Neutral Citation Number: [2022] EAT 177

Case No: EA-2022-000126-JOJ &
EA-2022-000257-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 9 December 2022

Before :

THE HONOURABLE MR JUSTICE BOURNE

- -

Between :

MRS S GARROD	**Appellant**
- and -	
RIVERSTONE MANAGEMENT LIMITED	**Respondent**

- -

Elizabeth Grace (Advocate) for the **Appellant**
Deshpal Panesar KC (instructed by Sherrads Employment Law Solicitors) for the **Respondent**

Hearing date: 1 November 2022

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JUDGMENT

SUMMARY

Practice and Procedure, Unfair Dismissal, Maternity Rights and Parental Leave, Harassment

The Employment Tribunal did not err when it ruled that references in the Claimant's particulars of claim and evidence to settlement proposals made by the employer at a meeting before the claim was issued should be removed because they were within the scope of "without prejudice" privilege. At the time of the meeting there was a "dispute", it was the same dispute as became the subject of the claim, and an allegation that the settlement proposal was made with a discriminatory motive did not mean that the "unambiguous impropriety" exception to the without prejudice rule applied. There was also no error in the Employment Tribunal's further decision to require the claimant to pay costs because untruthful evidence had been given and this had increased the length and complexity of the hearing.

THE HONOURABLE MR JUSTICE BOURNE:

Introduction

1. This pair of appeals arises out of claims by the Appellant, Mrs Garrod, for breaches of the Maternity and Parental Leave etc Regulations 1999 ("the MPL Regulations") and of section 47C of the Employment Rights Act 1996 ("the ERA"), discrimination on grounds of maternity, harassment and constructive unfair dismissal.

2. The claim (under headings other than constructive dismissal) was issued on 2 March 2020. In her Particulars of Claim, Mrs Garrod set out the relevant history of her employment up to and including her raising of a formal grievance on 30 October 2019. Then at paragraph 28 (the first of two paragraphs with that number, because of a clerical error), she stated that she was invited to a meeting on 8 November 2019, where the Respondent's representative "told her in no uncertain terms that he did not care about her grievance, and he was there to make an offer to the Claimant to terminate her employment". In the penultimate paragraph of the Particulars (numbered 31), she stated that she anticipated that the Respondent would argue that evidence of the meeting was inadmissible under section 111A of the ERA, but that she would submit that the evidence should be admitted under section 111A(4) because of improper conduct on the Respondent's part.

3. A grievance meeting was held on 3 December 2019. On 16 January 2020 the Respondent informed Mrs Garrod that no part of her grievance had been upheld.

4. On 16 March 2020 Mrs Garrod resigned her employment. Thereafter she obtained permission to amend her claim to allege constructive unfair dismissal.

5. In paragraph 10 of its Grounds of Resistance, the Respondent said:

> "The Claimant makes reference at paragraphs 28 … and … 31 … to without prejudice matters which it is not appropriate should be in evidence or in the pleadings in this matter. The Claimant is invited to agree, without further application, and in advance of the preliminary hearing of this matter listed on 30th June 2020, to the removal of those matters from the ET1 and consequential amendment of these Grounds of Resistance. In the absence of such agreement the Respondent will be obliged to make an application for the removal of such material."

6. No agreement was reached to omit the references to the offer of settlement made at the meeting. By letter dated 14 October 2020 the Respondent applied for those paragraphs to be removed and for its costs of the application.

7. The application was heard on 28 May and 3 and 5 August 2021, with live evidence from all three individuals who were present at the meeting.

8. By a decision dated 6 November 2021, Employment Judge Harrington ("the EJ") decided this preliminary issue in the Respondent's favour. Mrs Garrod has permission to appeal against that decision on three grounds, and also to appeal against a costs order which followed it.

