EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4107109/2020, 4107110/2020, 4107111/2020, 4107112/2020, 4107113/2020

Public Final Hearing held in Glasgow by Cloud Based Video Platform (CVP) on 5-6 July 2021

Employment Judge Mr. A. Tinnion

Mr. Gary Thomson	**Lead Claimant** **Represented by** **Mr. Briggs, Solicitor**
Hoyer Petrolog UK Limited	**Respondent** **Represented by** **Mr. Harte, Solicitor**

RESERVED JUDGMENT

For the reasons given below, the Tribunal's judgment is that:

1. The Claimants' complaints of 'automatic' unfair dismissal under reg 7(1) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 are not well-founded and are dismissed.

2. The Claimants' complaints of 'ordinary' under dismissal under s.98 of the Employment Rights Act 1996 are not well-founded and are dismissed.

REASONS

Findings of fact

1. The material facts of this case are largely not in dispute. The Tribunal makes the following findings on the balance of probabilities (including those findings set out in the other sections of these Reasons).

Respondent

2. Respondent Hoyer Petrol UK Limited (**Respondent**) is a limited company incorporated in England and Wales under company no. 01164085 whose business includes (but is not limited to) the collection and delivery of aviation and 'retail' fuel to its clients who operate from airports in England and Scotland and petrol stations/forecourts located throughout the UK.

3. Prior to the 2020 furlough arrangements described below, the Respondent employed fuel delivery drivers falling into the following groups:

   a. the Claimants – drivers working exclusively on the 'WFS Contract' (for which, see paragraphs 5-12 below);

   b. AirBP drivers - drivers working exclusively on the Respondent's aviation fuel delivery contract with AirBP (BP business focusing on aviation fuel);

   c. "Flexifleet drivers" – a larger, more flexible group of drivers who could, and did, deliver fuel to petrol stations/forecourt clients like Esso, Tesco and BP, as well as deliver aviation fuel to clients WFS and AirBP.

4. It is not in dispute that (a) proper training is required in order to safely conduct aviation and non-aviation fuel delivery (the duties and safety requirements of those two posts are not interchangeable, and different customers in the same industry (eg, aviation) may have different technical/safety requirements (b) in 2020, after the Covid-19 pandemic began, it was not possible to safely conduct driver training to eg train an aviation fuel delivery driver to work as a

retail fuel delivery driver due to social distancing requirements (learner and teacher drivers could not sit in the same cab together whilst maintaining social distancing).

Claimants

5. The five Claimants in this case are (i) Mr. Gary Thomson (**Mr. Thomson**), lead claimant (ii) Mr. Ian Stewart Gatens (iii) Mr. Gerard Kelly (iv) Mr. Scott Docherty (v) Mr. John Graham. Mr. Thomson's period of continuous employment began on 9 May 2012.

6. Prior to 1 May 2018, the Claimants were employees of another fuel delivery business called 'Lewis Tankers'. Until it lost the contract to the Respondent, Lewis Tankers had a contract (**WFS Contract**) with client 'World Fuel Services' (**WFS**) which required Lewis Tankers to deliver aviation fuel to UK airports in Aberdeen, Edinburgh, Glasgow and Newcastle.

7. Although there was nothing in the express terms of their employment contracts to this effect, as a matter of fact and practice in the period preceding the 2018 TUPE transfer referred to below the Claimants worked exclusively on the WFS Contract, regarded themselves as the 'core' WFS aviation fuel delivery team/group (along with a colleague), and did not do any non-WFS fuel delivery work (ie, delivery work for other clients in the aviation sector or clients in the retail sector). The Claimants formed an organised grouping of employees for the purpose of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (**TUPE 2006**).

2018 TUPE transfer

8. In 2018, Lewis Tankers lost the WFS Contract to the Respondent – WFS became the Respondent's client. It is not in dispute that on 1 May 2018, following that service provision change, the Claimants' contracts' of employment transferred to the Respondent under reg 4(1) of TUPE 2006. According to Mr. Thomson, the contracts of a total of 13 Lewis Tankers' employees TUPE-transferred to the Respondent – 6 WFS drivers in

Grangemouth (5 of whom are now the Claimants), and a further 7 drivers based around Newcastle Airport.

