EMPLOYMENT TRIBUNALS

Claimants: Mr J Mildenhall

Respondent: Micro Focus Ltd

Heard at: Exeter, in person **On:** 10 May 2024

Before: Employment Judge Volkmer
Ms Lloyd-Jennings
Mr Ley

Appearances

For the Claimant: Ms Hornblower (Counsel)

For the Respondent: Mr Milsom (Counsel)

RESERVED JUDGMENT

ON APPLICATION FOR RECONSIDERATION

The judgment of the Tribunal is that the Respondent's application for reconsideration is refused because there is no reasonable prospect of the decision being varied or revoked.

REASONS

BACKGROUND

1. By a claim form presented on 30 June 2022 the Claimant brought the following complaints:
    a. unfair dismissal;
    b. a redundancy payment;
    c. a protective award for failure to consult under s. 188 of Trade Union and Labour Relations (Consolidation) Act 1992 ("TULR(C)A").

2. A liabilities and remedies hearing took place before the Tribunal in Exeter in person on 17 to 19 May 2021. The Claimant's claim for a redundancy payment was formally withdrawn at the beginning of the hearing and was therefore dismissed upon withdrawal.

3. The Claimant's complaints of unfair dismissal and a failure to collectively consult were upheld and the Tribunal ordered the Respondent to pay the Claimant a compensatory award of £63,890.46 (gross) and a protective award of £53,742 (gross).

4. A corrected judgment was sent to the parties on 31 July 2023, and written reasons were sent to the parties on 3 August 2023 (the "Written Reasons").

5. The Respondent submitted an appeal of the Tribunal's decision on dated 11 September 2023. Ground One of the Notice of Appeal set out the following.

    "*The Claimant made a number of important concessions, none of which were recorded by the ET:*
    i. The Respondent had fully complied with its disclosure obligations and a specific disclosure request. The Claimant accepted the Respondent's assertion that there are no references to redundancies in any Board meetings nor were there any strategy documents indicative of a proposal to dismiss 20 or more;
    ii. The Respondent did not have an overall redundancy proposal with a headcount target imposed from above;
    iii. Whilst each business was given a cost reduction figure, it was up to the individual areas to decide how to make those costs;
    iv. Para.11 of Mr Luthersson's witness statement was true: "It is important to note that the focus of the reorganisation was about cutting costs and driving efficiency and were never about reducing headcount. I was given a target budget that included a costs reduction figure that I had to meet and I then had to determine how to do this. As such, when I was looking at cutting costs I considered a number of different ways I could do this including process automation, funding for people from other parts of the business, cancelling contractors, cancelling any open vacancies, moving the location of roles, looking at natural reduction in headcount and not backfilling positions from people who left, and looking at other areas where budgets are assigned to see if we could cut costs there (e.g. travel budgets, overtime payments). Of course, as part of the costs cutting exercise, I also had to consider redundancies

but this was really a last resort and there was never a proposal that a certain number of people or roles needed to be deleted; it was always just about financial savings. This meant that proposals for any redundancies came in a piecemeal fashion from the bottom up (i.e. from me to Mike) rather than a top-down directive. This is also why there is no record of any comprehensive strategy or planning documentations on redundancies because it was fundamentally a cost cutting exercise, and there was no formal redundancy proposal per se;"
v. There were multiple strands of redundancy consultations which had nothing to do with the restructure (e.g. by reason of outsourcing);
vi. Several individuals in his list of 45 personnel were not proposed to be dismissed as redundant. Some transferred into other businesses. The list of 45 comprised individuals from the Respondent as well as two discrete legal entities employing many of the UK employees: Micro Focus Software Ltd and Autonomy Systems Ltd.

6. At the sift stage, HHJ Barklem made the following order dated 11 January 2024:

    1. "*This prospective appeal is before me for sift. Ground one asserts that the ET failed to record (and, inferentially, to heed) certain concessions said to have been made by the Claimant. The manner in which those concessions were said to have been before the ET is not stated. The ground also asserts the truth of para 11 of Mr Luthersson's witness statement, again without stating the basis upon which the EAT should take this assertion as read.*

    2. *From the Written Reasons it appears that the Appellant faced evidential difficulties due to the inability of the witness Mrs Friend to substantiate or explain evidence which she had been called to given and of which she had little or no personal knowledge.*

    3. *It is within the unique knowledge of the ET, and not the EAT to explain how the material asserted to have been overlooked, if accepted, alters the overall evidential position in the Appellant's favour.*

    4. *It seems to me that the more logical step for the Appellant to have taken would have been to seek reconsideration. The ET could then have explained the reasons for it having taken the view that it did, and state whether it agrees with the assertions advanced on appeal."*

7. The Respondent applied for reconsideration on 31 January 2024, with further clarification provided on 8 February 2024. The Claimant provided a response on 23 February 2024.