The facts found by the Employment Tribunal

9. I take the following facts from EJ Harrington's written reasons.

10. Mrs Garrod was employed by the Respondent as Company Secretary. She returned from maternity leave on 15 July 2019. On 17 October 2019 she informed her manager that she was pregnant with a second child. From 18 to 30 October she was signed off sick, feeling depressed and anxious. On 30 October 2019 she submitted a grievance to the Respondent in which she raised serious allegations against three senior managers. She complained of mistreatment and pregnancy and maternity discrimination including bullying from her manager for nearly 5 years, harassment by her manager and a breach of her legal rights i.e. a detriment pursuant to the MPL Regulations.

11. On 6 November 2019, she received an email from Harry Sherrard, an HR and employment law adviser to the company. He said that he had been asked to "deal with this matter" because several of the company's senior managers were named in the grievance, and he proposed a meeting for a "preliminary discussion". The company offered to pay up to £500 plus VAT for a legal adviser to attend if Mrs Garrod wished.

12. The meeting was arranged for 8 November 2019 in a private room at a local golf club. Mrs Garrod attended with her husband, and did not choose to have a legal adviser present. The EJ noted that the Claimant and her husband both have degrees in law, that she also took the Legal Practice Course and that he has a PhD in Law.

13. At the meeting, Mr Sherrard asked Mrs Garrod who she considered to be the most appropriate person to hear her grievance. They also discussed in outline the main part of the Claimant's grievance, namely the assertion that her duties were not identical when she returned from her first period of maternity leave. Mr Sherrard asked her what she wanted from the grievance. She said that she wanted her reporting line changed to enable her to report to the Managing Director rather than to her current manager.

14. Then, Mr Sherrard said that he would like to have a without prejudice conversation. He assumed that Mrs Garrod understood what this meant, and she did not ask. In his evidence, he described this as an initial exploratory conversation about settlement and the possibility of the Respondent making a severance payment to her. He described the employment relationship as "fractured" and "problematic" and said that the Respondent would like to make an offer to terminate her employment, mentioning a sum of £80,000.

15. The EJ accepted Mrs Garrod's evidence that she was taken by surprise by this part of the meeting and felt ambushed. It was agreed that when the subject of termination was raised, she began to cry.

16. There was an issue between the parties of whether Dr and Mrs Garrod understood the meaning of "without prejudice". Contrary to their evidence, the EJ found that they did.

17. The Employment Judge also rejected Dr Garrod's evidence that he tried to query this with Mr Sherrard and was told to "shut up". She also rejected the Garrods' evidence that Mr Sherrard had a draft settlement agreement with him at the meeting. She preferred Mr Sherrard's

account of the meeting as amicable and professional, rejecting the Garrods' evidence that he was overbearing and aggressive and finding that their evidence as to this was exaggerated.

18. No agreement was reached at the meeting, and further emails did not lead to any agreement. As I have said, the Respondent went on to reject Mrs Garrod's grievance and Mrs Garrod eventually resigned.

The decisions under appeal

19. Having set out the facts, the EJ referred to the rule of evidence that "without prejudice" communications are privileged from disclosure and inadmissible in evidence, and its public policy objective of encouraging litigants to settle their disputes by agreement rather than through litigation. She directed herself that:
    i. the rule applies only if there is an existing dispute between the parties at the time of the communication and if the communication is part of a genuine attempt to settle it;
    ii. the rule can apply to communications prior to the commencement of litigation, if in the course of the negotiations the parties contemplated or might reasonably have contemplated that litigation would ensue if they could not agree;
    iii. the mere act of an employee raising a grievance does not by itself mean that there is a "dispute", but it is necessary to consider the nature of the grievance and the manner and circumstances in which it is raised (*BNP Paribas v Mezzotero* [2004] IRLR 508 EAT);
    iv. the rule cannot be relied upon if the exclusion of the evidence would "act as a cloak for perjury, blackmail or other unambiguous impropriety" (*Unilever PLC v Proctor & Gamble Co* [1999] EWCA Civ 3027); and
    v. in claims for unfair dismissal only, section 111A of the ERA provides that evidence of pre-termination negotiations is inadmissible, enabling employers to instigate conversations about the possibility of termination without risk of disclosure, despite the existence of a "dispute" which would prevent the "without prejudice" rule from applying, but subsection (iv) disapplies the section to any improper behaviour.

