EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr B Ibrahim	**v**	**Vatan Catering Limited**

Heard at: Watford (by CVP) **On**: 17 December 2021

Before: Employment Judge Smail

Appearances

For the Claimant: Mr K Wilford, Counsel
For the Respondent: Mr J Kendall, Counsel

COSTS JUDGMENT

1. The Claimant must pay the Respondent costs in the sum of £6,363 within 14 days.

2. The Respondent's application for costs of the costs hearing is refused.

3. Without prejudice to 2 above, the Respondent's costs of the costs hearing and application for costs was assessed at £5,050.

REASONS

Outcome of the Full Merits Hearing

1. The Claimant was a Production Manager at the Respondent. His length of service was significant, something like 26½ years. His family was heavily involved in the business. His father was a 40% shareholder; his brother also worked for the business. The Respondent is in the meat trade.

2. The Claimant admitted, either within the course of internal disciplinary proceedings and/or before the Tribunal, that for approximately six months he had been supplying a third party with on average four to five boxes of the Respondent's beef flanks, approximately twice a week for approximately six months. The third party paid the Claimant in cash at an undervalue. The Respondent did not receive the money. The Claimant was dismissed for this. This was misconduct; it would be perverse to argue otherwise.

3. The Claimant was dismissed by Mr Harris, the 60% controller of the company. Against advice, Mr Harris, who conducted the original disciplinary and the decision to dismiss, also conducted the appeal. That immediately generated a ground of procedural unfairness making a claim of unfair dismissal strongly arguable.

4. I presided over the full merits hearing of the Claimant's claims in Watford over 4 and 5 June 2019 and my judgment was that:

> " 1. The Claimant's claim of wrongful dismissal (for notice pay) is dismissed.
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> 2. The Claimant was procedurally unfairly dismissed.
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> 3. There was an 80% chance that the Claimant would have been fairly dismissed if the procedural unfairness had been cured.
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> 4. The Claimant contributed 100% to his own dismissal.
>
> 5. It is not just and equitable to compensate the Claimant."

5. Whilst written reasons were not requested in time, Counsel for the Respondent took an admirably accurate note and I have, in effect, the entire judgment before me.

Power to award costs

6. Under Rule 76(1) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, costs may be awarded against a party where a party has acted unreasonably in either the bringing of the proceedings (or part) or in the way that the proceedings (or part) have been conducted.

The Respondent's application for costs

7. The Respondent submits that, fundamentally, it was unreasonable to bring the claim at all. Alternatively, it submits it was unreasonable to fail to engage with the Respondent's offers of settlement.

8. I reject the submission that it was unreasonable to bring the claim at all. The Claimant had a strong case of procedural unfair dismissal. What the percentage reduction for Polkey and contributory fault should be were a matter for submissions. Inevitably, there was going to be substantial reduction for both. The Respondent submits that it was inevitable that there was going to be 100% reduction for contributory fault in any event, both of the basic and the compensatory award. During the trial I struggled with whether the Polkey reduction should be 100%. In the end I was persuaded that there was a theoretical 20% chance that a final written warning might have been granted. Accordingly, the Polkey reduction was 80%. I might have been persuaded to award something of the basic award or perhaps some percentage of contributory fault short of 100% but, nonetheless, very close to 100%. In the event, I found it was 100%.

9. What is uncontroversial is that there was going to be a very heavy percentage reduction of the Claimant's compensation claim and it was inevitable that the Claimant's pursuit of reinstatement or re-engagement would fail because contributory fault, substantial contributory fault which was inevitable in this case, provided a compelling reason not to order reinstatement or re-engagement. Plainly, for excellent reasons, Mr Harris had lost all trust and confidence in the Claimant and the Claimant was, in reality, never going to be reinstated or re-engaged. Accordingly, if the Respondent made offers to settle, then the Claimant would have to engage with them; it would be unreasonable not to.

10. On 28 March 2019 the Respondent offered a drop hands settlement predicting, as it happened, accurately, that there would be a 100% reduction for contributory fault. I do not say that the Claimant was bound to accept that offer at the time. As I say, there could have been an argument along the lines I have indicated above for something of a basic award, possibly some variation to the 100% contributory fault award, albeit a percentage extremely close to that. The Claimant rejected that offer and counter offered £12,500, which were his losses up to then, plus reinstatement. That was never going to be accepted by the Respondent.

11. On 30 April 2019, the Respondent made its first offer of actual money, £5,000. That, of course, is a sum that the Claimant did not receive at the full merits hearing. He received no pounds. That £5,000 was a serious offer that needed to be engaged with.

12. On 20 May 2019 however, the Claimant repeated his offer of £12,500 plus reinstatement. On 24 May 2019, the Respondent said they could continue negotiating but the Claimant had got to drop his position of reinstatement/re-engagement. On 28 May 2019, the Claimant offered £45,000 compensation which, in effect, was 100% of his theoretical losses bearing in mind he had found alternative work. That was a wholly unrealistic offer, there was no reduction in that for contributory fault. Reductions for contributory fault were inevitable. On 3 June 2019, the Respondent offered £11,000 on the eve of the claim.

