Neutral Citation Number: [2022] EAT 78

Case No: EA-2022-000045-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 12th April 2022

Before:

THE HONOURABLE MR JUSTICE BOURNE

- -

Between:

SWISS RE CORPORATE SOLUTIONS LTD	**Appellant**
- and -	
MRS H SOMMER	**Respondent**

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Mr A Edge (instructed by Clyde & Co LLP) for the **Appellant**
Mr P Sommer (Lay Representative & Husband) for the **Respondent**

Hearing date: 12th April 2022

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JUDGMENT

SUMMARY

8 PRACTICE AND PROCEDURE

A solicitors' letter proposing settlement of an ET claim was inadmissible in evidence at the final hearing by application of the "without prejudice" rule. The protection was not displaced by the letter containing exaggerated allegations by the employer that the employee had committed serious misconduct with potential criminal and/or regulatory consequences. Where there was an arguable basis for the allegations, an Employment Judge at a preliminary hearing without oral evidence was not in a position to rule that the letter amounted to "unambiguous impropriety".

THE HONOURABLE MR JUSTICE BOURNE:

Introduction

1. This Appeal was ordered to proceed to an expedited hearing on two grounds. Last week I allowed an application to amend the Notice of Appeal to correct a clerical error to which I will briefly return below. Conduct, including the error, which I considered to have been merely clerical, was relied on by the Respondent, Mrs Sommer, in an application to strike out the Appeal last week. I dismissed that application and the focus has now shifted back to the substance of the Appeal.

2. The Appeal is directed against an order by Employment Judge Grewal ("the EJ") which was sent to the Parties on 30th December 2021, following a preliminary hearing on 9th December 2021. The material part of the decision was that an order sent by the employer's solicitors, Clyde & Co, dated 22nd January 2021 and headed "Without prejudice and subject to contract" ("the WP letter") was admissible in the Employment Tribunal ("ET") proceedings. The employer, which is the Respondent in the ET proceedings, now advances two grounds of appeal:

   i) the EJ a) misunderstood or b) misapplied the law in relation to the "unambiguous impropriety" exception to the without prejudice rule; and

   ii) the EJ's finding that there was "no basis at all" for assertions made in the WP letter, was unsupported by or inconsistent with the evidence and/or was perverse.

3. I will consider first whether the EJ directed herself incorrectly as to the law (Ground 1a). I will then consider the other questions together, i.e. whether the EJ incorrectly applied the law (Ground 1b) or reached a perverse conclusion (Ground 2).

4. The two underlying ET claims are brought by the Respondent to the Appeal, Mrs Sommer. A full merits hearing is due to begin on 20th April 2022, just over a week from now. The employer is a UK services company which forms part of a global provider of insurance and reinsurance. Mrs Sommer was employed as a Band E political risk underwriter until she was

dismissed on grounds of redundancy on 16th April 2021. On 22nd January 2021, before her dismissal, she brought the first claim, complaining of race, sex and pregnancy/maternity discrimination and claiming for equal pay. Her second claim was presented on 28th April 2021, complaining of further acts of pregnancy/maternity discrimination, and of harassment and victimisation and unfair dismissal, and discriminatory dismissal. For present purposes it is not necessary to go into further detail about those claims.

5. On 22nd January 2021, the employer's solicitors sent the WP letter to Mrs Sommer. It made a number of allegations against her and suggested that these could result in summary dismissal, criminal convictions, fines and/or findings of a breach of the Conduct Rules of the Financial Conduct Authority ("FCA"), which could make it difficult for her to work again in the regulated sector. It ended by offering a settlement agreement in which she would be paid £37,000 and her employment would be terminated. In summary, the allegations were:

   i) She had sent three e-mails with attachments to her personal e-mail address and one of these was also sent to her husband. I should interject that the unamended Notice of Appeal stated that the latter went to her husband's work e-mail address. The amendment corrected this, referring, instead, to his personal e-mail address. That was the clerical error to which I referred above. Although Mrs Sommer was suspicious of the original error, today's hearing has not had to consider it any further.

   ii) The sending of these e-mails was a breach of the confidentiality obligations in her contract of employment.

   iii) It was also a criminal offence under section 170 of the Data Protection Act 2018, consisting of knowingly disclosing or retaining personal data without consent.

   iv) She had lied to the employer, stating that she had not sent any of the information to a third party (her husband).

   v) In these respects she had acted, or may have acted "without integrity", breaching the FCA's conduct rules.

