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 COSTS

The Judgment of the Tribunal is that the Respondent is ordered to pay to the Claimant the sum of £2,000 plus VAT in costs.

REASONS

BACKGROUND

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

2. The Claimant's claim for a redundancy payment was formally withdrawn at thebeginning of the hearing and was therefore dismissed upon withdrawal.

3. A liabilities and remedies hearing took place before the Tribunal in Exeter in personon 17 to 19 May 2019. The Claimant's claims 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. By letter dated 30 June 2023 (page 261) the Claimant made an application that theRespondent pay his costs of £22,060 plus VAT on the grounds that the Respondent had behaved unreasonably and that the Respondent had no reasonable prospects of successfully defending the Claim. The Respondent wrote opposing the application on 7 July 2023 (page 272).

5. The Tribunal considered a Costs Hearing Bundle of 439 pages, as well as writtenand oral submissions from both parties.

FINDINGS OF FACT

Unreasonable Conduct

6. The factual position was not in dispute between the parties, I set out the Tribunal'sfindings as follows.

7. The Claimant made a voluntary disclosure request on 8 September 2022, theRespondent did not provide certain documentation in response to this, including the "master spreadsheet". This led to the Claimant making a formal application for a disclosure order on 29 November 2022, supported by witness evidence from the Claimant in relation to the 'master spreadsheet' document on the basis that he knew it existed.

8. During the first Preliminary Hearing on 7 December 2022, the Respondent concededthat it had no objection to the disclosure of the 'master spreadsheet' document. Disclosure of the 'master spreadsheet' was ordered by the Tribunal. The Respondent disclosed the master spreadsheet on 21 December 2022, but it was heavily redacted with employee names removed, making it much more difficult for the Claimant to track individuals. The names were relevant to the Claimant's claim because he was seeking to establish the number of employees who had been dismissed for his collective redundancy complaint.

9. In the first Preliminary Hearing on 7 December 2022 Employment Judge Liveseyalso made the following order, recorded at paragraph 10 of the Case Management Order ("CMO"):
   "10. *The Respondent must write to the Tribunal and the other side by 21 December 2022 with the following further information:*
   10.1 the number of employees that it dismissed and/or were redeployed and/or who experienced changes to their terms and conditions as a result of the restructuring exercise which commenced in September 2021 showing;
   10.1.1 The establishments at which they were employed;
   10.1.2 The dates of any dismissals, redeployments and/or changes."

10. On 21 December 2022, the Respondent sought to comply with the CMO by servinga summary table, listing the number of employees who were either made redundant, left voluntarily (after a proposed restructuring of their role) or were redeployed, and the months in which these took place. No information was provided in respect of any differing establishments between the employees, implying that 'establishment' was no longer a point in issue.

11. On 29 March 2023, the day upon which the parties were due to exchange witnessstatements, the Respondent sent a different version of the summary table, this time asserting that the employees referred to were in fact employed by three different legal entities only one of which was the Respondent.

12. The Claimant delayed exchange of witness statements and requested additionaldisclosure of the raw data underlying the summary table. The Respondent resisted this.

13. The Claimant made a specific disclosure application on 7 April 2023 for anunredacted version of the master spreadsheet and for data underlying the summary table, and an emergency preliminary hearing was convened on 10 May 2023. The Claimant's application was upheld.

14. The Claimant amended his witness statement to take into account the newinformation he received as a result of the above.

15. The Respondent's witness, Lucy Friend gave written witness statement about theaccuracy of the 'summary table', which stated that "…*I can confirm that the table at page 173 shows the total number of people made redundant, redeployed or who left voluntarily throughout the whole of Micro Focus' operations in the UK*." Under cross examination, however, Ms Friend admitted that she had no personal knowledge of the creation of the table or the data underlying it. In written witness evidence Ms Friend stated that a Redundancy Policy had been produced by the Claimant but accepting under examination that the policy had in fact been produced by the Respondent itself as part of the disclosure process.

16. In relation to the Respondent's witness Sigurjon Lutherson it was revealed for thefirst time in written witness evidence that that Mr Lutherson had privately sought stakeholder feedback as part of a comparison exercise as between the Claimant and Mr De Nazareth.

No Reasonable Prospect of Success

17. Prior to the commencement of the proceedings, a 'Letter Before Claim' dated 4 May2022 was sent from the Claimant's legal representative to the Respondent (page 274). This set out in detail a timeline and the factual assertions relied on by the Claimant. The Respondent had knowledge of the following points:
    a. there had been no centralised redundancy process;
    b. there was a spreadsheet identifying individuals for potential redundancy longbefore any consultation;

c. there was no formal selection process as between the Claimant and Mr De Nazareth;
d. there had been a private comparison exercise (as per Mr Lutherson'sevidence) as between the Claimant and Mr De Nazareth;
e. the Claimant's team was moved to being under Mr De Nazareth before hehad been put at risk of redundancy;
f. Ms Friend had not followed up on the Claimant's challenges to the fairness ofthe redundancy;
g. there had been no right of appeal;
h. the Claimant had informed the Respondent that he had contemporaneousnotes of all key meetings with Mr Lutherson;
i. there were documents in which the IT department designated the Claimantas a leaver before the conclusion of the redundancy process.

