



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr E Mullings

**Respondent:** Ealing Law Centre

**Heard at:** London Central (by CVP)

**On:** 18 May and 9 June  
2023

**Before:** Employment Judge H Grewal

## Representation

**Claimant:** In person

**Respondent:** Ms J Linford, Counsel

# ORDERS

1 The Claimant has waived legal advice privilege in respect of the legal advice given to him by the solicitor in Barnet Citizens' Advice Bureau on the merits of his claim in July 2022, and is to disclose the rest of the advice.

2 The Claimant is to pay £1,000 towards the Respondent's costs.

# REASONS

## Waiver of legal advice privilege

1 In a claim form presented to the Tribunal on 5 October 2022 the Claimant complained of race discrimination, but did not give any particulars of his complaint. Attached to his claim form was an email dated 20 July 2022 from David Rommer, a

solicitor employed as a caseworker at Barnet Citizen's Advice Bureau, to the Claimant. The email comprised three typed pages. In that email Mr Rommer said,

*"I have now completed the first part of my assessment of your potential Employment Tribunal Claim.*

...

*In this first part of my assessment, I have disregarded the crucial issue of whether or not – as a volunteer at Ealing Law Centre – you had the protection of the Equality Act 2010 (EqA 2010). In this part I have looked at the allegations themselves and at the evidence. I have, for the moment, proceeded on the assumption that you are covered by EqA 2010.*

*In the second part of my assessment I will go on to analyse the chance of persuading a Tribunal that you were indeed covered by the rights in the EqA 2010 and that you should be allowed to pursue your Claim."*

He then set out four incidents in respect of which the Claimant would have potential Employment Tribunal complaints if he was protected by the Equality Act 2010 in relation to his volunteering arrangements with Ealing Law Centre." Mr Rommer emphasised the second half of the sentence in bold. He analysed each of the complaints in turn and concluded that, if the Claimant was covered by the Equality Act 2010, two of them (a complaint of harassment and a complaint of direct discrimination) would have a reasonable chance of succeeding and the other two would have a weaker chance of succeeding.

2 In its Grounds of Resistance the Respondent contended that by submitting that document as part of his claim the Claimant had waived legal privilege in relation to the advice he received in relation to the merits of the claim, and that he should disclose the rest of advice. It also stated that the Tribunal did not have jurisdiction to consider the claim as the Claimant had been engaged as a volunteer and had not been employed by the Law Centre within the meaning of section 83(2) of the Equality Act 2010.

3 At a preliminary hearing on 9 March 2023 the case was listed for a preliminary hearing to determine whether the Claimant had been employed by the Respondent.

4 On 30 March 2023 the Respondent made an application to the Tribunal for a specific disclosure order in respect of the advice. It made the point again that by disclosing half the legal advice, the Claimant had waived privilege in respect of all of it. The Claimant had not disclosed it and had asserted that privilege had not been waived. The application had not been determined prior to the preliminary hearing before me on 18 May to determine the Claimant's employment status.

5 I said to the parties that I would consider the application once I had determined whether the Tribunal had jurisdiction to consider the Claimant's complaint of race discrimination. It appeared to me that whatever advice the Claimant had been given about the merits of his claim would not be relevant to the issue that I had to determine. If, however, the Claimant did not succeed and an application for costs was made, it might become relevant. The fact that the Claimant had had legal advice on the merits of his claim (including the jurisdiction issues) might be relevant to the issues of whether the Claimant should have appreciated that his claim had no reasonable prospect of success and whether he had acted unreasonably in bringing

his claim. As Choudhury P said, in **Brooks v Nottingham University Hospitals NHS Trust** **UKEAT.0246/18**, at paragraph 36,

*“A party that is represented may not be afforded the same degree of latitude by the Tribunal in the assessment of whether the claim had reasonable prospects of success as would be afforded to a litigant in person ... Reliance upon advice is a factor that may be taken into account by the Tribunal but positive professional advice will not necessarily insulate a Claimant against an award for costs. There may be many reasons for the advisers reaching a different view as to the prospects of success from the Tribunal: these may include the fact that the advice was based on more limited material than that which is considered by the Tribunal, the advice being based on the Claimant coming up to proof, or the advice being negligent. In the absence of any evidence to the contrary, the Tribunal is entitled to proceed on the assumption that a represented party has been properly and appropriately advised as to the merits.”*

In those circumstances the question may well arise whether the Tribunal could determine that issue by taking into account only half the advice which the Claimant had chosen to disclose.