20. The EJ was satisfied that there was an "existing dispute" at the time of the meeting on 8 November 2019, and that the parties contemplated or might reasonably have contemplated that litigation would follow if there were no settlement. In particular she referred to the fact that Mrs Garrod in her grievance referred to using ACAS mediation or the Early Conciliation process if the matter could not be resolved "in-house", those being the first steps required for bringing a claim before the Tribunal. The EJ also found that the communications instigated by Mr Sherrard at the meeting were a genuine attempt at settlement. Finally, having rejected Dr and Mrs Garrod's evidence that Mr Sherrard's behaviour was anything other than polite and professional, she ruled that the exception for "unambiguous impropriety" did not apply.

21. That being so, the EJ decided the issue in the Respondent's favour. She did not find it necessary to give separate consideration to section 111A.

22. The EJ also found that in her opposition to the application, Mrs Garrod had acted unreasonably by (1) making an unfounded contention that she had not understood the meaning of "without prejudice" and (2) making unfounded allegations against Mr Sherrard of trickery, perjury and dishonesty, claiming that her evidence was supported by notes taken by her husband at the meeting but not mentioning those notes until the hearing and, then, being unable to find them.

23. A further hearing took place on 24 and 25 February 2022 before EJ Jones QC to deal with costs. EJ Jones noted that costs may be ordered under rule 76 of the Employment Tribunal Rules if a two stage test is satisfied. The "threshold stage" was a finding that a party had acted unreasonably. That would give the ET a discretion to make or refuse a costs order, and the second stage was to decide how to exercise that discretion. Although EJ Harrington had already found that the threshold was passed, EJ Jones noted that proceeding in this way (applying the threshold stage but deferring the discretion stage) could prejudice the parties' appeal rights. He therefore applied the threshold stage afresh.

24. EJ Jones QC found that Mrs Garrod had not acted unreasonably in contesting the issue of whether there was a dispute, albeit that she did not succeed. However, the threshold stage was satisfied by the fact, found by EJ Harrington, that she had given untruthful evidence about her knowledge of the without prejudice principle and about the conduct of Mr Sherrard. Applying the discretion, he directed himself that making a costs order is an exceptional step. Nevertheless, he found that running a knowingly untruthful case "very substantially complicated" the issue, calling for extra evidence, cross examination and submissions. Having regard to Mrs Garrod's means, he decided to order costs and fixed the sum at £3,400.

25. Mrs Garrod sought reconsideration of both decisions.

26. On 7 April 2022, EJ Harrington dismissed the application for reconsideration of her decision, finding in particular that there was no reasonable prospect of her decision being changed by arguments that (1) a risk of bias arose from her brief and slight past professional association with the Respondent's counsel or (2) there had been any failure to make reasonable adjustments for Mrs Garrod's evidence or to grant an adjournment to accommodate childcare arrangements.

27. By a decision dated 10 May 2022 and sent to the parties on 24 October 2022, EJ Jones dismissed the application for reconsideration of the costs decision on the basis that none of the grounds had any reasonable prospect of success.

Ground 1
The parties' submissions

28. Mrs Garrod has been represented pro bono by Elizabeth Grace of counsel, who has made comprehensive, forceful and persuasive submissions for which I am grateful.

29. By ground 1 it is said that the ET erred in concluding that on 8 November 2019 there was an extant dispute sufficient to engage the "without prejudice" rule.