THE LAW

18. Rule 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the "Tribunal Rules") provides:

1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that –

a) a party (or that party's representative) has acted vexatiously, abusively, disruptivelyor otherwise unreasonably in either the bringing of the proceedings (or part) or the way the proceedings (or part) have been conducted; or

b) any claim or response has no reasonable prospect of success;".

19. *Rule 78 provides: "1) A costs order may –*

a) Order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party."

20. Although the Tribunal Rules provide the Tribunal with the power to make costs awards, such awards in Employment Tribunal proceedings are the exception rather than the rule (*Gee v Shell UK Ltd [2003] IRLR 82*).

21. *Milan v Capsticks Solicitors LLP & Others UKEAT/0093/14/RN* sets out a structured approach to be taken in relation to an application for costs where the then President of the EAT, Langstaff J, described the exercise to be undertaken by the Tribunal as a 3 stage exercise at paragraphs 52:

"*There are thus three stages to the process of determining upon a costs order in a particular amount. First, the tribunal must be of the opinion that the paying party has behaved in a manner referred to in [Rule 76]; but if of that opinion, does not have to make a costs order. It has still to decide whether, as a second stage, it is "appropriate" to do so. In reaching that decision it may take account of the ability of the paying party to pay. Having decided that there should be a costs order in some amount, the third stage is to determine what that amount should be. Here, covered by Rule [78], the tribunal has the option of ordering the paying party to pay an amount to be determined by way of detailed assessment in a county court*."

Unreasonable conduct

22. The EAT decided in *Dyer v Secretary of State for Employment EAT 183/83* that "unreasonable" has its ordinary English meaning and is not to be interpreted as if it means something similar to "vexatious". It will often be the case, however, that a Tribunal will find a party's conduct to be both vexatious and unreasonable. Whether conduct is unreasonable is a matter of fact for the Tribunal to decide.

23. In *McPherson v BNP Paribas (London Branch) [2004] EWCA Civ* 569 Mummery LJ stated:

    [40] … "*The principle of relevance means that the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion, but that is not the same as requiring BNP Paribas to prove that specific unreasonable conduct by Mr McPherson caused particular costs to be incurred.*"

24. In *Yerrakalva v Barnsley Metropolitan Borough Council and another [2012] ICR 420*, CA Lord Justice Mummery held:
    "*The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and ask whether there was unreasonable conduct by the Claimant in bringing and conducting the case and, in doing so, identify the conduct, what was unreasonable about it and what effects it had." Yerrakalva* also made clear that although there was no requirement for the Tribunal to determine whether there is a precise causal link between the unreasonable conduct in question and the specific costs being claimed, that did not mean that causation is irrelevant.

No reasonable prospects

25. The focus should be on the claim or response itself (*Hosie and ors v North Ayrshire Leisure Ltd EAT 0013/03*).

26. The threshold of "no reasonable prospects" is a high one. In a case regarding thesame test in relation to strike out, The Honourable Lady Smith emphasised the point as follows: "*the tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the word "no" because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects.*"

27. The Tribunal must not be influenced by the hindsight of taking into account thingsthat were not, and could not have reasonably been, known at the start of the litigation. "*Ordinary experience of life frequently teaches us that that which is plain for all to see once the dust of battle has subsided was far from clear to the combatants when they took up arms*." (*Maler v Robertson [1974] ICR 72*)

28. However, the Tribunal may have regard to any evidence or information which castslight on what was, or could reasonably, have been known, at the start of the litigation: *Radia v Jefferies International Ltd [2020] IRLR 431, EAT*.

29. In *Lodwick v Southwark London Borough Council [2004] ICR 884*, CA, the Court of Appeal determined that at both stages of the Tribunal's discretion to make a costs award, the fundamental principle that costs awards are compensatory not punitive, must be observed.

CONCLUSIONS

30. There are three stages to be applied:
    a. finding whether the Respondents have behaved unreasonably in the way the proceedings have been conducted and/or whether there were no reasonable prospects of success;
    b. considering whether it is appropriate to make a costs order; and
    c. considering whether the Tribunal should exercise my discretion in making such an order.

Stage 1: no reasonable prospect of success

31. To make a finding that a response has no reasonable prospect of success is a highbar. The scope of the "range of reasonable responses" test in an unfair dismissal is relatively broad. The Tribunal rejected the Respondent's defence, but that is not the same as finding that it had no reasonable prospect of succeeding.

32. The Tribunal considered that it might be correct to say that if the totality of evidencehad been properly analysed by the Respondent, the merits would have been assessed as more likely to fail than to succeed. However the Tribunal considered it would be incorrect to say that there were no reasonable prospects of success. Arguable points were made in relation to selection pools, consultation, and in relation to the Claimant's ability to meet the burden of proof regarding collective consultation. It is also of importance that there was a 35% Polkey reduction made by the Tribunal. The Claimant's application for costs does not go any further under this head, as it cannot be said that there were "no reasonable prospects" of defending the claim.