6. Mrs Sommer sought a ruling from the ET that the WP letter, despite the "Without prejudice" heading, was admissible in the full merits hearing. Employment Judge Grewal decided that the WP letter was admissible on the basis that it constituted "unambiguous impropriety".

The Law

7. There is a strong and consistent rule that communications, written or oral, when made as part of negotiations genuinely aimed at settlement of a dispute are not generally admissible in evidence in litigation between the parties over that dispute. That rule is founded upon the public policy of encouraging litigants to settle their disputes by agreement and enables them to negotiate without fear that what is said will be used in evidence.

8. As the EJ stated in her ruling, the privilege must not be used and will not apply in a case where it would "act as a cloak for perjury, blackmail or other unambiguous impropriety": **Unilever PLC v Procter & Gamble Co.** 1999 EWCA Civ 3027. In such a case, the public interest in disclosure will outweigh the usual public interest in maintaining the privilege.

9. However, case law has repeatedly emphasised that a high bar is to be surmounted before there can be such an incursion into the scope of privilege. In **Motorola Solutions Inc. v Hytera Communications Corp Ltd** [2021] EWCA Civ 11 WLR 679, Lord Justice Males said:

> "31. … In my judgment [previous case law] … demonstrates three points which are of importance to the present appeal. First, the without prejudice rule must be "scrupulously and jealously protected" so that it does not become eroded. Second, even in a case where the "improper" interpretation of what was said at a without prejudice meeting is possible, or even probable, that is not sufficient to satisfy the demanding test that there is no ambiguity. Third, evidence which is asserted to satisfy this test must be rigorously scrutinised. While this last point was made with particular emphasis in the context of evidence procured by clandestine methods, the point itself applies generally. All this is inconsistent, in my judgment, with an approach which simply takes at face value the evidence of a party seeking to disapply the without prejudice rule.
> …
> 57. … the courts have consistently emphasised the importance of allowing parties to speak freely in the course of settlement negotiations, have jealously guarded any incursion into or erosion of the without prejudice rule, and have carefully scrutinised evidence which is asserted to justify an exception to the rule. Although the unambiguous impropriety exception has been recognised, cases in which it has been applied have been truly exceptional, and … there has been no scope for dispute about what was said, either because the statement was recorded (the admission of a dishonest

> claim in **Hawick Jersey Ltd v Caplan**) or because it was in writing (the email threats in **Ferster v Ferster**). ...
>
> 62. …, the cases have firmly and rightly set their face against any erosion of the without prejudice rule, even if that means that some statements disclosing or constituting impropriety, albeit not unambiguously so, retain the protection of the rule. The policy choice is that the public interest in the settlement of litigation generally outweighs the risk of abuse of the privilege in individual cases."

The EJ's Judgment

10. Employment Judge Grewal set out the basic background and key contents of the WP letter. She then stated the effects of the without prejudice rule and the exception to it, quoting from **Unilever**. She cited **Savings and Investment Bank Ltd v Fincken** [2004] 1 WLR 667 for the proposition that the exception applies only when the privilege is abused. She referred at some length to **Ferster v Ferster** [2016] EWCA Civ 717 as an example of a threat made by a party in negotiations amounting to blackmail, and also to **Motorola** for the proposition that the exception only applies in cases that are "truly exceptional".