6 I concluded at the end of the hearing that the Tribunal did not have jurisdiction to consider the claim as the Claimant's relationship with the Respondent had not been covered by either section 83(2) of the Equality Act 2010 or sections 55 and 56 of the same Act (the Claimant had been given permission to pursue the second argument although it had been raised late and had led to an adjournment). The Respondent indicated that it was going to apply for costs on the grounds that the claim had had no reasonable prospect of success and that the Claimant had acted unreasonably in bringing and continuing the claim. I dealt with the application for specific disclosure at that stage. In response to the application the Claimant said that he had not waived privilege, he had not realised that the Respondent would see it and that he had sent it "to help the Tribunal come to a decision.". He denied that he had been selective about what he had disclosed and said that he had only been able to upload one document.

### The Law

7 In the civil courts communications passing between a party and his legal advisors are privileged and exempt from the rules of disclosure provided they are confidential and were made for the purpose of obtaining or giving legal advice. This is referred to as legal advice privilege (it is one type of legal professional privilege). Employment Tribunals are obliged to give effect to the law on legal professional privilege.

8 Legal advice privilege may, however, be waived by a party. There may be a waiver where a party intentionally places privileged material before the court or tribunal. In **Paragon Finance Ltd v Freshfields** [1999] 1WLR 1183 Lord Bingham CJ stated at page 1188,

*“A client expressly waives his legal professional privilege when he elects to disclose communications which the privilege would entitle him not to disclose ... While there is no rule that a party who waives privilege in relation to one communication is taken to waive privilege in relation to all, a party may not waive*

*privilege in such a partial and selective manner that unfairness or misunderstanding may result.”*

A party is not permitted to “cherry pick” a document containing legal advice, only disclosing those parts upon which he seeks to rely while seeking to retain privilege as to the remainder of the document.

9 In order to determine whether a party has waived privilege, it is necessary to examine both the nature of the disclosure that has been made in respect of the legal advice and the purpose for which it has been made. In **Brennan v Sunderland City Council [2009] ICR 470** Elias J stated at paragraph 64,

*“Typically ... the cases attempt to determine the question whether waiver has occurred by focusing on two related matters. The first is the nature of what has been revealed: is it the substance, the gist, content or merely the effect of the advice? The second is the circumstances in which it is revealed: has it simply been referred to, used, deployed or relied upon in order to advance the party’s case?”*

10 In the present case, there were two important aspects to the Claimant’s case – (i) whether the Tribunal had jurisdiction to consider his claim in light of the fact that had been a volunteer at the Ealing Law Centre and (ii) the merits of the complaints of race discrimination which he sought to advance. The Claimant received legal advice in respect of both aspects. He attached to his claim form, and presented as part of his claim, half the legal advice that he had received. He disclosed it intentionally and selectively to give the misleading impression that he had been given positive legal advice about his claim in general. I did not accept the Claimant’s assertion that he had had only disclosed half the advice because he had only been able to upload one document with his claim form. I found that he was selective about what he disclosed and only disclosed that which supported him. He disclosed it, to use his words, “to help the Tribunal to come to a decision.” One of the matters on which the Tribunal had to come to a decision was whether it should make an order for costs against the Claimant. The fact that the Claimant had received legal advice as to the merits of his claim was a relevant factor that the Tribunal would take into account in making its decision. It would have been unfair to the Respondent and to the Tribunal for the Tribunal to take the legal advice into account in the exercise of its discretion on the basis of having had sight of only half of it. It would not have the full picture. I concluded that by disclosing half the legal advice, the Claimant had waived privilege to the entirety of the advice and that fairness demanded that the other half be disclosed as well.