9. Following that TUPE transfer, the Claimants – now employees of the Respondent - continued to work on the WFS Contract. Whatever the contractual arrangements with Lewis Tankers may have been, so far as the Respondent's own contract with WFS is concerned, the fuel the Claimants delivered was the fuel which WFS ordered as and when required – there was no contractual obligation on WFS' part to order a minimum quantity of fuel from the Respondent, nor was there any obligation on WFS' part to order/have fuel delivered on any specific dates, periods or occasions.

10. It is not in dispute that during the entirety of their period of employment by the Respondent (a) the Claimants worked for WFS only, delivering aviation fuel from Grangemouth to WFS at Aberdeen, Edinburgh, Glasgow and Newcastle airports (b) the Claimants did not deliver fuel to any other aviation fuel clients of the Respondent, eg AirBP (c) the Claimant did not deliver retail fuel to any of the Respondent's retail clients, eg, Esso, BP or Shell.

11. It is also not in dispute that in the period 1 May 2018 – 1 February 2020, the Claimants did not consent to doing any fuel delivery work of any type for any client of the Respondent other than aviation fuel to WFS. When the Claimants were mistakenly asked/rota-ed to deliver fuel to a client other than WFS, they refused to do so, and did not do so. Mr. Thompson's evidence that "*none of the five of us worked anywhere other than on the WFS contract throughout our time at Hoyer, but I do not see how we could have said no*" omits the fact that the Claimants had in fact said no to the Respondent in the past.

12. The question arises as to why the Claimants were so insistent on doing solely WFS work (at least prior to 2020). The answer is that it was the Claimants' view – one they were entitled to adopt, and probably a reasonable view in the circumstances – that the chances of their employment contracts/employment 'TUPE-transferring' to a new business if the Respondent lost the WFS Contract would be significantly increased if the Claimants remained a

cohesive grouping of drivers doing solely WFS aviation fuel delivery work. The Claimants knew from experience that the Respondent could lose its WFS Contract to another business, just as Lewis Tankers had lost its WFS Contract to the Respondent. The Tribunal does not accept the Claimants' suggestion that their pre-Covid position that they would only do aviation fuel delivery work for WFS was a mere "*negotiating tactic*". When they told the Respondent they would only do WFS work, they meant it.

Events following 2018 TUPE transfer, preceding 2020 Covid-19 pandemic

13. Between 1 May 2018 (date of TUPE transfer) and 1 February 2020, the following events occurred.

14. First, in 2018, shortly after the 2018 TUPE transfer, the Respondent dismissed the drivers who had been delivering aviation fuel to clients at Newcastle Airport.

15. The reason why the Respondent dismissed the so-called '*Newcastle drivers*' is in dispute. Mr. Thomson's case is that they were dismissed because "*they had transferred across on terms and conditions which were more than Hoyer wanted to pay*". The Respondent disputes this, and says they were dismissed because the Respondent lacked the required Operators Licence to deliver aviation fuel to Newcastle Airport, and while a short-term arrangement was possible using a fuel storage facility in Jarrow, it was not viable to continue that arrangement in the long-term.

16. The Claimants' pleaded case makes no reference to the '*Newcastle drivers*', and this is not one of the issues in respect of which the Tribunal was required to make findings of fact. The Tribunal makes no finding of fact as to the real reason for the dismissal of the 'Newcastle drivers'. What is clear, however, is that when the Respondent wanted to dismiss drivers in its employment after a TUPE transfer, it was willing to do so, did so, and did so in an open, transparent manner. In contrast, the Respondent made no overt or covert attempt to dismiss any of the Claimants in the period 1 May 2018 – 1 February

2020, from which the Tribunal infers that this is because, unlike the Newcastle drivers, the Respondent had no intention of doing so at the time.

17. Second, in 2019 the Respondent gave the Claimants a modest pay rise – see Respondent's final pay offer to Claimants dated 12 April 2019 [Bundle, pp.87-88] increasing the Claimants' wages by 1% (2018 - £37,127.04, 2019 - £38,315.11) and increasing the Claimants' additional shift rate by 1% (2018 - £189.91, 2019 - £195.99).