8. The Tribunal heard submissions from counsel for each party and considered a Hearing Bundle of 439 pages.

THE LAW

9. Under Rule 71 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the "Tribunal Rules") an application for reconsideration under Rule 70 must be made within 14 days of the date on which the decision (or, if later, the written reasons) were sent to the parties.

10. Under Rule 5 the Tribunal may, on its own initiative or on the application of a party, extend or shorten any time limit specified in the Rules or in any decision, whether or not (in the case of an extension) it has expired.

11. The grounds for reconsideration are only those set out in Rule 70, namely that it is necessary in the interests of justice to do so.

12. The Employment Appeal Tribunal ("the EAT") determined in *Outasight VB Ltd v Brown 2015 ICR D11, EAT* that:

> "*The interests of justice have thus long allowed for a broad discretion, albeit one that 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*."

13. The EAT in *Trimble v Supertravel Ltd [1982] ICR 440* decided (in relation to a previous but analogous version of the rules) that if a matter has been ventilated and argued then any error of law falls to be corrected on appeal and not by review. The same principles were applied by the EAT in *Ebury Partners UK Ltd v Acton Davis 2023 IRLR 486, EAT*, per HHJ Shanks:

> "*The employment tribunal can therefore only reconsider a decision if it is necessary to do so "in the interests of justice." A central aspect of the interests of justice is that there should be finality in litigation. It is therefore unusual for a litigant to be allowed a "second bite of the cherry" and the jurisdiction to reconsider should be exercised with caution. In general, while it may be appropriate to reconsider a decision where there has been some procedural mishap such that a party had been denied a fair and proper opportunity to present his case, the jurisdiction should not be invoked to correct a supposed error made by the ET after the parties have had a fair opportunity to present their cases on the relevant issue. This is particularly the case where the error alleged is one of law which is more appropriately corrected by the EAT.*"

14. More recent case law suggests that the "interests of justice" ground should not be construed as restrictively as it was prior to the introduction of the "overriding objective" (which is now set out in Rule 2). This requires the tribunal to give effect to the overriding objective to deal with cases fairly and justly. As confirmed in *Williams v Ferrosan Ltd [2004] IRLR 607 EAT*, it is no longer the case that the "interests of justice" ground was only appropriate in exceptional circumstances. However, in *Newcastle Upon Tyne City Council v Marsden [2010] IRLR 743*, the EAT confirmed that it is incorrect to assert that the interests of justice ground need not necessarily be construed so restrictively, since the overriding objective to deal with cases justly required the application of recognised principles. These include that there should be finality in litigation, which is in the interest of both parties.

TIME LIMITS

15. The reconsideration application was made on 31 January 2024, which is outside of the 14 day time limit from the date of the written reasons (3 August 2023) set out in

Rule 71 of the Tribunal Rules. However, the Tribunal exercised its discretion to extend time for the reconsideration application in light of the Order of the EAT suggesting such application be made.

DISCUSSIONS AND CONCLUSIONS

i. The Respondent had fully complied with its disclosure obligations and a specific disclosure request. The Claimant accepted the Respondent's assertion that there are no references to redundancies in any Board meetings nor were there any strategy documents indicative of a proposal to dismiss 20 or more;

16. The Tribunal did not make a finding regarding whether or not the Respondent had complied with its disclosure obligations and a specific disclosure request. This was not a matter that the Tribunal was asked to determine. There were discussions at the beginning of the hearing as to whether there were any preliminary matters to be dealt with, and no application made in this respect. As such it was not a matter which fell to be determined by the Tribunal.

17. The Tribunal does not agree that the Claimant accepted the Respondent's assertion that there are no references to redundancies in any Board meetings nor were there any strategy documents indicative of a proposal to dismiss 20 or more. The Tribunal's notes of cross examination accord with that put forward by the Claimant, namely that the Claimant accepted that <u>if there were no documents</u> which confirmed a certain headcount reduction was required then as a matter of logic, there would be nothing to disclose. This is not an acceptance that there are no such documents, merely an acceptance of a point of logic that if there are none, they could not be disclosed.

18. The core assertion being made by the Respondent here is that there were no internal documents created by the Respondent which referred to a proposal to dismiss 20 or more employees. The Tribunal based its decision on the evidence it had before it, and as such, on the basis that there were no such Board minutes or strategy documents regarding any redundancy proposals, or setting out the number of employees potentially affected by redundancy proposals.