30. Ms Grace refers to *BNP Paribas v Mezzotero* [2004] IRLR 508 EAT for the proposition that the existence of a dispute is not proved purely by the fact that the employee has raised a grievance. As Cox J said in that case at [28]:

> "*I do not consider that the act of raising a grievance by itself means that the parties to an employment relationship are necessarily in dispute. Grievance procedures are well recognised and well used in the workplace. They provide a mechanism whereby an employee who is aggrieved about a particular matter can raise it through appropriate internal channels. It may be upheld, or alternatively dismissed for reasons which the employee finds acceptable,*

> *so that the parties never reach the stage where they could properly be said to be 'in dispute'*".

31. Ms Grace further points out that negotiations relating to a dispute will be privileged and inadmissible only in litigation relating to the same dispute. She also cites *Barnetson v Framlington Group* [2007] ICR 1439 on the subject of how "proximate" the negotiations and the litigation must be for the without prejudice rule to apply, for the proposition that what matters is not whether they are close in time, but whether the situation during the negotiations was such that the parties contemplated or might reasonably have contemplated that litigation would ensue if they could not agree.

32. It can be seen from my summary at paragraph 19 above that the EJ had these principles in mind.

33. Nevertheless, by the first ground of appeal, Ms Grace submits that:
    i. In finding that there was a dispute, the EJ was wrong to attach weight to the reference in the grievance to ACAS mediation and Early Conciliation because these did not "signpost litigation in any way".
    ii. The EJ was also wrong to attach weight to the fact that the grievance was based on employment rights, because this did not necessarily mean that an actionable dispute was in prospect.
    iii. The EJ was wrong to attach weight to Mrs Garrod having "legal knowledge and experience".
    iv. The EJ should instead have appreciated that Mrs Garrod wished to keep her job, with the same terms and conditions as before her maternity leave, and that the purpose of the grievance was to avoid a dispute.
    v. This case was virtually indistinguishable from *Mezzoterro*.

34. On behalf of the Respondent, Mr Deshpal Panesar KC contends:
    i. The grievance contained various indicators of a "dispute", such as references to bullying, harassment and discrimination, breaches of statutory maternity rights and case law on that subject, the lack of any "attempt to comply with the law", unfair treatment, direct and indirect discrimination and ACAS mediation or Early Conciliation. It was accompanied by a document resembling a witness statement, listing dozens of matters of complaint and asserting that Mrs Garrod was being punished for exercising legal rights.
    ii. The EJ, having carried out an extensive investigation over 3 days, was entitled to find a dispute in the circumstances of this case.
    iii. *Mezzoterro* establishes only that a grievance may not be proof of a dispute, not that it cannot be such proof.
    iv. *Mezzoterro* is very different from the present case because (a) the tribunal there, by contrast with here, did not hear evidence but only looked at documents; (b) on the facts of *Mezzoterro*, the relevant discussions were found not to be a genuine attempt at settlement of the appellant's discrimination claim; and (c) the employer's conduct in *Mezzoterro* was held on the facts to amount to an abuse of the without prejudice rule, whereas in the present case it was not.

Discussion

35. It is necessary to consider *Mezzoterro* more closely.

36. The outline facts were similar to those of this case. The claimant, after returning to work from maternity leave, raised a grievance in which she complained of being discouraged from returning, having been prevented from returning to her old job and being given less favourable terms, amounting to discrimination on grounds of sex or maternity. She was then invited to a meeting. At the meeting, the employer said that it wished the discussion to be "without prejudice". It then suggested that termination of her employment would be best for all parties and offered her, in effect, a redundancy package.

37. However, what happened next was different from the present case. The claimant brought an employment tribunal claim alleging that her employers were guilty of direct sex discrimination and victimisation following maternity leave, consisting of seeking to terminate her employment.

38. Giving the judgment of the EAT, Cox J recorded that the ET chairman had noted that excluding any reference to the meeting would prevent the tribunal from considering that part of the claimant's claim. The chairman had then ruled that at the time of the meeting, there was not an extant dispute about termination of the claimant's employment. Therefore what happened at the meeting could not be privileged in a subsequent dispute about that termination. The chairman also found that the meetings were not genuinely aimed at settlement of the discrimination claim.