18. The fact the Respondent increased the Claimants' wages in 2019 undermines the Claimants' case that the Respondent had a 'problem' with their wages in 2019 or later targeted them for dismissal "*because they were on a higher salaries than their colleagues*" [F&BP, p.48, para. 2.2].

19. Third, in the course of the Respondent's February 2019 pay negotiations with the WFS drivers, in response to a suggestion that the Claimants do (or be available to do) non-WFS work, Mr. Thomson on behalf of the Claimants made a clear threat of industrial action to the Respondent's Gareth Sterland - see Mr. Thompson's email to G Sterland sent 19 February 2019 ("*The idea that we will revert back to being 100% WFS only in the last year of Hoyers current 3 years deal has caused more anger than the pay offer. Given the response from the drivers I'm afraid that this issue may well lead us to an industrial dispute quicker while trying to conclude all the above*.")[Bundle, p.85]. Mr. Thompson's email underscores the Claimants' vehement opposition and "*intransigence*" to doing any non-WFS work in the period preceding the 2020 Covid-19 pandemic – it was an issue even more important to the WFS drivers than their pay.

20. Fourth, in February 2020 (ie, before the Covid-19 pandemic), the Respondent gave the Claimants a further modest pay rise of 1%, with a further modest pay rise of 1% planned for 2021 - see Respondent's pay offer to Claimants dated 13 February 2020 [Bundle, pp.90-91] increasing the Claimants' wages by 1% (2019 - £38,315, 2020 - £38,698, 2021 - £39,085) and increasing the

Claimants' additional shift rate by 1% per annum (2019 - £195.99, 2020 - £197.95, 2021 - £199.93).

21. Again, the fact the Respondent in February 2020 offered the Claimants a wage rise in 2020 and an additional wage rise in 2021 undermines the Claimants' case that the Respondent had a 'problem' with their wages in 2020 or targeted them several months later for dismissal "*because they were on a higher salaries than their colleagues*".

22. Fifth, in the absence of evidence suggesting otherwise, in the period 1 May 2018 – 1 February 2020 the Tribunal finds that the Respondent did not do or say anything (or omit to do or say anything) which (a) challenged or sought to challenge the Claimants' wages or terms and conditions of employment, or (b) was aimed at reducing their wages or terms and conditions. In cross-examination, it was not put to any of the Respondent's witnesses that anything the Respondent did (or did not do) in this period had, or was intended to have, these or similar effects.

Covid-19 pandemic: effects on Respondent

23. In 2020, the worldwide Covid-19 pandemic occurred. In March 2020, the UK government on health and safety grounds imposed numerous 'lockdown' and social distancing measures on UK businesses, public bodies, third sector/charitable organisations and the public, which were extended as it became clear that the pandemic would continue for an extended period of time. Governments worldwide imposed similar lockdown and social distancing measures to tackle the pandemic. There is little dispute that the Covid-19 pandemic has been the greatest public health threat of the last 100 years.

24. The Covid-19 pandemic and the measures undertaken worldwide to attempt to tackle it and prevent/reduce the spread of Covid-19 had a serious adverse effect on nearly all industries worldwide (healthcare being a notable exception). Covid's adverse economic effects were particularly pronounced in the tourism and aviation industries.

25. A direct consequence of the Covid-19 pandemic was a significant reduction in the demand for fuel worldwide (and associated demand for fuel deliveries). UK demand for 'retail' petrol station/forecourt fuel reduced by approximately 50%. UK demand for aviation fuel (and associated demand for aviation fuel deliveries to UK airports) reduced even more as UK tourist flights were cancelled (little/no demand, foreign countries unwilling to allow UK tourists to enter at all).