### **Application for costs**

11 The Respondent applied for its costs in the sum of £6,000 (including VAT) on the grounds that (a) the claim had had no reasonable prospect of success and (b) the Claimant acted unreasonably in bringing the claim and in the conduct of it. The Respondent argued that the Claimant had had no reasonable prospect of establishing that his position as a volunteer at the Law Centre was covered by the Equality Act 2010. It also argued that the Claimant had acted unreasonably in bringing the claim and continuing it. That argument was advanced on that basis before the Respondent had sight of the legal advice on the ground that it believed

that that was what the advice would have been. The disclosure of the advice confirmed that that was the case. It also relied on a “Without prejudice save as to costs letter” that it sent to the Claimant on 2 June 2023. The preliminary hearing on 18 May 2023 had heard all the evidence and submissions on whether the Claimant had been employed by the Respondent, but had then been adjourned in order to enable the Respondent to respond to the Claimant’s argument that the Respondent had been providing him employment services under section 55 of the Equality Act 2010. In that letter the Respondent made it clear to the Claimant that it believed that his argument on either basis had no reasonable prospect of success. It stated,

*“Given your legal background and knowledge, we consider that you would recognise this position, and not pursue a claim that is without merit.”*

It also said he had conducted the proceedings unreasonably and relied, in particular, on his raising the section 55 argument at the hearing on 18 May as a result of which the hearing had had to be adjourned and had led to the Respondent incurring additional costs. It said that its costs were likely to be in the region of £6,500. It said that if the Claimant withdrew his claim, it would not seek costs against him. It warned him that there was a real risk that he could be ordered to pay costs.

### The Law

12 Rule 76(1) provides,

*“A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that –*

*(a) a party (or that party’s representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or*

*(b) any claim or response had no reasonable prospect of success; or*

*(c) ...”*

Rule 84 provides,

*“In deciding whether to make a costs, preparation time or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party’s (...) ability to pay.”*

13 In deciding whether to make a costs order the Tribunal has to determine first whether any of the criteria for making a costs order in Rule 76 have been met. If it decides that one of them has been established, it then has to exercise its discretion as to whether to make a costs order and, if so, for what sum or what percentage of the costs sought by the party seeking to recover its costs. The purpose of an award of costs is to compensate the party in whose favour the order is made, and not to punish the party ordered to pay the costs.

14 In **Radia v Jefferies International Ltd [2020] IRLR 421** the EAT dealt with the overlap between applications for costs made under rule 76(1)(a) and (b) when the unreasonable conduct being relied on is that a claimant brought or pursued a claim that he or she knew or ought reasonably to have known had no reasonable prospect of success. Judge Auerbach said, at paragraphs 62 and 63,

*“The Tribunal may consider, in a given case, under (a), that a complainant acted unreasonably, in bringing or continuing the proceedings, because they had no reasonable prospect of success, and that was something which they knew; but it may also conclude that the case crosses the threshold under (b) simply because the claims, in fact, had no reasonable prospect of success, even though the complainant did not realise it at the time. The test is an objective one, and therefore turns not on whether they thought they had a good case, but whether they actually did...”*

*However, in such a case, what the party actually thought or knew, or could reasonably have been expected to have appreciated, about the prospects of success, may and usually will, be highly relevant at the second stage, of exercise of the discretion.”*

15 The fact that a party's ability to pay is limited does not require the tribunal to assess a sum that is confined to an amount that the party could pay – **Arrowsmith v Nottingham Trent University [2012] ICR 159**. In exercising its discretion the Tribunal can also take into that the party against whom costs are sought had the benefit of legal advice (see paragraph 5 above).

