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EMPLOYMENT TRIBUNALS

Claimant: **Mr D Corbineau**

Respondent: **The Hook Group Ltd**

Heard at: **East London Hearing Centre** **On: 1 June 2018**

Before: **Employment Judge Brook (In Chambers)**

Representation

Claimant: Claimant's written submissions

Respondent: Solicitor's Lewis Silkin's written submissions

JUDGMENT

The Judgment of the Employment Tribunal is that:

1 The Claimant's application for Costs in respect of the Hearing of 23 February 2018 is dismissed;

2 The Respondent's application for costs in respect of the Hearing of 23 February 2018 is dismissed;

3 The Claimant's application for Review of the Judgment of 7 March 2018, in particular on the refusal to reinstate the Claimant, is refused

REASONS

1 This matter was heard on 23 February 2018 and the Judgment promulgated and sent to the parties on 7 March 2018. So far as the Claimant's claims for basic and compensatory awards in unfair dismissal, and his claim in wrongful dismissal for a payment in lieu of notice, these succeeded on pleaded admissions by the Respondent. The Claimant's application for reinstatement was not successful. At the Hearing there was no application for costs by either party.

2 By email dated 9 March 2018 the Claimant wrote to the Tribunal enquiring whether a Certificate was available that "proves I was unfairly dismissed" to which request, by letter from the Tribunal dated 13 March 2018, the Claimant was referred to the Judgment which "sets out the findings in the case". This settled that request.

3 By letter dated 15 March 2018 Messrs Lewis Silkin for the Respondent made written submissions in support of an Application for costs in the sum of £20,000 against a detail Cost Schedule totalling £20,288.88 including VAT. In making that application Lewis Silkin stated that they were content for this to be decided on written submissions. By letter dated 28 March 2018 the Claimant submitted a vigorous defence to the Respondent's Costs Application in the course of which he reserved his position as to making his own Costs Application in the sum of £1,491.14, with the request that if the Respondent's Costs Application was to be considered then he would prefer a hearing "*in situ*" so he might have the opportunity to make oral submissions. The Claimant subsequently confirmed he was making a Costs Application.

4 By email dated 21 March the Claimant wrote to the Tribunal requesting a reconsideration of the decision not to reinstate him to his previous employment. In support of that Application the Claimant cited that this decision had unwanted consequences regarding his reserved County/High Court claims and in particular had potentially adverse future capital gains tax consequences for him. The Claimant went on to say that whilst he had developed his mistrust and lack of confidence in the Respondent as a result of his *"experience with and treatment by the Respondent",* the Respondent, according to the Claimant, only later developed its view as a result of the Claimant expressing his own views. I take it that the point being made is that it was not the Claimant's conduct at work that was in issue though I remind myself that the evidence of the Respondent at the Hearing was that as well as the (mutual) breakdown in trust and confidence the Claimant's skill sets were no longer considered relevant.

5 In support of his request for reconsideration of my Decision not to reinstate him to the Respondent's employment Mr Corbineau made an entirely new submission to the effect that if reinstated to his previous position of what was effectively a retainer of £50 a month then he would not seek substantive work from the Respondent Company, at least not unless or until his other reserved issues with the Respondent had been adjudicated or otherwise resolved. Mr Corbineau advanced this new proposition because he felt it would have no adverse consequences for the Respondent yet it would he believed, amongst other advantages for him, place him in a more favourable capital gains tax position in relation to his shareholding in the Respondent Company. This entirely new submission had not, or so it seemed to me, been made known to the Respondent and accordingly I caused a letter to be written to the Respondent's solicitors, copied to the Claimant, setting out this new submission and inviting the Respondent's observation and comments. In the event the Respondent replied to the effect that it was content with the Judgment, had no interest in reinstating the Claimant on the new basis or at all, and still had no trust or confidence in the Claimant. At the Hearing on 23 February 2018 the unambiguous evidence of both the Claimant and of Mr Andrew Fidler, the principal shareholder and CEO of the Respondent company, was that each had lost trust and confidence in the other and that there was no prospect of any rapprochement between these individuals.