26. Pages 89 and 144A of the Bundle provide a detailed, non-disputed factual breakdown of the impact the Covid-19 pandemic had on WFS' demand for aviation fuel deliveries from the Respondent. The information shows the following:

Month	**2019 - WFS fuel deliveries to Aberdeen, Edinburgh, Glasgow and Newcastle airports**	**2020 - WFS fuel deliveries to Aberdeen, Edinburgh, Glasgow and Newcastle airports**	**Percentage change**
Jan	376	424	+13%
Feb	330	397	+20%
Mar	356	267	-25%
Apr	427	8	-98%
May	386	31	-92%
June	544	22	-96%
July	571	68	-88%
Aug	586	105	-82%
Sept	553	108	-80%

Month	2019 - WFS fuel deliveries to Aberdeen, Edinburgh, Glasgow and Newcastle airports	2020 - WFS fuel deliveries to Aberdeen, Edinburgh, Glasgow and Newcastle airports	Percentage change
Oct	536	120	-78%
Nov	474	48	-90%
Dec	477	56	-88%
TOTAL	5616	1653	-71%

27. Page 89 of the Bundle also illustrates the impact the Covid-19 pandemic had on the revenues the Respondent was deriving from its WFS work in the period January – October 2020:

Mon.	2019 - WFS fuel deliveries to Aberdeen, Edinburgh, Glasgow, Newcastle	2020 - WFS fuel deliveries to Aberdeen, Edinburgh, Glasgow, Newcastle	% change (2019 actual vs 2020 actual)	% change (2020 budget vs 2020 actual)
Jan	£100,806	£115,448	+15%	+10%
Feb	£90,411	£105,734	+17%	+5%
Mar	£97,550	£73,379	-25%	-22%
Apr	£116,176	£1,769	-98%	-99%
May	£108,235	£6,174	-94%	-94%
June	£146,155	£5,029	-97%	-97%
July	£154,301	£12,776	-92%	-92%

Mon.	**2019 - WFS fuel deliveries to Aberdeen, Edinburgh, Glasgow, Newcastle**	**2020 - WFS fuel deliveries to Aberdeen, Edinburgh, Glasgow, Newcastle**	**% change (2019 actual vs 2020 actual)**	**% change (2020 budget vs 2020 actual)**
Aug	£155,544	£27,446	-82%	-82%
Sept	£150,005	£29,507	-80%	-81%
Oct	£142,567	£33,309	-77%	-69%

28. The Covid-19 pandemic caused a significant deterioration in the Respondent's financial situation, resulting in a situation whereby in 2020 it had accumulated an unanticipated £4m loss, with no clear end-date to the pandemic, or its adverse effect on the Respondent's fuel delivery business or financial bottom line, in sight.

29. The Respondent did not know with any degree of certainty what its future WFS deliveries/WFS revenues would be, which were subject to the future course/vagaries of the Covid-19 pandemic and WFS' future contingent demand for aviation fuel. However, in 2020 the Respondent did know and would have had available to it the information on p.89 as each month progressed (eg, in April 2020 the Respondent knew its March 2019 WFS delivery performance, its March 2020 WSF delivery performance, and the extent of the absolute and relative deterioration in both the WFS delivery performance and WFS revenues over that 12 month period).

2020 Furlough discussions/arrangements

30. On 20 March 2020, the UK Government announced the Coronavirus Job Retention Scheme (**CJRS**).

31. To help it through the pandemic, the Respondent reasonably perceived a need to reduce its costs base, a significant element of which was its wages

bill. However, the Respondent's first step was not to conduct an immediate redundancy exercise but to seek to cut its wages bill by taking advantage of the CJRS and put eligible staff on furlough.

32. It is important to note that furloughing employees did not entirely remove ongoing wage-related costs of furloughed staff – the Respondent voluntarily agreed to, and did, top up the wages of furloughed employees to meet their basic wages – conduct which again does not suggest that the Respondent had any particular 'issue' or 'problem' with the wages of any particular group of its drivers.

33. The Respondent conducted separate furlough negotiations with representatives of its driver groups, which resulted in separate documents setting out the furlough arrangements ultimately agreed – see, eg, Respondent's letter to Mr. A. Devlin (Unite) dated 14 April 2020 regarding furlough arrangements for drivers delivering fuel pursuant to Respondent's Esso contract [Bundle, pp.96A-96D].

34. What is important about this document is that it shows that when the Respondent's drivers did agree to do "*alternative work*"(in the case of drivers working on the Esso contract, delivery work for clients other than Esso), that agreement was memorialised in writing ("*Step 4: Core drivers will work on alternative work (inside or outside Hoyer) as long as they are or can be suitably trained to do so. Prior to any work of this nature commencing, the NNC chair, the local Unite Steward and core DTI will be consulted regarding the necessary training and operational requirements for any such work.*").

