 to 48.7 above. Further, the discussions about the Claimant's earlier grievance and ongoing Employment Tribunal claim (both protected acts) strayed outside the scope of the disciplinary panel's remit.

51. It is harder to assess whether the transcript is capable of evidencing a discriminatory motivation, or whether the Respondent's conduct was 'related to' race, solely from reading the document. The frequent references made to race throughout the discussion arose in part because the Claimant raised the issue of race discrimination in her own defence. Therefore, absent the victimisation complaint, on the basis of the direct discrimination and harassment complaints, the balance would not tip in favour of admitting the transcript. However, I do consider as a relevant secondary factor that taken together with other evidence heard at the final hearing, the transcript may become an important part of the picture with regard to the direct discrimination and harassment complaints as well.

52. Parts of the Claimant's second claim, for example the allegation that she was not afforded fair airtime for her defence, can be considered on the basis of the 'open' parts of the transcript, which the parties agree is admissible. However, plainly, the allegations solely based on the private deliberations could not be pursued if the transcript of those deliberations is not admissible.

53. Overall I conclude that the evidence contained in the transcript of the recorded deliberations is sufficiently cogent, and sufficiently integral to the Claimant's second claim, that the public interest in allowing her to rely on this relevant evidence outweighs the public interest in protecting the privacy of the deliberations.

54. In reaching this conclusion I have not taken into account any practical difficulties that might potentially arise in cross-examining the Respondent's witnesses about the deliberations were the transcript to be excluded. Although these were discussed during the hearing, I accepted Mr Adjei's submission that the issue should be determined on application of principle, and that any consequences for managing the hearing fell to be worked out afterwards. Further, I do not take into account the Claimant having referred to the recordings in her subsequent grievance and appeal because it will not be necessary to hear detailed evidence about those processes in order to determine the Claimant's claims.

Whether parts of the recording are privileged

55. The parties agreed that parts of the transcribed recording where the disciplinary panel discussed advice from the Respondent's solicitor, and consulted the solicitor by telephone, were *prima facie* covered by legal advice privilege. Those parts are denoted by red highlighting on the transcript.

56. The Claimant contended that the red highlighted sections should be admitted into evidence because they showed *"sharp practice amounting to iniquity".* In her oral submissions, Ms Pitt explained that it was not alleged that the Respondent's solicitor acted in an iniquitous way, but rather that Ms Idrees made misleading statements during the discussion with the lawyer that rendered that discussion admissible.

The law on the iniquity exception to legal advice privilege

57. In *Fleming v East of England Ambulance Service NHS Trust*, HHJ Shanks provided a helpful summary of the law on legal advice privilege at §13:

> **'(1) Legal professional privilege covers confidential communications between a lawyer and client for the purpose of giving or obtaining legal advice.**
>
> **(2) "Legal advice" covers all advice given by a lawyer in her capacity as such (Three Rivers District Council v Bank of England (No 6) [2005] 1 AC 610).**
>
> **(3) The privilege is absolute; it belongs to the client and can only be waived by the client.**
>
> **(4) The privilege does not apply where the purpose of seeking or giving the advice is to effect "iniquity" (Barclays Bank plc v Eustice [1995] 1 WLR 1238).**
>
> **(5) "Iniquity" involves conduct which goes beyond a mere civil wrong: there must be something akin to sharp practice or fraud or something which the law treats as entirely contrary to public policy (BBGP v Babcock [2011] Ch 296).'**

58. The definition of 'client' for these purposes is discussed in *Three Rivers District Council v Governor and Company of the Bank of England (No.5)* [2003] 3 WLR 667; it means the group of individuals employed by an entity who are authorised to seek and receive legal advice on its behalf. (There is no dispute in this case that all members of the disciplinary panel were the 'client' for the purposes of taking advice on the disciplinary process.)

59. In *Curless v Shell International Ltd* [2020] ICR 43, a claimant who had brought a disability discrimination claim was sent (anonymously) an internal email from a senior lawyer in the respondent company advising on the possibility that he could be dismissed as part of an organisational restructure. The Court of Appeal (Sir

Terence Etherton MR, Lewison and Bean LJJ) held that "*this was the sort of advice which employment lawyers give "day in, day out" in cases where an employer wishes to consider for redundancy an employee who (rightly or wrongly) is regarded by the employer as under-performing*" (§49) and not iniquitous.