19. The Tribunal considers that this matter was not overlooked by it but rather expressly considered in its decision. This referred to in the Written Reasons:

    a. in paragraph 23, which refers to a complete lack of factual evidence put forward by the Respondent;
    b. in paragraph 24, which states "There were no board minutes showing any record of the Respondent tracking the number of employees affected";
    c. in paragraph 31, which sets out the Tribunal's finding that the Respondent was simply not keeping track of the number of employees potentially affected by the redundancy proposals, if it had been, it would have adduced evidence of the same.

20. The Tribunal considered that, even in the absence of a board minute or strategy document which expressly set out a proposal to dismiss 20 or more employees, on the balance of probabilities, based on the totality of the evidence before the Tribunal,

there had been such a proposal. This is set out at paragraph 30 of the Written Reasons.

ii. The Respondent did not have an overall redundancy proposal with a headcount target imposed from above;

iii. Whilst each business was given a cost reduction figure, it was up to the individual areas to decide how to make those costs;

21. These two points are accepted as being a fair representation of the position before the Tribunal. The Tribunal found that what had been imposed from above was a requirement to remove $400 to $500million of gross annual recurring cost, with a budget of $200 million for settlement packages in relation to associated redundancies (paragraph 16 of the Written Reasons). Internal functions were tasked with the details of how they would make the relevant costs savings for their functions, but it was inevitable that redundancies would be required to make such a large saving (paragraph 17 of the Written Reasons). As reflected in the written reasons, these points were taken into account by the Tribunal in making its determination.

22. The Tribunal found that the cost reduction figure announced in September 2021 had, by mid-January 2022, crystalised into a proposal to dismiss more than 20 employees within a 90 day period, see paragraphs 30 and 42 of the Written Reasons.

iv. Para.11 of Mr Luthersson's witness statement was true

23. This is accepted insofar as it is summarised by points ii and iii above. The Tribunal made a finding that this was a cost cutting exercise of such proportion that significant redundancies were inevitable, with this being reflected by the budget of $200 million for settlement packages (paragraph 17 of the Written Reasons).

24. The last sentence quoted from Mr Luthersson's statement refers to there being no formal redundancy proposal "per se". The Tribunal accepted Mr Luthersson's evidence that in November 2021, there had been no firm proposal (paragraph 20 of the Written Reasons), however the plans had solidified and crystalised to form a proposal for Mr Luthersson's team by mid January 2022 (paragraph 21 of the Written Reasons). As such the last sentence was true at a certain point in time, but this changed as plans crystallised, as set out in the Tribunal's findings of fact.

v. There were multiple strands of redundancy consultations which had nothing to do with the restructure (e.g. by reason of outsourcing);

25. This is not a fair representation of the facts before the Tribunal. The Respondent asserts that this was not disputed in cross examination. The Claimant was asked in cross examination whether he was aware that there were other consultations going on which may have led to redundancies. He stated that he believed that there were. The Tribunal's note of this does not record a reference in cross examination to this being nothing to do with the restructure or being by reason of outsourcing.

26. This line of questioning was not then linked back to the Claimant's analysis of 45 individuals. Nor did the Respondent adduce evidence showing that the Claimant had

incorporated individuals subject to other consultations within his table. As such, the Tribunal considers that this assertion would not change the findings of fact made by the Tribunal.

vi. Several individuals in his list of 45 personnel were not proposed to be dismissed as redundant. Some transferred into other businesses. The list of 45 comprised individuals from the Respondent as well as two discrete legal entities employing many of the UK employees: Micro Focus Software Ltd and Autonomy Systems Ltd.

27. It is accepted that the Claimant's evidence related to 45 individuals, which included individuals who were being considered for redeployment or transfers. This was taken into account in the findings made by the Tribunal (see paragraph 30 of the Written Reasons) that more than 20 employees were proposed to be dismissed as redundant.

28. The Respondent's "summary table" referred to different employing entities, however in the absence of any witness who could explain its provenance or accuracy, the Tribunal determined that it could not put any weight on the table (see paragraphs 25 and 27 of the Written Reasons). The Tribunal took into account that there may have been different legal entities as employers, however the Tribunal found that the Respondent operated as the de facto employer of all UK staff, see paragraph 43 and 44 of the Written Reasons.

OUTCOME

29. For the reasons set out above, the Tribunal considers that there is no reasonable prospect of the decision being varied or revoked. The assertions put forward by the Respondent were taken into account at the time and/or would not have changed the Tribunals findings of fact and determination.

Employment Judge Volkmer

Date 15 May 2024

SENT TO THE PARTIES ON

4th June 2024

FOR EMPLOYMENT TRIBUNALS