35. This letter shows that while other 'core drivers' also had concerns about doing 'non-core' work (it was not just the WFS drivers who had those concerns), other core drivers were willing, because of the Respondent's difficult circumstances, to do non-core work to assist the Respondent.

2020 Furlough discussions/arrangements with WSF Drivers

36. On 26 March 2020, Paul Noble (Head of Operations, BP and AirBP) held a consultation meeting with Mr. Thomson and Alexander Smart (Unite) to discuss the furlough arrangements the Respondent could reach with the WSF drivers. At the meeting, Mr. Noble outlined the Respondent's current situation, which was that there had been an 80% reduction in aviation fuel deliveries, a 40% reduction in retail fuel deliveries, this was not expected to be a short-term issue, and there was an urgent need to manage costs in order to protect employment. Mr. Noble stated the Respondent would need to consider moving to furlough agreements and, in the worse case scenario, redundancies. The Tribunal finds these factual representations were true when made.

37. Mr. Noble's proposal to the WSF drivers was five-fold: first, remove any subcontract/agency workers; second, remove any extra/overtime shifts; third, identify alternative work for drivers both internally and externally; fourth, nominate 13 extra days holiday over and above contractual commitments; and fifth, furlough drivers, with the Respondent paying 100% of basic pay to bridge the shortfall that would otherwise arise under the CJRS. Mr. Noble confirmed that only after step 5 would the Respondent look at making drivers redundant.

38. Mr. Noble's proposal was conditional upon the Claimants (through their representatives) accepting steps 1-4 above (ie they would need to accept the need to be available to do non-WFS work); their annual guarantee being reduced pro-rata to any period of time in which a driver was furloughed; continued availability of the CJRS; acceptance of the Respondent's pay deal proposals for 2020 and 2021; and the conclusion of consultations by the week commencing 6 April 2020.

39. At that meeting, Mr. Noble was asked numerous questions, including (a) whether there was a WFS forecast (b) whether furlough was definitely a potential for the 5 WFS drivers (c) what WFS' minimum deliveries would be

(d) whether that minimum would be 5 drivers' worth of work (e) whether Mr. Noble could confirm that the 5 WFS drivers would not be affected by redundancies. Mr. Noble noted those questions, and confirmed a further meeting would be arranged where those questions would be answered.

40. During the meeting, neither Mr. Thomson nor Mr. Smart disputed the truth or accuracy of what Mr. Noble told them. Neither questioned the fact the Respondent was in a serious situation. Neither contended at that meeting that the Respondent was not acting in good faith. Neither suggested the Respondent was using the Covid-19 pandemic as a pretext to undermine the WFS drivers' position at the Respondent or attack or undermine their wages.

41. By email on 26 March 2020 at 20:59, Mr. Noble sent a summary of the meeting to Mr. Thomson, Alexander Smart (Unite), Rob Dyal and Hannah Brook. Neither Mr. Thomson nor Mr. Smart sent a reply email to Mr. Noble disputing his summary of what they had discussed at the meeting earlier that day. They did not do so because they accepted what he had told them, and wished to continue discussions in order to reach a hopefully mutually acceptable agreement.

Did Mr. Thomson verbally inform the Respondent that WFS drivers were willing to do non-WFS work?

42. One of the few material factual disputes in this case is whether Mr Thomson verbally informed the Respondent that the WFS drivers were willing to deliver aviation fuel to AirBP (ie, at least one non-WFS client). Mr. Thomson says he did; Mr. McLeod and Mr. Noble's witness statements say the WFS drivers did not; the Respondent's case is that Mr. Thomson made no such offer.