11. The EJ then referred to the factual context in which the WP letter was sent. The following details are taken from her judgment:

12. Mrs Sommer returned to work from maternity leave on 1st July 2020. On 9th October 2020, she was informed that her role (unlike any others in her team) was at risk of redundancy.

13. On 19th October 2020 she raised a formal grievance by e-mail complaining of discrimination on several grounds. She attached documents, including the CV of a male colleague who she alleged had been wrongly appointed to a senior role ahead of her. She openly copied the e-mail to her personal e-mail address and blind-copied it to her husband. On 14th November 2020, she sent a further grievance about equal pay, attaching e-mails which contained information about transactions with clients of the company to show how work was allocated. This was openly copied to her personal e-mail address. On 17th November 2020, she sent another e-mail, also openly copied to her personal e-mail address, with further details about her grievance, attaching documents including one with information about a transaction with a

client of the company.

14. On 16th December 2020, she was informed that her grievances had not been upheld.

15. In a further letter to her on 6th January 2021, an HR partner pointed out that the e-mails which she had sent to her personal e-mail address and to her husband included personal data and matters confidential to the company and its clients. This was referred to as a "low level data breach" but she was told that this should not have occurred, was asked to explain it and was asked to delete the material.

16. Mrs Sommer responded on the same day, stating that she had sent the e-mails in order to provide herself with a copy of the evidence for her grievances and potential tribunal case, and asking which items should be deleted. The HR partner identified the items and Mrs Sommer confirmed that she had deleted them.

17. On 19th January 2021 the HR partner informed Mrs Sommer that a disciplinary investigation was being commenced to establish the facts of the transmission of confidential information and personal data. On 20th January an investigator was appointed.

18. The WP letter was sent on 22nd January 2021.

19. On 25th January 2021, the investigator reported that there had been a breach of Mrs Sommer's employment contract and that her acts were not in line with the employer's code of conduct, but that there were strong mitigating factors, in that the sole purpose was to support the grievances she had raised with no indication that anyone had suffered adverse consequences. He recommended informal action.

20. Having set out those facts, the EJ then asked herself whether the main body of the WP letter (occupying five-and-a-half of the six pages) "amounted to improper threats and pressure to persuade the Claimant to accept" the settlement offer. She added at para. 48:

> "48 ... What concerns me in this case is the striking disparity between what was known about the alleged misconduct and what was said about it in the letter of 22 January 2021."

21. The EJ pointed out that, although it was always apparent that Mrs Sommer had copied the

grievance e-mails to herself, no complaint was made in October, November or December of 2020. The only new matter that the employer would have discovered was the copying of one e-mail to Mr Sommer. The HR Partner had described the data breach as "low level". Meanwhile, the WP letter was sent before the investigation had established the facts.

22. Her conclusion, at para. 52, was that having regard to Mrs Sommer's reason for sending the e-mails, her having done so openly, the low level of any breach, the lack of action until January 2021 and the early stage that the investigation had reached:

> "52 …, there was no basis at all for the Respondent's solicitors to assert that what she had done was serious misconduct which fundamentally undermined the employment relationship and hence merited summary dismissal or that she had committed one or more criminal offences. ..."

23. The EJ then summarised the threats of dismissal, prosecution, fines and regulatory action and concluded:

> "The Respondent's solicitors grossly exaggerated the severity of what she had done in order to put pressure on her to accept what they proposed, namely the immediate termination of her employment. I am satisfied that the making of those threats in those circumstances was an abuse of the privilege and that they unambiguously exceeded what was permissible in settlement of hard fought litigation."

24. Finally, the EJ said that her conclusion was "reinforced" by what happened next, namely the investigator finding that there had been only a "technical" breach not warranting formal disciplinary action, and then a failure to inform Mrs Sommer of the outcome of the investigation before the deadline of 5th February 2021 which she had been given to respond to the offer. That delay, the EJ concluded, "must have been to let the Claimant believe that she was still at risk" of the various consequences threatened.