39. Cox J said at [31] that she agreed with the chairman's conclusion about the lack of a dispute and the lack of a genuine attempt at settlement, but her ruling was on the more limited basis that those conclusions were open to the chairman on the evidence. So this was not a ruling of law to the effect that on the fact of *Mezzoterro* there could not have been a dispute.

40. At [35] Cox J went on to say that "what lies at the heart of the issue in this case is that this applicant alleges direct sex discrimination and victimisation against her employers in seeking to terminate her employment after she had raised a grievance concerning discriminatory treatment following maternity leave".

41. In the present case Mrs Garrod set out detailed particulars of claim. Under the heading "Unlawful Detriments", the alleged breaches of section 47C of the ERA were listed in 17 sub-paragraphs which went up to 17 October 2019 and therefore did not include anything occurring at the meeting of 8 November 2019. Then, the claim under "Pregnancy and Maternity Discrimination" was said to be based "on the same facts as for the s.47C ERA claim above". Under "Harassment" there were 3 specific allegations, not including anything occurring at the meeting. Nor was there any reference to the meeting under "Personal Injury".

42. As I have said, there was then an amendment to add a claim for constructive unfair dismissal. By a letter to the tribunal on 16 March 2020 Mrs Garrod explained that she was attaching her letter of resignation and that the grievance appeal outcome for her had marked the final act in a course of conduct which terminated the employment relationship. The attached resignation letter did not refer to the meeting of 8 November 2019.

43. There was therefore no reliance on the meeting as an unlawful act giving rise to a head of claim. That is emphasized by the fact that Mrs Garrod has since applied to amend her claim to

add an express allegation that Mr Sherrard's conduct at the meeting amounted to victimisation, contrary to section 27 of the 2010 Act. Permission for that amendment was refused by EJ Self at a case management preliminary hearing on 5 September 2022.

44. It therefore seems to me that this tribunal claim, unlike the claim in *Mezzoterro*, was not to any significant extent based on the allegedly "without prejudice" meeting. The reference to the meeting in the particulars of claim, read in context, was part of a narrative making the point that Mrs Garrod's grievance was not dealt with to her satisfaction. The reference to the termination offer may have been intended to show that the Respondent thought that it had a weak case.

45. Therefore EJ Harrington (having conducted a 3 day hearing with live evidence, unlike the ET in *Mezzoterro*) was plainly entitled to conclude that the dispute which was the subject of the ET claim already existed at the time of the grievance and at the time of the meeting. The pleaded particulars of the ET claim dated back to June 2019. The content of the grievance (summarised at the first paragraph 27 of Mrs Garrod's particulars of claim) corresponded closely with the content of the issued claim. In my judgment the references to infringements of legal rights and to ACAS and to Early Conciliation (a statutory element of the Employment Tribunal process) were clear signposts to the possibility of litigation. Mrs Garrod's legal training was also, in my view, a reasonable basis on which an EJ could conclude that those apparent signposts were genuine signposts, i.e. that they meant what they said.

46. EJ Harrington therefore did not make the error of ruling that the existence of a grievance per se is proof of the existence of a relevant dispute. Instead she considered the facts and reached what was clearly a reasonable conclusion.

47. Similarly the EJ was entitled to conclude that the proposal made at the meeting on 8 November 2019 was part of negotiations genuinely aimed at settlement of the dispute. There is nothing unusual about an employment dispute being settled by an agreement for termination of employment on financial terms.

48. Nor was there any failure to apply the law as explained in *Mezzoterro*. That was in reality a very different case, where the allegedly "without prejudice" communications were also the alleged unlawful acts on which the claim was based.

49. I therefore dismiss ground 1.

Ground 2

50. By ground 2 Mrs Garrod contends that if there was an extant dispute on 8 November 2019, it did not involve termination of her employment, and therefore the offer of settlement on that date could not have related to any existing dispute about termination.