### Conclusions

16 I considered first whether the claim had had no reasonable prospect of success. That is an objective test. In order to pursue his claim of race discrimination, the Claimant had to establish that his relationship with the Respondent fell within either section 83(2) or sections 55-56 of the Equality Act 2010. In order to establish that he had been employed by the Respondent he had to establish that there had been a contract between them, i.e. there were mutually binding legal obligations between the parties. There are two decisions by the higher courts in which they have upheld the decisions of the Tribunal that there was no contract between Citizens Advice Bureaux (CABs) and volunteers who provided their services to the CABs – **Melhuish v Redbridge CAB [2005] ICR 419** and **X v Mid-Sussex CAB [2011] ICR 335 (CA)** and **[2013] 1 All ER 1038 (SC)**. (They are dealt with in detail in the Tribunal's decision On jurisdiction). The facts in both those cases were very similar to the facts in the present case. In light of the established law and the facts of this case, there was no reasonable prospect of the Claimant establishing that there had been a contract between him and the Respondent. In the absence of a contract, there could not have been any employment.

17 Although there is no reported case on section 55 and 56 of the Equality Act 2010, the question of whether the relationship between CABs and the volunteers was one whereby the CABs provided the volunteers with vocational training was considered by the Court of Appeal in **X v Mid-Sussex CAB [2011] ICR 335**. It was considered by the Employment Tribunal in that case under section 14C of the Disability Discrimination Act 1995 and by the Court of Appeal under Article 3.1(b) of the Framework Directive (Directive 2000/78/EEC). The Court of Appeal wholly endorsed the Tribunal's reasoning for rejecting the argument that the CAB volunteer fell within section 14C of Disability Discrimination Act 1995 and rejected the argument in the Court of Appeal that Article 3.(b) of the Framework Directive applied to volunteers at CABs. This is dealt with in detail in this Tribunal decision on jurisdiction. In the light of

that law and the facts of this case, that argument too had no reasonable prospect of success.

18 I then considered whether the Claimant had acted unreasonably in bringing and in pursuing the claim. That is relevant both to the exercise of my discretion, having concluded that the claim had no reasonable prospect of success, and for establishing whether that ground for making an order for costs has also been met. It was not in dispute that the Claimant received legal advice from a solicitor at a CAB before he presented his claim. If I had not had sight of any of the advice that he received, I would have proceeded on the basis that, in light of the authorities on the status of volunteers in CABs, he had been advised that he had no reasonable prospect of establishing that he fell within the protection of the Equality Act 2010. Having seen the legal advice the Claimant was given on the jurisdiction issues, two points are noteworthy – first, the advice that was given is very detailed – it comprises six typed pages and explains in detail what the Claimant would need to prove under sections 83(2) and 55-56 of the Equality Act 2010 and the difficulties that he would have; Secondly, the advice is very similar to the Tribunal’s reasoning in its decision on the issues.

19 Mr Rommer gave the Claimant the legal advice in writing on 22 July 2022 (two days after the Claimant commenced Early Conciliation and about two and a half months before he presented his claim). I set out below the main points of his advice. He started by saying,

*“My view is that there is a possibility that a Tribunal would conclude that it has jurisdiction to consider your complaints under the Equality Act 2010(EqA2010), but the chances of a Tribunal doing so are weak.”* (my emphasis).

He then gave his reasons for stating that. He dealt first with the employment issue. He dealt with the question of whether or not the Claimant was doing work under a “contract” and said,

*“This is likely to be the most difficult hurdle for you. One essential feature of a contract is that it places legal obligations on the parties. There is nothing in the ELC documentation to suggest that you were legally obliged to attend ELC, or that they were legally obliged to provide work for you to do.”* (the advisor’s emphasis).

He continued that while the seeming lack of a legally binding contractual obligation was damaging to his prospects, there were some arguments that could be put forward in favour of the existence of a contract and set out what they were. Having done so, he concluded,

*“While the above points may be put forward as evidence of something more formal than standard voluntary work, they are unlikely to be enough – even cumulatively – to persuade a tribunal that the parties envisaged a legally binding obligation to work.”*

He then dealt with the issue of whether the Respondent could be said to providing him with vocational training under sections 55 and 56 of the Equality Act 2010. He dealt with some of the evidence that the Claimant had provided to him, and then said,

*“However, the difficulty you are very likely to face in trying to persuade a Tribunal that ELC was a provider of vocational training and or guidance is that – while some of these services were arguably provided – they were ancillary to the purpose of the volunteering arrangement. It is clear from ELC’s website that they recruit volunteers in order to assist the law centre in providing services to its clients. There is no suggestion that ELC operates a volunteering scheme in order to provide work experience or training.”*