Ground 1A

The Appellant's Submissions

25. By Ground 1A, the employer effectively contends that the EJ misdirected herself as to the legal test for the "unambiguous impropriety" exception.

26. Andrew Edge, of Counsel, representing the employer, submitted that the exception cannot be

triggered merely by a party making threats in the course of negotiations. So, it was not triggered by a threat to bring an action for infringement of a patent in **Unilever**, or by a threat to remove assets from the jurisdiction in **Motorola**. Something more is needed, such as dishonesty or behaviour akin to blackmail, perjury or extortion, and it was therefore necessary for the EJ to analyse the WP letter and decide whether it contained any such element.

27. Mr Edge referred to the small number of cases in which unambiguous impropriety has been found. In **Greenwood v Fitz** [1961] 29 DLR 2D 260, a party stated that, if the case went to trial, then he would perjure himself and bribe witnesses to do the same and would go abroad rather than pay damages. In **Hawick Jersey International Limited v Caplan**, The Times, 11th March 1998, the claimants admitted that they had sued for a non-existent debt in order to impose dishonest pressure on the defendant to settle. In **Ferster v Ferster**, parties to a company dispute made "an attempt at blackmail" by using a threat of committal proceedings and imprisonment to put pressure on another party to buy their shares at a higher price. In **Boreh v Republic of Djibouti & Others** [2015] EWHC 769 (Comm), a party falsified evidence and used it as the basis to demand settlement for a sum greater than the value of their claim.

28. In support of Ground 1, Mr Edge submits that the EJ's scrutiny of the evidence and her findings did not go far enough for the case to be capable of passing the high threshold of unambiguous impropriety. Although she found that the employer's solicitors had no, or no sufficient, grounds to justify the allegations made in the WP letter, she did not find that they acted dishonestly or that they engaged in extortion or blackmail, and therefore she set the bar too low.

29. Mr Edge reminds me that it is not unusual for employers to uncover potential misconduct by a claimant in the course of an employment dispute. Such conduct can be highly relevant to a tribunal claim. It can also be criminal in nature and/or have regulatory consequences. Mr Edge submits that there can be value in the parties negotiating and in reference being made to

such potentially relevant matters, even if an employer's investigation has not yet occurred or finished.

30. It is therefore an error of law, Mr Edge submits, for a tribunal to base a finding of unambiguous impropriety on the perceived weakness of an allegation made by a party in negotiations, save in the most exceptional circumstances. Given the importance of the privilege attaching to without prejudice communications, Mr Edge submits that when parties merely exaggerate their case or put pressure on the other side to settle, that does not amount to unambiguous impropriety unless the conduct is akin to extortion. By 'extortion' he meant using a threat to extract money (or some other remedy) which could not otherwise have been legitimately obtained in the underlying proceedings.

31. Mr Edge also criticises the EJ for relying on circumstances post-dating the WP letter, such as delay by the employer in sending Mrs Sommer the outcome of the disciplinary investigation, because the question was whether the WP letter was an abuse of privilege when it was sent.

32. He also complains that the EJ had no, or no sufficient, regard to the fact that when the WP letter was sent, the employer believed that Mrs Sommer was represented by a solicitor and a Trade Union representative because she had untruthfully stated this. However, that point was not developed in the hearing and also, in my view, has more to do with the application of the law to the facts.

The Respondent's Submissions

33. Mrs Sommer was assisted by her husband, Mr Phillippe Sommer, as a lay representative. Not being legally trained, he did not descend into the technicalities of the legal argument, but he submitted that the EJ had made no error of law and invited me to uphold her reasoning. The bulk of Mr Sommer's submissions concerned the evidence and the facts, so I shall return to them under the heading of 'The Other Grounds'.

Discussion

34. I do not consider that the EJ misdirected herself on the law. She correctly defined the test as

whether there was unambiguous impropriety of an exceptional nature, with blackmail as an example, and asked herself, at para. 47, whether the contents of the letter "amounted to improper threats and pressure to persuade the Claimant to accept that offer" which "unambiguously exceeded what was permissible in settlement of hard fought litigation". That, in my judgment, was the right question.

