EMPLOYMENT TRIBUNALS

Claimant: Mr D Kiernan

Respondent: Asda Stores Ltd

RECONSIDERATION JUDGMENT

Upon the claimant's application for reconsideration of the Tribunal's judgment of 16 August 2022, sent to the parties on 24 August 2022, the application is refused. The original judgment is confirmed.

REASONS

1. Following a hearing and an oral decision on 16 August 2022, the Tribunal's judgment was sent to the parties on 24 August 2022.

2. The decision of the Tribunal was that the claim stands dismissed without further order under rule 38(1) of the Employment Tribunals Rules of Procedure 2013 because the claimant did not comply by the specified date of 3 May 2022 with the unless order made on 11 April 2022 (sent to the parties on 19 April 2022). An oral application for relief from sanctions was refused on the ground that it was not in the interests of justice to set the unless order aside or to reinstate the claim.

3. The claimant applied for reconsideration of the decision on 5 September 2022. The grounds of that application were set out in a document comprising 2 pages.

4. The application was referred to the judge on 20 September 2022. The judge considered the reconsideration application in chambers on 22 September 2022.

The rules of procedure

5. Rule 70 provides that a Tribunal may on the application of a party reconsider any judgment where it is necessary in the interests of justice to do so. On

reconsideration, the original decision may be confirmed, varied, or revoked. If it is revoked, it may be taken again.

6. The application complies with the procedural requirements of rule 71. It is usual for the application to be considered by the judge who took the original decision. See rule 72(3).

7. Rule 72(1) requires the judge to consider the application. If the judge considers that there is no reasonable prospect of the original decision being varied or revoked, the application shall be refused, and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the judge's provisional views on the application.

The application

8. The application is in five parts, as follows.

9. First, the claimant objects that the respondent's counsel's written skeleton argument was only provided to him one hour before the hearing on 16 August 2022.

10. There was no order to produce or to exchange skeleton arguments or written submissions. Counsel would have been free to have made wholly oral submissions containing the same points as are contained in the written document. There was no procedural irregularity. There was also no inequality of arms given that the claimant had been given notice of the submissions the respondent wished to rely upon, and he had ample opportunity to make his own submissions.

11. Second, the claimant objects to the respondent relying upon delay in the matter coming to a hearing, when the claimant had not been at fault for any such delay.

12. Delay in a matter coming to a hearing is but one consideration in case managing the proceedings. As this hearing was concerned with whether an unless order had not been complied with, any delay in the matter coming to a final hearing was a relatively small consideration and it did not weigh heavily with the Tribunal. The question was whether there had been material compliance with the unless order and, if not, whether there might be relief from sanctions.

13. Third, the claimant says that any delay in providing information required by the unless order was unintentional, but it was due to a misunderstanding of what was required.

14. The Tribunal accepts that the claimant and his lay representative are not legally trained. However, what was required of the claimant by the unless order was clear, and it had been explained more than adequately. The information that had been provided in any event fell short of what the unless order required.

15. Fourth, the claimant asserts that the respondent had failed to comply with case management orders and so neither party should be penalised.

16. This is a false analogy. Parties often fail to comply with case management orders in substance or in a timely manner. If they do so, suitable applications can be made to the Tribunal to enforce its orders. However, an unless order is of a different kind. It is made where an earlier order has failed to bring about the case management outcome that the order was intended to have. An unless order cannot be ignored because it is made clear that non-compliance will lead automatically to the claim (or the response, as the case might be) being struck out without further order. Whether the other party may or may not have been in breach of case management orders is not a consideration where compliance with an unless order is in issue.

17. Fifth, the claimant says that no consideration has been given to the substance and merits of the claim against the respondent.

18. Again, this is not a relevant consideration when dealing with non-compliance with an unless order. The question is whether there has been material compliance with the unless order. If there has not been, as was the case here, then the consequences of rule 38(1) are clear, subject only to an application for relief from sanctions under rule 38(2).

Decision

19. The judge does not consider that it is necessary in the interests of justice to reconsider his judgment made under rule 38. He considers that there is no reasonable prospect of the original decision being varied or revoked. The application for reconsideration is refused.

Judge Brian Doyle
DATE: 22 September 2022

JUDGMENT SENT TO THE PARTIES ON
3 October 2022

FOR THE TRIBUNAL OFFICE