13. In my judgment, it was unreasonable of the Claimant not properly to engage with financial negotiations, realistic ones, from 30 April 2019. Had he so engaged, a settlement of the case between the figures of £5,000 and £11,000 would have been achieved well in advance of the full merits hearing. His position in negotiations was entirely unreasonable. First of all, not discounting his compensation claims, and, secondly, pursuing re-engagement and re-instatement. Both of those positions were positions no employment Tribunal was going to reach in the light of his admitted misconduct.

14. Mr Wilford, on behalf of the Claimant, points to correspondence from Mr Harris after the conclusion of the hearing in attempted support of a submission that it was not unreasonable to seek reinstatement or re-engagement. He reminds me that the Claimant's father was a 40% and, as far as I know, remains a 40% shareholder.

15. Mr Wilford points me to a letter that Mr Harris sent to Mr Ibrahim senior after the conclusion of the case. He points to two aspects of the letter as suggesting the only reasons that Mr Harris has pursued this costs application is, first of all, because Mr Ibrahim senior suggested defending the case was a waste of the Respondent's resources and so, in reaction to that, Mr Harris seeks to recover some of the Respondent's resources; and secondly, because Mr Ibrahim appears to have been willing to invest substantially into the business on condition that the Claimant was reinstated. Mr Wilford submits that this, in reality, is what it is all about.

16. In my judgment, it may well be that Mr Harris was considering waiving his costs application to maintain the peace, and it may be that once he had come to the decision that it was not going to be possible to maintain the peace, Mr Harris pursued his costs application. He did that, however, within the period he was allowed to bring the costs application. Those matters of Mr Ibrahim Senior potentially investing in the business are all matters outwith the evidence before the Tribunal and the considerations that would have been relevant to the Tribunal. Indeed, in the course of the full merits hearing the Claimant withdrew his position that he was seeking reinstatement.

17. All of those matters, as I say, are outwith what is relevant to me. What is relevant to me are the effects of the admitted misconduct and Mr Harris' view of the trustworthiness of the Claimant. Inevitably, there was not going to be reinstatement and re-engagement and inevitably, there was going to be substantial reduction to any compensation that the Claimant might otherwise have received. In the event, there was complete reduction, which was always a real possibility.

18. So, it was unreasonable of the Claimant not to engage with the settlement process from 30 April 2019 and the likelihood is that this case would have settled well before the costs of the full merits hearing were incurred for a proportionate figure which would have been somewhere between £5,000 and £11,000. That would have reflected the procedural merits of the Claimant's case although, in the event, under the microscope in the cold light of day, the judgment of the Tribunal was that it was not just and equitable to award him anything. Of that possibility, the Claimant was aware.

19. Accordingly, there was unreasonable conduct in my judgment in not engaging in the settlement process. There is causation, the full merits hearing costs would have been avoided and I exercise my discretion to award those costs against the Claimant in this case. I do not see why, the Respondent having made reasonable efforts to resolve the matter outside Tribunal, the Respondent should have to cover its final hearing costs.

20. Accordingly, the Claimant must pay the Respondent the trial costs of £6,363 within 14 days. The Claimant is not impecunious. I have been asked also by Mr Kendall to consider what other costs might have been incurred by the Respondent between 30 April 2019 and 4 June 2019. I have not been provided with a reliable CPR style costs schedule. I have however easily

been able to identify the costs of the full merits of the trial which I assess as being reasonable.

21. So, the order resulting from this costs hearing is that the Claimant must pay the Respondent £6,363 in 14 day's time.

22. I made enquiry of the Claimant's ability to pay. Whilst he initially maintained that he was being paid £20,000 a year as a courier and had cash flow challenges, upon enquiry he admitted to owning property in which he has £400,000 equity. On that basis I am satisfied that he has the means to pay the costs judgment.

Costs of the Costs Hearing

23. There then arises the questions of costs for today and I have got to apply the same tests as to whether the Claimant has behaved unreasonably by attending today, or by resisting this costs application. I am struggling with this submission on behalf of the Respondent. They have put in a costs schedule for £35,000. The schedule is not CPR compliant but, nonetheless, the figure pursued today is £35,000. At one point, counsel mentioned the possibility of restricting the application to £20,000. That is not clear from the costs' application. But, in any event, they have recovered £6,363, only. So, to my mind, it was not unreasonable of the Claimant to be here to defend this costs application. There was on this occasion, no Calderbank without prejudice save as to costs correspondence from the Respondent making it unreasonable for the Claimant to attend here. The question is whether it is unreasonable for the Claimant to attend today to resist this application. Given that the Respondent has only been successful in terms of £6,363 or so, as against an application of £35,000, or even if it were £20,000, it is not unreasonable of the Claimant to oppose this application. This is not like the County Court where costs follow the event.

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Employment Judge Smail

Dated: …28 January 2022…..……..

Sent to the parties on:

1 February 2022

For the Tribunal Office