Stage 1: unreasonable conduct

33. The Tribunal considered that, whilst parties are encouraged to cooperate with oneanother, there is no obligation to provide documents in response to a request for voluntary disclosure. In the ordinary course, parties wait until the issues have been clarified at a preliminary hearing, and a disclosure order has been made by the Tribunal. Therefore, the Respondent's conduct in this respect was not unreasonable.

34. In relation to the evidence of Lucy Friend, it was clear that a statement in writtenwitness evidence that the "summary table" put forward by the Respondent was accurate, was not underpinned by any personal knowledge of how it was compiled or which data it was drawn from, or indeed whether that data was accurate.

On that basis, the Tribunal was not able to put any weight on the table or indeed the evidence of Ms Friend that it was accurate. However, there was no finding of dishonesty or similar. It is often the case that witnesses undermine their written witness statement in cross examination, indeed that is the aim of the cross examination in most cases. Looking at all the circumstances of the case, the Tribunal did not consider this conduct to be unreasonable.

35. In relation to the evidence of Sigurjon Lutherson, the Claimant says that it wasunreasonable conduct to have put a contradictory position forward regarding the need for a selection pool. On the one hand the Respondent's position was that the Claimant and Mr De Nazareth were not comparable, but then Mr Lutherson gave evidence that he had sought stakeholder feedback as part of a comparison exercise between the two. This evidence, which was not supportive of the Respondent's case on selection pooling, was taken into account when determining liability. Looking at all the circumstances of the case, the Tribunal did not consider this conduct to be unreasonable.

36. With regard to the way in which the proceedings were conducted by the Respondent,the Tribunal made a finding above that the following conduct of the Respondent was unreasonable:
    a. failing to provide an unredacted version of the "master spreadsheet" by 18January 2023 as required by the order of EJ Livesey on 7 December 2022 or on request of the Claimant after that and thereby requiring the Claimant to make the specific disclosure application of 7 April 2023. It should have been clear to the Respondent that such redactions were entirely inappropriate;
    b. failing to comply with paragraph 10.1.1 of the CMO following the hearing on 7December 2022, which required disclosure of the relevant establishments. This was ordered to take place by 21 December 2022, but was not disclosed by the Respondent until 29 March 2023, the day on which witness statements were due to be exchanged. Naturally the Claimant assumed that the Respondent had complied with the order and that it could rely on the table disclosed on 21 December 2022, which contained no reference to differing establishments, which gave rise to the natural assumption that establishment was not in dispute; and
    c. not providing further documentation voluntarily which was subject to the ongoingduty of disclosure (i.e. the unredacted master spreadsheet and contracts of employment sought), thereby requiring the Claimant to make the specific disclosure application of 7 April 2023.

Stage 2: Is a Costs Order Appropriate?

37. Having found that some of the conduct on behalf of the Respondents wasunreasonable, there is no requirement for this Tribunal to award costs. There are a number of factors to consider, including the nature, gravity and effect of the unreasonable conduct, although there is no principle that costs should only be awarded where they can be shown to have been incurred by specific instances of unreasonableness.

38. The Tribunal considered the circumstances as a whole, including the mattersoutlined above and the Respondent's genuine engagement in settlement discussions with the Claimant.

39. In this case, the Tribunal find that it is appropriate to award costs against theRespondents in respect of the conduct outlined above. The conduct outlined above created additional unnecessary cost for the Claimant in that he needed to:

    a. amend his witness statement in light of new information regardingestablishment and an unredacted master spreadsheet;
    b. make a further specific disclosure application on 7 April 2023;
    c. prepare for and attend the additional Preliminary Hearing on 10 May 2023.

40. In deciding whether costs should be awarded, the Tribunal is permitted to take intoaccount the Respondent's ability to pay. However, there were no submissions or evidence in respect of their ability to pay and, therefore, this does not affect the decision in finding that it is appropriate to award costs.

Stage 3: Should the Tribunal Exercise its Discretion?

41. Having found that there was unreasonable conduct and that it is appropriate to awardcosts, the Tribunal is still required to address its mind to whether it should exercise its discretion in awarding costs in this matter. In other words, the Tribunal must decide whether it is just to exercise the power to award costs. The basic principle is that the purpose of an award of costs is to compensate the party in whose favour the order is made, not to punish the party ordered to pay the costs. Looking at all the evidence in the round, the Tribunal find that is just to award costs in this matter to take into account the conduct outlined above and the effect on the Claimant. Given the nature of the findings of unreasonableness when considered in the context of the case overall, the Tribunal makes an award of costs in the sum of £2,000 plus VAT.

42. Whilst the Claimant submitted a costs schedule in the sum of £5,032 plus VATdealing solely with what was said to be the disclosure issue, the Tribunal has discounted this because it has found the Respondent's conduct prior to the hearing of 7 December 2022 not to be unreasonable.

Employment Judge Volkmer

Date 16 May 2024

SENT TO THE PARTIES ON

4th June 2024

FOR EMPLOYMENT TRIBUNALS