43. On that issue, the Tribunal makes a finding that either (a) Mr. Thomson did not make this offer at all, or (b) that if he did so (ie, the Tribunal is wrong to find that he did not), Mr. Thomson did not do so in terms sufficiently clear that the Respondent actually understood at the time that that offer had been made or can reasonably be criticised for not appreciating that Mr. Thomson had

made such an offer. The Tribunal makes those findings on the following grounds:

44. First, had Mr. Thomson made that offer in sufficiently clear terms to Mr. McLeod or Mr. Noble, they would have realised its importance, that offer would have been accepted, and that offer would have subsequently been memorialised in the terms of the 16 April 2020 letter to Mr. A. Smart (Unite) memorialising the arrangements which the Respondent and Unite had agreed for the WFS drivers. That did not happen. On the contrary, conspicuous by its absence from the 16 April 2020 letter is any term/provision akin to that in the Esso contract letter dated 14 April 2020 providing for the WFS drivers to do alternative (non-WFS) work.

45. Second, Mr. Thomson accepted receiving via email (and then reading) the 16 April 2020 letter. If he read it, the Tribunal finds that (a) he would have realised that it failed to include the WFS drivers' alleged offer to deliver aviation fuel to AirBP (at least on a temporary/interim basis), and (b) he would have brought that to the Respondent's attention as that offer was important, not trivial. It is not in dispute that Mr. Thomson did not do so, from which the Tribunal infers that he did not so because no such offer was made.

46. Third, there is no contemporaneous documentary evidence referencing or memorialising either (a) that offer or any other offer on similar terms (b) the Respondent's reaction to the offer, evidence which might have been expected to exist had Mr. Thomson made that offer. The Tribunal infers there is no such evidence because Mr Thomson made no such offer.

47. Fourth, Mr. McLeod's dismissal letter to Mr. Thomson dated 23 July 2020 assumed Mr. Thomson and the other 4 WFS drivers remained a 'resource' dedicated to servicing WFS only. This suggests Mr. McLeod cannot have been aware of the offer.

48. Fifth, Mr. Thomson made no reference to this offer in his letter outlining his grounds of appeal.

49. Sixth, Mr. Thomson made no reference to this offer at his appeal hearing either – see minutes of appeal hearing. The Tribunal does not accept Mr. Thomson's evidence that he did raise this offer at his appeal hearing and the minutes of his appeal hearing are inaccurate by not mentioning it.

50. Seventh, Mr. Noble made no reference to this offer in his letter dismissing Mr. Thomson's appeal. Reading that letter, it is abundantly clear that Mr. Noble was acting on the assumption that Mr. Thomson and his WFS driver colleagues were still at this late stage limiting themselves to solely WFS driver work. Mr. Noble could not, and would not, have thought that if Mr. Thomson had told him otherwise at the appeal hearing.

2020 Redundancy Exercise

51. The Respondent decided to make redundancies among (i) its WSF drivers (ii) its AirBP drivers (iii) its Flexifleet drivers. On 1 July 2020, the Respondent announced its proposal to reduce the number of WFS drivers' posts from 5 to 0. The Respondent proposed to make redundancies amongst the Flexifleet drivers (8 out of 25) and the AirBP drivers (2 redundancies). On 1 July 2020, Mr. McLeod gave a collective briefing to staff.

52. The Respondent prepared and circulated amongst its drivers a document entitled "Consultation Aviation Redundancies: FAQs" [Bundle, pp.99-105, the "**WFS FAQ**"] which addressed 33 topics relevant to the 5 WFS drivers at risk of redundancy. The WFS FAQ explained why the Respondent proposed to make redundancies in its WFS, AirBP and Flexifleet driver groups:

> "*As our Grangemouth site we have two pools of drivers who we are consulting with on our proposal to reduce the number of roles and are therefore at risk of redundancy. One pool is made up of our drivers who are 100% dedicated to aviation work (these would typically be*

referred to as WFS or AirBP drivers). Given the significant reduction in volume, which we have detailed in our announcement, there is not enough ongoing work available and so we have proposed to reduce the number of roles dedicated to exclusively support aviation.

We have another pool which is made up of our drivers who support aviation work, but this is as and when required (these would typically be referred to as Flexifleet drivers) and these drivers do a mix of work and activity as required, given the significant reduction in volume, which we detailed in our announcement, our expectation of the amount of work to support aviation will not be available or required to the same level and so we have proposed to reduce the number of Flexifleet roles required." [Bundle, p.99]

53. The WFS FAQ explained why the Respondent proposed redundancies when aviation deliveries were still ongoing:

"*Hoyer Petrolog has lost over 90% of its aviation volume and that recovery [is] not expected until late summer 2021 or perhaps even as late of 2022. Any volume we currently have is very infrequent and our clients are not able to give us any indication or assurance as to when volume would return, we therefore have to make decisions on the information we have*." [Bundle, p.99].