His conclusion on this issue was,

*“Accordingly, there are arguments that you could potentially use to try to persuade a Tribunal that ELC was a provider of “employment services” and that as such you had protection under s55. However again these arguments are weak and have only a small chance of succeeding. (My emphasis).*

His overall conclusion was,

*“There are arguments that you can raise in order to try to convince a Tribunal that you should be afforded protection under EqA 2010... However, on the facts as I understand them, all of those arguments are weak. While I would not characterise the position as helpless, my view is that the most likely outcome of a Claim is that a Tribunal would conclude that the protections against discrimination and harassment set out in the Equality Act 2010 did not apply to you as a volunteer.*

*As your prospective Claims are unlikely to succeed, our team cannot act for you in this matter. Our funding is very limited and we are unable to take on cases in which there is no reasonable prospect of achieving a successful outcome for a client.”*

20 Mr Rommer then set out the pros and cons of proceeding with a weak claim. The pros were that there was a small chance that he might win and some chance that that threatening or making a claim might lead to negotiations and a payment to settle the case. He continued,

*“The principal disadvantage is the small risk that the Tribunal could order you to pay ELC’s legal costs. Unlike in the civil courts where the normal position is that the loser pays the winner’s legal costs, the general rule in ET cases is that each party only pays their own lawyer’s fees – win or lose. However, the Tribunal does have the discretion to order one party to pay another party’s costs in certain limited circumstances... One scenario in which a Tribunal may order you to pay ELC’s legal costs is if the Tribunal takes the view that a Claim had “no reasonable prospects of success.” My own view is that – while your case is weak – I believe that you have some potentially arguable points. However, if the Tribunal disagrees and decides that your Claim is more or less hopeless, there is a risk that you would be ordered to pay some or all of ELC’s costs. If so, that would be a disaster as – on a somewhat complex matter like this -ELC’s costs could easily exceed £5000.”*

21 It is clear from reading the whole of the solicitor’s advice was that his view was that the Claimant had no reasonable prospect of establishing that there was jurisdiction to consider his claim under the Equality Act 2010. That is the reason he gave for the CAB being unable to act for him. Having had that very clear and detailed



advice from an employment solicitor, and having been warned that costs could be awarded against him, the Claimant chose to initiate his claim. I considered that the Claimant acted unreasonably in bringing the claim in those circumstances. Once he had done so, the Respondent made it clear in its response that (i) it would argue that he could not bring a claim under the Equality Act 2010 because of his status as a volunteer and (ii) that it would argue that he had waived privilege in respect of the legal advice that he had received on that issue. That should have made it clear to the Claimant that the Respondent was going to argue the very matters that his advisor had highlighted and that it would seek disclosure of the advice that he had had on those issues and use that against him in an application for costs.

22 At the preliminary hearing on 9 March 2023 the case was listed for a preliminary hearing to determine whether the Claimant had been in employment as defined in the Equality Act 2010. Although the Claimant had the detailed written advice from the CAB and had, at that stage, had had about seven months to study and consider that advice, he did not say at that stage that he would also be seeking to argue that the Respondent was providing “employment services” under sections 55 and 56 of the 2010 Act. Having received the note of that hearing, which stated that a preliminary hearing had been listed to determine the employment issue, he did not contact the Tribunal or the Respondent to say that he wanted to argue an additional jurisdiction issue. The Claimant first referred to section 56 applying in his case in the last paragraph of his witness statement which was sent to the Respondent about four weeks before the preliminary hearing. At the start of the preliminary hearing on 18 May I confirmed with both parties that the only issue that I had to determine was whether the Claimant had been employed by the Respondent, and both parties agreed that it was. In his closing submissions the Claimant again referred to section 56 and I asked him whether he wished to argue that the Tribunal had jurisdiction to consider his claim on that basis. He said that he did. As the case had not been listed to consider that issue the Respondent had not prepared to deal with it and had not dealt with it, the case had to be adjourned. At the time when the hearing was adjourned the Tribunal had heard all the evidence and the submissions on the “employment” issue. On 2 June the Respondent sent the Claimant a “without prejudice save as to costs letter.” It made it clear that it considered that his jurisdiction arguments had no reasonable prospect of success and that it would be applying for costs. It made an offer to the Claimant that if he withdrew his claim, even at that late stage, it would not make an application for costs against him.