35. Mr Edge rightly says that it is not uncommon for employee misconduct to be discussed in correspondence of this kind and the EJ recognised at para. 48, that there is "nothing inherently wrong in referring to the potential disciplinary process" in without prejudice negotiations. That, of course, does not mean that an employer is then free to raise such matters dishonestly or to use them in an attempt at blackmail.

36. Nor do I think that any misdirection in law can be detected in the EJ's references to matters post-dating the WP letter. I shall return to that subject when I deal with the facts but, in general, whilst it may be unlikely that conduct could be viewed as unambiguously improper in the light of later events, I would not rule out the possibility.

37. For these reasons I do not consider that EJ Grewal misunderstood the relevant law, and Ground 1A cannot succeed.

Ground 1B and Ground 2

The Appellant's Submissions

38. Mr Edge emphasises the nature of the impropriety actually identified by the employment judge. She found that threats were made on the basis of allegations of serious misconduct for which there was "no basis at all" or which were "grossly exaggerated". However, she did not make a different kind of finding that a threat was used as a lever to try to obtain something to which the employer was not entitled.

39. Mr Edge submits that, although the EJ rejected the allegations in the WP letter, she did not properly or sufficiently address their substance by scrutinising the evidence and considering whether there was a proper explanation for them, and that this failure prevented her from

properly deciding whether any impropriety was unambiguous.

40. Any such analysis, he contends, would have had to deal with the following:

i) As the EJ found, the information forwarded by Mrs Sommer included details of transactions by named clients or potential clients of the employer.

ii) An intention to use information in tribunal proceedings or for taking legal advice does not justify an employee in removing confidential information (see **Brando Advisers UK Limited v Chadwick** [2010] EWNC 3241 QB, **Nissan v Passi** [2021] EWHC 3642 Chancery).

iii) As the EJ found, Mrs Sommer forwarded personal data (a CV referring to an injury suffered by a colleague) to herself and her husband without the consent of the data controller by the employer. On the face of it this was, or at least may have been, an offence under section 170 of the Data Protection Act 2018;

iv) Mrs Sommer did lie to the employer, stating that the information had not been disclosed to third parties when an e-mail had been blind copied to her husband. That was capable of breaching the obligation "to act with integrity" under FCA Conduct Rule 1.

41. So Mr Edge complains that in the absence of discussion of those factors, the EJ simply did not explain how they permitted a conclusion that there was "no basis" for the assertion of serious misconduct.

42. He adds that the EJ also did not closely analyse the language of the WP letter, and that the views expressed there about Mrs Sommer's conduct were all expressly made conditional on, or subject, to the findings of the investigation which had not yet concluded. Although the letter wrongly predicted that the investigation would conclude that there was a formal case to answer, it only identified dismissal as "one of the possible outcomes" of an eventual disciplinary hearing.

43. These matters, Mr Edge submits, should have compelled the EJ to conclude that the

employer's solicitors at least may have held the genuine view that the allegations were true, and that it was not unambiguously improper to set them out and then to make Mrs Sommer a settlement offer to resolve all the outstanding issues. Meanwhile, the making of that offer gave effect to the policy underpinning the without prejudice rule of encouraging settlement of disputes of all kinds.

44. In the alternative, he submits that the matters listed at para. 40 above made it perverse for the EJ to find that there was "no basis at all" for asserting that Mrs Sommer had committed serious misconduct, a criminal offence and a breach of the FCA Conduct Rules.

45. Finally Mr Edge also contends that, on the facts of this case, it was an error for the EJ to refer to circumstances post-dating the WP letter and that the letter either was or was not unambiguously improper on the day that it was sent.