51. It seems to me that that contention goes nowhere. As I have said, the EJ found and was entitled to find that the disputes advanced in the grievance and in the subsequent litigation were one and the same. Therefore a settlement offer made in a discussion about the grievance was inadmissible in the litigation. The EJ did not find that the dispute was "in relation to termination", and no such finding was necessary to support her decision.

52. Perhaps conscious of that, Ms Grace develops a slightly different point, namely that a settlement proposal based on termination could not have been a genuine attempt to resolve a dispute in which Mrs Garrod, in her grievance, had expressed the wish to remain in her employment. She relies on the passages in *Mezzoterro* where Cox J upheld the chairman's finding that there had not been an extant dispute "as to termination".

53. But as I have said, that was in the context of a tribunal claim in which the termination proposal was the alleged unlawful conduct. In the present case it was not, and the comparison is inapposite. Here, the grievance, the meeting and the tribunal claim all concerned the same subject matter. As Mr Panesar said, to propose termination on terms is neither an unusual nor an impermissible means of attempting to compromise a dispute of that kind.

54. It follows that the EJ was entitled to conclude that the dispute discussed at the meeting was the same dispute which would be the subject of the ET claim.

Ground 3
The parties' submissions

55. By ground 3 it is contended that the EJ erred in not finding that there was "unambiguous impropriety" or that excluding the evidence would be an abuse of the without prejudice principle because (a) responding to the grievance by proposing termination was or was alleged to be an act of victimisation and (b) the termination offer "was probative generally in relation to the Claimant's claims and the issues".

56. Ms Grace said that in the ET, Mrs Garrod claimed that the Respondent had tried to use the without prejudice rule to push her out of her job and that this amounted to discrimination and/or victimisation. The EJ erred, she submitted, by focusing on whether Mr Sherrard's manner had been intimidating or aggressive, instead of considering whether it was unambiguously improper for the Respondent to tell Mrs Garrod, in effect, that she had no future at the company. Further she submitted that the EJ imposed too high a threshold of "exceptional circumstances" for application of the exception to the without prejudice rule.

57. In response, Mr Panesar submitted that offering consensual termination as a genuine attempt to settle a case does not amount to unambiguous impropriety. The EJ's conclusion was reached, he points out, after a searching and detailed investigation at the hearing.

Discussion

58. The EJ correctly directed herself that the without prejudice rule will not be applied if the exclusion of the evidence would "act as a cloak for perjury, blackmail or other unambiguous impropriety": *Unilever plc v Proctor & Gamble Co* [1999] EWCA Civ 3027.

59. From the review of the authorities at paragraph [22] of *Mezzoterro* it can also be seen that the rule will be disapplied only in "the very clearest of cases" or "in truly exceptional and needy circumstances", the latter per Rix LJ in *Savings & Investment Bank Ltd v Fincken* [2004] 1 WLR 667 at [57].

60. In my view, *Mezzoterro* itself was an unusual case in which the allegedly unlawful conduct that founded the tribunal case was said to have occurred at the allegedly privileged meeting. If the evidence could not be admitted, the claim could not be pursued.

61. In the present case Mrs Garrod now seeks to place a discriminatory interpretation on the act of proposing a consensual termination. Given the lack of adverse findings by the EJ about the way in which the meeting was conducted, it seems to me that any criticism which might be made of an employer in this situation falls far short of the sort of "unambiguous impropriety" of which perjury and blackmail are examples. The EJ was right to consider whether this was "the very clearest of cases" and right to decide that it was not.