23 The Claimant is not a man of limited education. He has a degree in Sociology and an MA in Environmental Law and Sustainable Development. I considered that having had clear legal advice about the very poor prospects of his claim he acted unreasonably in pursuing the claim and continuing to pursue it when it must have been clear to him that the Respondent was going to run all the arguments about which his advisor had warned him and that it would be seeking its costs and that there was a chance that it would be awarded those costs. Furthermore, he acted unreasonably in not raising the section 55 arguments earlier, which led to the Respondent incurring additional costs.

24 I asked the Claimant whether he wanted his means to be taken into account. He said that he did and he was sworn to give evidence about it. His evidence was that he had no savings and did not own the property in which he lived. It was rented accommodation and he paid rent of £123 per week. He did not receive any housing benefit. He said he was not doing any paid work and had not done so since he left

the Respondent in June 2022. He was not receiving any money from the Respondent and his evidence previously had been that he was not doing any paid work while volunteering for the Respondent. He said that the only money that he received was Personal Independence Payment ("PIP") from the Government. Prior to 10 April 2023 he had received £92.40 per week. Since that date it had been increased to £101.75 per week. I asked him how he had lived on that for over a year as on his account his rent exceeded the PIP payment that he received. He said that he had been in arrears with his rent. He produced a letter to show that on 23 March 2023 he had been sent a letter that his arrears were £1343.26 . He was advised to pay all the arrears immediately or to contact the Council to pay some of it and then to reach an agreement about paying the latter. I was not satisfied that the Claimant had given a full picture of his financial position. On the figures that he had provided, it was difficult to see how he had managed to pay for his food, other essential items, the use of his mobile phone and utilities bills for over a year. I was prepared to accept that the Claimant's means were limited; I was, however, not satisfied that they were quite as limited as he had presented to the Tribunal.

25 The Claimant also produced a letter from his GP dated 12 April 2023. The doctor said that he had registered with that practice a year ago and that his medical conditions included mixed anxiety and depressive disorder, Sarcoidosis, Asperger's syndrome, he had issues with mobility, myalgia and joint pains and saw a rheumatologist regularly for infliximab injections. The doctor recommended reasonable adjustments and the only one specified was remote access to interaction in public. The Claimant said that because of his disability the work that he could do was limited. He said that he could do office based administrative jobs. In his evidence to the Tribunal on 18 May 2023 the Claimant said that he had been in paid employment in the past (before volunteering at the Law Centre). In his application to be a volunteer the Claimant said several times that he had work professionally in customer facing roles. Having considered all the evidence I concluded that the Claimant should be able, as he had done in the past, to find paid work that would alleviate his current financial position.

26 In deciding whether to make an order for costs and, if so, the amount to award I took into account the unreasonable conduct of the Claimant in initiating the claim and continuing with it (as set out in paragraphs 21-23 above), the fact that the Respondent had incurred legal costs in the sum of £6,000 in defending the claim, the fact that the Claimant had been warned that costs could be awarded against him, the fact that the Claimant had limited means (see paragraphs 24 and 25 above) and that he had chosen to pursue this claim knowing that his means were limited and that there was a risk of costs being awarded against him. If the Claimant's means had not been limited, I would have made an order for him to pay all of the Respondent's costs. Having taken his limited means into account, I considered that it would be appropriate to make an order for him to pay a fraction of its costs which I believed it would be possible for him to pay. I make an order for the Claimant to pay £1,000 of the Respondent's costs.

Employment Judge - Grewal

Date: 14<sup>th</sup> June 2023

ORDER SENT TO THE PARTIES ON

14/06/2023  
FOR THE TRIBUNAL OFFICE