60. In *The Abbeyfield (Maidenhead) Society v Hart* [2021] IRLR 932, a case concerning litigation privilege rather than legal advice privilege, an email sent by the respondent's appeal officer conveying a predetermined view that the claimant should not return to employment, was held not to fall within the iniquity exception. The respondent did not seek advice on how to act unlawfully, and its HR consultants to whom the email was sent did not give such advice. They were merely advising on how to take forward a disciplinary process and on the risk of that process leading to litigation. Bourne J, sitting in the EAT, summarised the case law on iniquity:

'42. Legal professional privilege applies generally to communications between a party and his lawyer, seeking or giving legal advice.

43. Legal professional privilege does not apply when the document in question comes into existence as a step in a criminal or illegal proceeding, e.g. when a solicitor is consulted on how to do an illegal act. See Bullivant v Attorney General of Victoria [1901] AC 196 [1901] AC 196 201 per Lord Halsbury and 206 per Lord Lindley. A strong prima facie case of some fraud or illegality or some other "iniquity" must be shown: BBGP Managing General Partner Ltd v Babcock & Brown Global Partners [2011] Ch 296 .

44. Litigation privilege arises when a document is produced or brought into existence and, at that time, the dominant purpose of its author (or the person under whose direction it is produced or brought into existence) is that it or its contents will be used to obtain legal advice, or to conduct or aid in the conduct of litigation which is in reasonable contemplation at that time. See Waugh v British Railways Board [1980] AC 521 HL.

45. The iniquity principle also applies to litigation privilege: Kuwait Airways Corp v Iraqi Airways Co (No. 6) [2005] EWCA Civ 286, [2005] 1 WLR 2734 .

46. Like privilege itself, the iniquity principle exists for reasons of public policy. It will apply where the circumstances are such that the usual policy in favour of non-disclosure must give way. The policy in favour of non-disclosure is a strong one, because legal professional privilege enables parties to communicate frankly with their legal advisers (and litigation privilege enables parties to communicate frankly with other advisers), e.g. about the strengths and weaknesses, and the risks, of their case, knowing that the communications will remain private.'

The parties' submissions

61. Ms Pitt for the Claimant submitted that the red-highlighted parts of the transcript showed Ms Idrees inappropriately took the lead in providing information to the lawyer, and wrongly stated that the rest of the panel had been made aware of an 'overview', but not the details of the Employment Tribunal proceedings. Further, Ms Pitt placed reliance on a passage in which Ms Idrees asked about redeploying the Claimant and referred to a breakdown in relationships, in response to which the lawyer cautioned that taking action in respect of workplace relationships was a separate process from sanctioning the Claimant for misconduct. The Claimant

argues that this evidences Ms Idrees seeking to use the disciplinary process to achieve a favourable outcome *vis-à-vis* the Claimant's grievance situation.

62. The Respondent's position was that the red-highlighted parts of the transcript contained a 'bread-and-butter' discussion of employment law advice, similar to that in *Curless v Shell International Ltd,* and that it was not unusual that the HR representative with an ongoing relationship with the employment lawyer should have led the discussion. In respect of the specific parts relied upon by the Claimant, Mr Adjei submitted that Ms Idrees' comment about having given the panel 'an overview' of the Tribunal proceedings was not incorrect (level of detail being a matter of degree) and noted that the Claimant herself had brought up the difficult relationship with a manager she had brought her grievance against, during the open part of the disciplinary hearing. Mr Adjei argued that these matters were *"nowhere near"* iniquitous.

Discussion and conclusion

63. I cannot see any basis for finding that the disciplinary panel took advice from their solicitor during the adjournments as a step in a criminal or illegal proceeding, fraud or sharp practice. To the contrary, it appears that they consulted the lawyer on how to approach to sanction given their view that the Claimant had committed misconduct and were given unexceptional advice on that topic. I note that even if the red highlighted text lent support to the Claimant's complaint of victimisation (and I make no finding to that effect), as a statutory tort, this is a type of 'civil wrong' not in itself amounting to iniquity in the sense developed in the case law cited above.

64. It follows that that red-highlighted parts of the deliberation discussions are covered by legal advice privilege, are not admissible, and should not be referred to in evidence.

Conclusion

65. I have concluded that the Respondent may withdraw its partial concession on admissibility, but that its argument to exclude the transcribed panel deliberations fails, save in relation to the red-highlighted parts of the transcript which are privileged.

66. Case management directions for making progress towards the listed final hearing following the receipt of this judgment were given at the conclusion of the hearing and are set out in a separate order.

Employment Judge Barrett
Date: 14 April 2024