62. That decision was consistent with this Tribunal's decision in *Woodward v Santander UK PLC* [2010] IRLR 834, where the claimant alleged that during negotiations to settle an unfair dismissal claim, the respondent had said that it would not provide a reference for her in future and that this intention was discriminatory. Applying the without prejudice rule and ruling that the evidence was inadmissible, HH Judge Richardson said at [63]:

> *"It may at first sight seem unattractive, given the fact sensitive nature of discrimination cases, to exclude any evidence from which an inference of discrimination could be drawn. But it would have a substantial inhibiting effect on the ability of parties to speak freely in conducting negotiations if subsequently one or other could comb through the content of correspondence or discussions (which may have been lengthy or contentious) in order to point to equivocal words or actions in support of (or for that matter in order to defend) an inference of discrimination. Parties should be able to approach negotiations free from any concern that they will be used for evidence-gathering, or scrutinised afterwards for that purpose."*

63. Nor was this a case of the *Mezzoterro* kind. As I have said, Mrs Garrod's claim itself was not based on what happened at the meeting.

64. Indeed, it is not clear that the claim could draw much if anything from the termination proposal. Although the claim can be read as including the meeting in the chain of events which are said to have terminated the employment relationship, it is a matter of record that the Claimant brought her grievance and that it was not upheld. There is no barrier, it seems to me, to Mrs Garrod also adducing the fact that a meeting took place and that it did not resolve any part of her grievance. That much is not barred by EJ Harrington's order for removal of "all references to the without prejudice content of that meeting" from the pleadings and evidence. She can also attempt to prove that she was the victim of the discrimination and/or victimisation alleged in the grievance. If she makes headway, it is difficult to see what will really be added by proving also that the Respondent made, and she rejected, a settlement offer based on termination.

65. But even if Ms Grace is right that evidence of the termination offer could provide support for the claim, e.g. by showing that the Respondent wanted to be rid of Mrs Garrod, it does not follow that it should be admitted. Whenever the without prejudice rule is applied, its effect is to exclude evidence which is relevant and which therefore would assist one or other party. The point of the rule is that the policy aim of encouraging settlement of disputes outweighs the competing aim of allowing all relevant material to be placed before courts and tribunals.

That is why the rule can be displaced only by very clear and very serious wrongdoing. Making a settlement offer which could, on one view, provide a clue to a party's discriminatory attitudes falls far below that threshold.

66. Ground 3 therefore is also dismissed.

The costs appeal

67. The second appeal contends that the costs decision of EJ Jones is unsafe in light of the errors of law made by EJ Harrington.

68. Ms Grace further argues that since EJ Jones had found that Mrs Garrod was not unreasonable to contest the preliminary issue, he was wrong to rule that she should nevertheless be liable for costs because she was found to have given untrue evidence. She cites *Kapoor v Governing Body of Barnhill Community High School* [2013] UKEAT/0352/13/RN for the proposition that giving untruthful evidence, without more, does not necessarily amount to unreasonable conduct so as to open the way for a costs order.

69. I agree that the authorities show that a finding of untruthful evidence, without more, does not mean that there should be a costs order. It is necessary to consider the nature, gravity and effect of the relevant evidence together with any other relevant circumstances before deciding how to exercise the discretion to make or refuse a costs order.

70. However, even from my brief summary above it is apparent that EJ Jones did consider these factors. There was no error in his approach to the exercise.

71. That being so, Ms Grace nevertheless makes the reasonable point that if any of the grounds of the first appeal are successful, that will disturb the context to which EJ Jones had regard when reaching his decision on costs.

72. In response, Mr Panesar points to the numerous aspects of Mrs Garrod's case, including numerous allegations of impropriety against the Respondent and/or Mr Sherrard, which were rejected by the EJ, and to her repeated failure to remove references in her case to the privileged material. He submits that the costs order should stand, whether or not the substantive appeal succeeds.

73. That last point is academic because, given the failure of the first appeal, the second must also be dismissed. There has been no change to the factual and legal context of EJ Jones' decision. He had regard to all the relevant factors, as I have said, and was entitled to reach the conclusion that he reached.

Conclusion

74. Both appeals are dismissed.