



EMPLOYMENT TRIBUNALS

Claimant: Mrs K Clayton

Respondent: Bright Blue Foods Limited

HELD AT: Manchester

ON: 2 February 2023

(In chambers)

BEFORE: Employment Judge Porter (sitting alone)

JUDGMENT ON RECONSIDERATION

The Order for Costs made on the 25 May 2022 and sent to the parties on 8 June 2022 is hereby confirmed.

REASONS

Issues to be determined

1. This was an application for reconsideration made by the claimant, by letter dated 18 July 2022, seeking the revocation of the Costs Order made at a preliminary hearing on 25 May 2022.

Written Submissions

2. Both parties agreed that the application for reconsideration should be decided by the judge in chambers on the papers. Both parties relied upon written submissions, with documentary evidence attached to or referred to in those submissions, which the tribunal has considered with care but does not repeat here.

Evidence

3. No evidence was heard. The claimant did not provide a statement of financial means.
4. No bundle of documents was presented. The tribunal considered the documents attached to or referred to in those submissions, together with the documents on the tribunal file, including the notice of the preliminary hearing on 25 May 2022, and the written reasons for the Cost Order, dated 30 June 2022 and sent to the parties on 8 July 2022 (“the written reasons”).

The Law

5. Rule 70 Employment Tribunal Rules and Procedure. A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision (“the original decision”) may be confirmed, varied or revoked. If it is revoked it may be taken again.
6. A tribunal dealing with the question of reconsideration must seek to give effect to the overriding objective to deal with cases ‘fairly and justly’. Rule 2.
7. In **Outsight VB Ltd v Brown 2015 ICR D11** Her Honour Judge Eady QC accepted that the wording ‘necessary in the interests of justice’ in rule 70 allows employment tribunals a broad discretion to determine whether reconsideration of a judgment is appropriate in the circumstances. However, this discretion must be exercised judicially, ‘which means having regard not only to the interests of the party seeking the review or reconsideration, but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation’.
8. The tribunal has considered and where appropriate applied the rules of procedure, presidential guidance and authorities referred to in submissions.

Determination of the application

9. The claimant to a large extent relies on the same points raised at the preliminary hearing on 25 May 2022 in reply to the respondent’s application for costs. However, the claimant does raise a new point, namely, that the hearing on 25 May 2022 was a private case management hearing at which an application for strike out could not be made or considered.
10. The tribunal has therefore reviewed with care the circumstances in which the preliminary hearing was called, and the actions of the parties at that preliminary hearing.
11. The tribunal notes that the Notice of Hearing dated 29 March 2022 indicates that this was a private hearing for case management purposes

and that “At the hearing an Employment Judge will discuss the disclosure issues raised by the parties”. An Agenda form was submitted for completion by the parties.

12. The tribunal therefore agrees with the claimant that the hearing on 25 May 2022 was a private hearing, when an application to strike out could not be considered.

13. This point was not raised at the commencement of the preliminary hearing on 25 May 2022, when the claimant confirmed that the application to strike out, or for an Unless order, was pursued. Both parties indicated that they relied upon written submissions made in correspondence to the tribunal prior to the hearing and, after some brief oral submissions, the tribunal retired to reach a decision on the claimant’s application. Neither party said that this was a technical error, that the hearing was a private one and it was not possible for the application to be heard. The claimant’s representative did not, as stated now, indicate that she just wanted a discussion re disclosure before proceeding with any application at a later date. The tribunal acknowledges that the claimant’s representative did, at the commencement of the hearing, say that her goal was to understand the respondent’s disclosure procedure and that the claimant believed that the respondent had failed to disclose documents. However, the employment judge did directly ask the claimant’s representative at that point if the application for a strike out was pursued. The claimant’s representative confirmed that it was. The claimant had not, prior to the hearing, given any indication to the respondent’s representative that the application was not being pursued, that all she wanted to discuss at the listed preliminary hearing was the respondent’s disclosure procedure. It is clear that both parties attended the preliminary hearing on 25 May 2022 with the expectation that the claimant’s application to strike out would be heard.

14. It is clear therefore that the tribunal, in reaching its decision to make a Costs Order, made errors namely :

14.1. proceeding with the claimant’s application to strike out at a private hearing.

14.2. Paragraph 21.9 of the written reasons for the Costs Order, is incorrect. It is clear that the preliminary hearing was not specifically listed to consider the claimant’s application for a strike out because it was not listed for an open preliminary hearing.

15. The question is whether those errors mean that it is in the interests of justice that the Costs order be revoked.

16. The tribunal has considered all the circumstances and notes in particular as follows:

16.1. case management orders had been made at a previous private case management hearing, including Orders for disclosure ;

- 16.2. It is not the normal practise of the tribunal to hold more than one private preliminary hearing for case management purposes, especially when both parties are legally represented;
- 16.3. the claimant made an application for strike out or an Unless Order on the grounds that the respondent had failed to comply with the Order for disclosure. This application was completely without merit for the reasons set out in the written reasons;
- 16.4. the closed preliminary hearing on 25 May 2022 was listed to deal with the “disclosure issues” between the parties. Those disclosure issues had been raised by the claimant in correspondence with the tribunal, backed up with the application to strike out or for an Unless Order. If those disclosure issues had not been raised, then the preliminary hearing on 25 May 2022 would not have been listed;
- 16.5. both parties attended the preliminary hearing on 25 May 2022 in the expectation that the claimant’s allegations of failure to disclose would be considered. Both parties agreed that the claimant’s applications should be determined by the employment judge at that preliminary hearing;
- 16.6. the tribunal found that the claimant’s allegations of failure to disclose , and each of the claimant’s applications, were without merit for the reasons previously stated.

17. In all the circumstances the tribunal finds that it is clear that the closed preliminary hearing on the 25 May 2022 was listed pursuant to the claimant raising the so-called disclosure issues. The claimant made a written application to the tribunal for strike out or an Unless Order. The respondent’s representative responded to that application in writing. Both parties attended the preliminary hearing on 25 May 2022 in the expectation that the disclosure issues and applications would be heard. There were no genuine disclosure issues which required determination by an employment judge at that second case management preliminary hearing on 25 May 2022. The claimant acted unreasonably in pursuing these issues, in making allegations of failure to disclose and pursuing an application for strike out or an Unless order, which was completely without merit. Both parties were legally represented. Both have a duty to cooperate with each other. In essence, the preliminary hearing was a waste of time and costs. The fact that errors were made by the judge in the conduct of the hearing does not affect the decision that in pursuing the disclosure issues and pursuing the application the claimant acted unreasonably. It is appropriate for the tribunal to exercise its discretion and award costs for the reasons set out in the written reasons.

18. The application for revocation of the Costs Order is refused

Employment Judge Porter
Date: 6 February 2023

JUDGMENT SENT TO THE PARTIES ON :
9 February 2023

For the tribunal office

NOTE:

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.