Reconsideration of the Judgment

6 Rule 70 of the Employment Tribunal Rules provides a Tribunal with the power to reconsider any Judgement where it is necessary to do so in the interests of justice. Case law confirms that the 'interests of justice' include circumstances where a decision

was wrongly made as a result of administrative error, that a party did not receive notice of the proceedings leading to a decision made in the absence of that party, or that new evidence has become available since the conclusion of the Tribunal hearing, the existence of which evidence could not reasonably have been known of or foreseen at the time of the hearing. These are examples of circumstances that directly concern the principle of natural justice going to parties receiving a fair hearing.

7 In all judicial proceedings there is an underlying public policy principle that there should be finality to the matters litigated. Reconsiderations are thus limited specific exceptions to the general rule that Tribunal decisions should not be reopened and relitigated. It is not a method by which a disappointed party can get what might be called a 'second bite of the cherry' on matters already properly judicially decided. Appeals to a higher court are a different matter & must be based on errors of law. In Stevenson v Golden Wonder Ltd [1977 IRLR 474] the Employment Appeal Tribunal held that the review procedure was not intended to give a party the opportunity of a rehearing at which the same evidence can be rehearsed but with different emphasis, or that further evidence and/or propositions can be advanced which, though available at the original hearing, were not then advanced.

8 The Rules provide that Judgements can be reconsidered only where it is necessary in the sense set out above, the Rules do not provide a litigant unsuccessful in some aspect or other of their case with an automatic right to reconsideration of the Judgment. An unsuccessful litigant might well feel that the interests of justice require the decision to be reconsidered, particularly where the effects of that Judgment are thought to be disadvantageous and they come to think that had they taken a different approach, or adduced more evidence/advanced a different proposition, then the Judgment would have been more favourable to them. However, the basis for reconsideration are narrow, essentially where something has gone very wrong with the procedure such that it involved a denial of natural justice or something of that of magnitude. Furthermore, it is clear that the interests of justice relate to the interests of both sides. In the appeal case of Reading v EMI Leisure Ltd the Court, in considering the claimant's appeal of a Tribunal's refusal to reconsider a decision, observed that *"when you boil down to what is said on the claimant's behalf it really comes down to this; 'that she did not do herself justice at the hearing so justice requires there should be a second hearing so that she may'."* That appeal failed for precisely that reason and it seems to me that Mr Corbineau is saying much the same, that there was something he should have said at the time of the Hearing and has now, rather belatedly, come to consider it would be a good idea to change his position from that he actually advanced at the Hearing because, if accepted, this could place him in a better tax position as well as having other collateral advantages. He had the opportunity to advance this new proposition, namely that he be reinstated on the basis that he would not seek actual work, but did not take that opportunity, indeed he took the position that if reinstated he would seek substantive work from the Respondent.

9 I am not persuaded that it is in the interest of justice to review this Judgment. That said I was prepared to put Mr Corbineau's new proposition to the Respondent in case it wished to reach some agreement on the point. It did not. There is thus no basis at all on which to review the Judgment. I would add that even if there was a proper basis for Review it is highly unlikely that I would have granted the requested reinstatement. There plainly remains the fundamental breakdown in trust and

confidence between the Parties, inimitable to any employment relationship no matter how artfully that employment might be arranged, and there is a further issue as to whether an employment relationship can exist at all in the absence of reciprocity of obligations, namely on the part of an 'employer' to provide work and if so provided of an 'employee' to undertake that work. It is not, however, necessary for me to explore such issues as I have found that Mr Corbineau has not provided adequate grounds on which to reconsider the Judgment within the Rules.