The Respondent's Submissions

46. Mr Sommer emphasised the imbalance between the Parties. This was a case of a large, wealthy corporation instructing a leading firm of solicitors to send a threatening letter to an individual who, at that time, had already referred to deteriorating mental health. The letter, he says, had a profound and detrimental impact on Mrs Sommer.

47. In that context, Mr Sommer invites me to uphold the careful reasoning set out by the Employment Judge in nine pages of her Judgement. He submits that the EJ was right to view the WP letter as containing improper threats in the nature of blackmail. This can be seen from the disproportion between Mrs Sommer's conduct and its characterisation in the letter. It was understandable that she sent the e-mails to preserve evidence which was needed for her case at a time when she was worried that she would be shut out of the employer's systems, and the employer itself repeatedly referred to the low level of any breach of obligations.

48. Mr Sommer submitted that, for a company in this situation to say, in effect, "sign an agreement or else", that is in the nature of blackmail and the addition of qualifying words in the letter do not change that. He added that the EJ was right to see this conclusion as reinforced by the

later events. The employer should have told Mrs Sommer about the outcome of the investigation but did not do so until she had raised a further grievance about the WP letter.

Discussion

49. The key question under Ground 1B and Ground 2 is whether the EJ made a finding which was not open to her on the evidence. Ground 1B is framed as a failure to test the "unambiguous" element of unambiguous impropriety, but the thrust of it is that the evidence compelled the conclusion that, even if there was evidence of impropriety, it was not unambiguous.

50. I have paid particular attention to **Ferster v Ferster**, which the EJ also quoted at some length. As I have said, this was a company dispute. In the context of a mediation, two shareholders wrote to the third, demanding that he sell his shares to them at an increased price. They stated that they had uncovered conduct on his part which would lead to criminal and contempt proceedings if the offer was not accepted. The trial judge, Mrs Justice Rose (as she then was) found that there was no lack of clarity in what was being said. There was a clear purpose to pressure the recipient to pay a higher price, for personal gain. The Court of Appeal, upholding her decision that the communication was admissible, noted that the judge reached those conclusions regardless of whether the senders had a genuine belief in the substance of their allegations. What was improper was the use of committal proceedings to place pressure on the recipient to pay a higher price. Even if it could be proper to take the threatened steps if there was a genuine belief in the basis for them, it was improper to use them as a lever for financial gain. Lord Justice Floyd, with whom Mr Justice Baker and Lord Justice Patten agreed, concluded that the test was satisfied because:

> "23. ... Firstly, the threats went far beyond what was reasonable in pursuit of civil proceedings, by making the threat of criminal action, (not limited to civil contempt proceedings). Secondly, the threats were said to have serious implications for Jonathan's family because of Jonathan's wrongdoings. Thirdly, the threats were of immediate publicity being given to the allegations. It is nothing to the point in this connection that Warren and Stuart may have believed the allegations to be true. The threat to publicise allegations of extreme severity against Jonathan and his partner, and within such a short timescale, placed quite improper pressure on Jonathan. Fourthly, the purpose of the threats was to obtain for the brothers an immediate financial

> advantage arising out of circumstances which should accrue, if they had basis in fact, to the benefit of the company. Finally, there was no attempt to make any connection between the alleged wrong and the increased demand.
>
> 24. It is not necessary for the threats to fall within any formal definition of blackmail for them to be regarded as unambiguously improper. … "

51. It is notable that the question of whether the person making the threats believed the allegations to be true was found to be beside the point. What mattered in **Ferster** was the type of threat made. It is entirely normal for parties in negotiations to threaten to bring or continue legal proceedings against each other, for example. The impropriety in **Ferster** consisted of using a threat of criminal or quasi-criminal proceedings as a lever for settling a civil dispute.

52. The present case has some similarities with **Ferster** but there are significant differences. Most importantly, the employment judge did not find that the threats of or references to criminal or regulatory consequences were of a kind which could not properly be made in civil proceedings. The reasons for finding impropriety in para. 23 of **Ferster** firstly went well beyond the mere warning that there could be criminal consequences, and secondly included the lack of any connection between the alleged conduct and the proposed settlement. In the present case, the letter was about conduct which was bound up with the continuing employment dispute and the employment relationship.