54. The WFS FAQ explained why no redundancies were proposed among BP retail drivers who were trained on aviation:

"*We are consulting with colleagues whose role is directly affected by the significant reduction in volume across our aviation business and those whose role is dedicated to aviation or where aviation is a core part of their role. Colleagues who are trained but where aviation is not a core part of their role are not affected by this and are not at risk of redundancy*." [Bundle, p.100]

55. The WFS FAQ did not rule out job-shares/part-time contracts ("*We would consider any proposals which would mitigate redundancies including considering job share … including considering a reduction in contracted hours*"), but noted that this was something which drivers were asked to carefully consider whether this was something they would be willing to do – interested drivers were asked to make a written proposal.

56. The WFS FAQ explained the Respondent's position regarding the possibility of continuing furloughing WFS drivers to allow more time for aviation to recover:

> "*the [CJRS] changed from 1st July and only colleagues who have previously been furloughed for a minimum of three consecutive weeks before 30th June are eligible to participate in furlough going forward, this means that a number of our at risk colleagues are not eligible for furlough. In addition the costs to the business are increasing on a monthly basis and would still present a considerable cost[ ] to the business that could not be sustained. As we have shared with you, Hoyer Petrolog UK has lost over 90% of its Aviation volume and recovery is not expected until late summer 2021 or even as late as 2022. Whilst some flights may [] return for July, you will have seen decisions by BA, making 30% of pilots redundant; the future of Gatwick is uncertain, and the airport service provider Swissport are looking to half their workforce from 9,000 to 4,500, given this we are not in a position to wait in anticipation of a recovery*." [Bundle, p.103]

57. The WFS FAQ explained that even offering pay cuts to remain in employment might not be sufficient (without ruling out that option):

> "*We would consider any proposals which would mitigate redundancies including considering a reduction in contractual pay terms, however, as you are aware from the announcement there is a significant impact on aviation volume and we are therefore proposing redundancies due to the*

decreased level of work available. You would need to consider carefully as well as your colleagues whether this is something you would all be willing [to] do. We would need then to consider whether this reduction in the salary costs matched the demand in volume and the required associated costs. If you would like to make a formal proposal, please share this in writing with your consulting manager as soon as possible to allow us to consider fully." [Bundle, p.104].

58. Mr Thompson's first individual consultation meeting, originally scheduled for 3 July 2020, was re-arranged to 14 July 2020 to accommodate his request that a full-time union official attend.

59. On 14 July 2020, the Respondent conducted its first in-person collective redundancy consultation meeting concerning the WFS drivers. In attendance were G Sterland (by phone – Divisional Director), J McLeod (Operations Manager, Scotland), B Woodburn (LTM Grangemouth), G Thomson (Unite Shop Steward) and R Dyal (HR Manager). A broadly accurate minute of the meeting (what was said, by who, in what order) is at Bundle pp.108-111. Of note:

a. G Sterland shared a presentation [Bundle pp.106-107] which noted the Respondent had lost over 90% of its aviation volume, with a recovery not expected until later summer 2021 and even as late as 2022, compared the Respondent's wage bill versus revenues for the period April-June 2020, noted the Respondent had not been getting enough money in to cover the cost of 1 WFS dedicated driver, and noted the Respondent had lost nearly £4m already (a position which could not be sustained);

b. Mr. Thomson asked why the Respondent was proposing to make redundancies just as the aviation sector was restarting, and requested a forecast for 15 July – 15 August 2020 (not historical data), to which Mr. Sterland replied that WFS could not give the Respondent future forecasts, and the Respondent was having to make decisions based on its best

guess given the current state of the market and the known reports in the press from the aviation industry;

c. Mr. Thomson alleged the Respondent had undercut his previous employer to get the work and the 5 WFS drivers were now paying the price for this, to which Mr. Sterland replied that the Respondent had been trying to support its own people as much as possible;