Cost Applications

10 Turning first to the Respondent's costs application. The Employment Tribunal is often regarded as a no cost jurisdiction though this is not entirely correct. Pursuant to Sections 76 to 78 of the Tribunal Rules there is power to make a costs order or, in the case of a party acting in person a preparation time order, against a party found to have acted vexatiously, abusively, disruptively or otherwise unreasonably in either bringing proceedings or the way that the proceedings have been conducted, or in persisting in any claim or response that had no reasonable prospect of success. In making it's substantial costs application against the Claimant, indeed the maximum this Tribunal can award, the Respondent argues that there was no point in the Claimant seeking a hearing of his unfair dismissal claim given the Respondent's comprehensive pleaded admissions, and that he has put the Respondent to considerable unnecessary cost and inconvenience. For his part the Claimant's relatively modest application would appear to have been prompted by the Respondent's cost application and little else.

11 Though the Respondent contends that it was entirely unnecessary for the matter to proceed to a Tribunal hearing, as it had made full admissions in respect of the Claimant's pleaded case and thus there was nothing more to be decided, this is not entirely correct. The Claimant's pleaded case was based on what I referred to as the "£50 retainer" and he did not, as it seems the Claimant sought to suggest in the course of interlocutory correspondence, seek a decision as to what his salary should properly have been. Whilst it is true to say that before me he touched upon what he considered the salary issue it was no part of his pleaded case and thus simply was not an issue before this Tribunal. Doubtless in recognition of this Mr Corbineau did not pursue this aspect of the matter with any vigour. That said it is not correct to say that there was no remaining issue for the Tribunal to adjudicate. The one issue that the Claimant plainly wanted resolving was that of reinstatement and whilst it is true to say that both he and Mr Fidler had fallen into a relationship of mutual distrust and lack of confidence, Mr Corbineau sought to persuade me that the geographical distance that would prevail, he lives in Australia and Mr Fidler in the UK, were he to be reinstated and take up substantive work would mean that he and Mr Fidler would not come into close contact and thus no interpersonal problems would arise. Whilst it is true to say that Mr Corbineau remains a shareholder in the Respondent company, and to that extent is unlikely to deliberately sabotage the workings of the company, it seemed to me that Mr Corbineau misunderstood the effect of a loss and trust and confidence in the context of employment, particularly in such a relatively small business. There was no doubt from the evidence before me at the Hearing that he was keen to recover his employment with the Respondent. My reasons for declining his application for reinstatement are as set out in the Judgment made in the light of the evidence then before me. Mr Corbineau was completely candid in his admission that he had lost trust and confidence in the Respondent, in particular Mr Fidler, but appeared to genuinely

believe that geographical considerations would work to nullify the effect of that mutual distrust. I was not persuaded by that proposition though he was entitled to make it.

12 As to the amount claimed by the Respondent this is a surprisingly large sum given the admissions. From the detailed schedule provided by the Respondent it seems to me that a great deal of the sum claimed appear to relate to matters of wider scope than just that of the pleaded admissions, that is to say matters relating to the contractual claim which Mr Corbineau has expressly reserved to the Courts. In the particular circumstances of this case the matter of reinstatement was arguable and it was always open to the Respondent to list the matter at an early stage for a preliminary hearing on the reinstatement point, all other aspects of the Tribunal Claim being admitted, which I would have expected to limit the costs referable to Tribunal matters. I have little doubt that Mr Corbineau did make himself unpopular with both the Respondent and with Lewis Silkin. However, this was not simply an ordinary matter of unfair dismissal but had, and continues to have, potentially wider aspects and implications which on the face of it seems to have resulted in the greater part of the cost schedule produced in the support of the Respondent's application. I am not persuaded that the Claimant's conduct in relation to the Tribunal Claim was improper and am not minded to grant the Respondent's cost application.

13 Turning to the Claimant's cost application, whilst this is for a relatively modest sum precisely similar considerations apply. His Tribunal Claim effectively became an application for reinstatement and whilst he had an argument to make in respect of that in the end it did not succeed. Though the costs sought are more likely to relate solely to the Tribunal matters it does not seem to me that there has been any improper conduct on the part of Lewis Silkin or the Respondent that could trigger a costs award, indeed quite the reverse. As I have already indicated the Employment Tribunal is not a venue in which "costs" follow the event. I am therefore not minded to grant the Claimant's application for costs against the Respondent.

Employment Judge Brook

12 June 2018