53. Instead, EJ Grewal put this case in a slightly different category as a case in which the conduct allegations were without basis or were grossly exaggerated.

54. I would not decide that, as a matter of principle, there is no such category which can satisfy the test for unambiguous impropriety. Baseless or exaggerated allegations could, for example, be evidence of dishonesty, which is a well-recognised basis for lifting the without prejudice privilege. However, I have not been referred to any decided case where such a finding has been made on the basis of a party making exaggerated allegations.

55. An important practical difficulty will arise in such a case where it is necessary to decide whether a party has acted dishonestly. That is that such issues will tend to be decided, as in

this case, at interlocutory or preliminary hearings without oral evidence and in advance of the court or tribunal hearing the evidence in the underlying proceedings. In those circumstances, I agree with Mr Edge that a finding of unambiguous impropriety will depend on a rigorous analysis of what is said, and can only be made in a very clear case. That was recognised by the Court of Appeal in **Motorola**, where Males LJ stated, at para. 64:

> "64. … In view of the necessary limits to the conclusions which a court can reach at an interim stage, the existence of a credible dispute about what was said (or what was meant by what was said) may mean that a court cannot be satisfied that there has been an unambiguous impropriety and therefore does not admit the evidence, but that is simply the result of applying the test which has consistently and for good reason been held to apply … ."

56. In my judgment, the problem with the Employment Judge's ruling in the present case is that it does not engage with the arguable merits of the allegations made in the WP letter. Instead, the EJ founded her conclusion on what was, essentially, a sudden change of attitude by the employer. Having first overlooked the e-mails and then described any breach as low level, it then framed them as serious misconduct in the WP letter. The Employment Judge may have been right to describe that framing as "grossly exaggerated". However, she did not acknowledge that the facts did at least arguably disclose breach of confidence, breach of contract, a breach of the data protection legislation and conduct lacking integrity.

57. I therefore consider that the EJ's reference to allegations of serious misconduct having "no basis at all" was an error. Her decision could still be founded on the ruling that the allegations were "grossly exaggerated". However, it seems to me that exaggeration will not usually pass the high threshold of unambiguous impropriety without findings as to the guilty party's state of mind. The EJ did not make those findings, and I doubt that she could validly have done so at a preliminary hearing without oral evidence.

58. Similarly, the EJ's conclusion that the purpose of delaying the notification to Mrs Sommer of the investigation outcome "must have been to let the Claimant believe that she was still at risk of summary dismissal, criminal conviction and being found to be in reach of the FCA Conduct

Rules", does appear to overlook the fact that the determination was being made without oral evidence. In my view the EJ's conclusion was probably correct, but that is not to say that there could not have been some other explanation.

59. In my judgment, therefore, Grounds 1B and 2 succeed. Given the basis for the allegations which were made in the WP letter and given the nature of this sort of preliminary hearing, it does not seem to me that there was a valid route to a ruling that unambiguous impropriety had been established.

60. In fairness to Mr and Mrs Sommer, none of this means that the WP letter was free from any impropriety. On the contrary, it seems to me that the employer or Clyde & Co sailed close to the wind. Although I accept Mr Edge's submission that there is no rule prohibiting parties who are negotiating in civil proceedings from making any threat of criminal or regulatory action, there will always be the danger of applying improper pressure by doing so. That danger was heightened here by the exaggeration of the misconduct in the WP letter, in the light of everything else that had been said about it. However, as I have said, there is a strong rule of public policy maintaining privilege for without prejudice correspondence and exaggeration by itself is insufficient to make out an exception.

Conclusion

61. The Appeal is therefore allowed. It follows from my conclusion that only one outcome is possible, which is that the WP letter is inadmissible in evidence at the forthcoming full merits hearing.