

Key Learning Points on Handling UK Legal Privilege in Internal Investigations

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The Employment Tribunal's judgment in *Ms A v UBS AG*,¹ which was delivered in November 2019 but only recently published, contains some important reminders of best practices for preserving legal privilege in internal investigations and some pitfalls to be avoided.

Background. Following grievances raised by the Claimant, the Respondent bank's Human Resources department ("HR") conducted a review into her allegations. The Claimant subsequently raised concerns about how HR had dealt with her complaint. This led to the bank engaging an external law firm to investigate how the complaint had been handled and the process that HR had followed. The law firm prepared a written report for the bank covering these issues and providing recommendations for future improvements. The bank gave the Claimant a summary of key findings from this report, but in her claim before the Employment Tribunal, the Claimant sought disclosure of the full document. The bank refused on the basis of legal advice privilege.

The Employment Tribunal rejected the claim to privilege over the report on the basis that the evidence showed that the law firm was not instructed or asked to give legal advice and that its investigation had not been done in a relevant legal context. It was persuaded by covert recordings that the Claimant had made of meetings with senior bank employees and the law firm where they appeared to distance the investigation from advising the bank on its legal position. Employment Judge Grewal found that this evidence indicated that the bank had not engaged the law firm to conduct its investigation because they were lawyers or to do so using their "legal spectacles". Importantly, the law firm had not been asked to give any advice relating to the bank's legal rights, liabilities, obligations or remedies.

Some Key Learning Points from the Decision. Although this case involves some unique factual issues, clients should bear in mind these points to help preserve legal privilege when conducting an internal investigation:

¹ *Ms A v UBS AG*, Employment Tribunal Case Number 2200832/2019 (1 November 2019, published April 2021)

- Determine who at the company is the appropriate person(s) to instruct the external lawyers and record this in writing;
- Prepare a written record of the scope and purpose of the investigation, which should also be reviewed by the external lawyers. This should include an explicit reference to legal advice or litigation privilege, explaining the relationship between the investigation and the legal advice / litigation. If privilege is not a concern, all parties should be clear about this. However, rarely will it be appropriate to engage external lawyers to conduct an investigation other than for their substantive legal expertise and to provide advice regarding the company's legal exposure;
- Ensure that all company employees who need to be aware of the investigation are properly briefed on the role of the external lawyers and the need to protect privilege, so that they communicate a consistent message to others and avoid undermining any future privilege claim;
- Continue to deliver the 'Upjohn warning' at the beginning of any substantive interview and, if questioned, resist any urge to back-track on the principles that underlie the wording;
- Consider carefully whether it is necessary to give third parties oral or written summaries of the investigation report, as this may waive privilege over the report. In *R (AL) v Serious Fraud Office*,² the High Court indicated that providing oral summaries of interview notes likely constitutes a waiver of any privilege, regardless of disclaimers that the company does not intend to do so.



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² *R (AL) v Serious Fraud Office* [2018] EWHC 856 (19 April 2018)