d. Mr. Sterland said the terms in the CJRS were changing, increasing the cost to the Respondent, and as the WFS drivers would not do any other work it was not possible to fully utilize them (Mr. Thomson did not dispute this);

e. L Turned asked for confirmation that Flexifleet drivers were not doing WFS work, to which J McLeod replied that they were when WFS drivers weren't available, but in reality the WFS drivers were stood down for most of the time;

f. L Turner suggested the Respondent continue to use the furlough scheme while they waited to see what happened to the industry over an agreed period of time;

g. Mr. Thomson asked why the WFS drivers were going from 5 to 0, to which Mr. Sterland replied that there was not enough work to support full shifts for a dedicated driver;

h. B Woodburn said the Respondent's forecast for that week was below a single driver's work, and when asked about orders for the next week, stated the Respondent had not had *any* orders.

60. On 14 July 2020, the Respondent conducted an in-person individual consultation meeting with Mr. Thomson. In attendance were Mr. Thomson, Mr. Lyn Turner (union representative), Mr. J McLeod (consulting manager)

and Mr. R Dyal (note-taker). A script for the meeting is at Bundle pp.112-114, although it oddly also appears to contain a record of questions Mr. Thomson actually asked at that meeting (unless the Tribunal has misunderstood it).

61. Mr. McLeod told Mr. Thomson that the Respondent's proposal was to reduce the number of roles on WFS Aviation in Grangemouth (ie, the WSF drivers' role) from 5 to nil. It is not in dispute that at the meeting, Mr. McLeod incorrectly informed Mr. Thomson that redundancy selection criteria of absence, service, disciplinary and initial training would be used.

62. By letter dated 17 July 2020, Mr. McLeod invited Mr. Thomson to attend a second consultation meeting on 22 July 2020. Mr. McLeod stated he would address Mr. Thomson's questions and counter-proposals at the meeting. The letter warned Mr. Thomson that a possible outcome of the next meeting was that his employment could end by reason of redundancy. The letter advised Mr. McLeod of his right to be accompanied by a work colleague or trade union representative.

63. On 22 July 2020, Mr. McLeod held a second consultation meeting. The Claimants were informed that following a consideration of the facts, a decision would be made on whether to proceed with the redundancy proposals.

Dismissal

64. By letter dated 23 July 2020, Mr. McLeod notified Mr. Thomson of his dismissal on grounds of redundancy with effect from 23 July 2020 [Bundle, pp.117-120]. The letter informed Mr. Thomson of his right of appeal.

65. Mr. McLeod's dismissal letter was not an empty pro forma. It went into considerable detail about the circumstances which had led the Respondent to dismiss Mr. Thomson on redundancy grounds, and directly addressed the points Mr. Thomson had raised questioning the need for his dismissal on redundancy grounds (underlining added by the Tribunal):

"*In these consultation meetings, we discussed in great detail the reasons your role was at risk of redundancy and I confirmed that whilst WFS had not made a decision to withdraw from Scotland, we had lost over 90% of our aviation volume and WFS volume has reduced by 95% year on year. I reiterated the impact of the pandemic across the country and in particular the aviation industry and that we do not expect that there will be a recovery until late summer 2021 and possibly as late as 2022. We discussed at length, due to the significant drop in volume we have experienced, our proposal that your role, as solely dedicated to WFS was not sustainable and therefore at risk of redundancy. I explained that even now, in what is traditionally our peak period volume was significantly impacted and neither we as a business, nor our customers and indeed the aviation industry have confidence in a return to anything like normal activity.*

<u>You queried this, as whilst you acknowledge reduction in volume, there was still some volume and whilst that is the case, you did not agree that your role should be at risk of redundancy</u>.

I reiterated that whilst I agree there is some volume, this is nowhere near the levels to sustain roles which are 100% dedicated to support WFS. I shared that the volume we currently have is sporadic and we have not been able to get any clarity or assurance from our customer [WFS] of what they anticipate volumes are likely to be going forward. I also explained that the volume that we currently have does not and will not have a clear pattern or timing that would allow this to be managed, planned and therefore delivered by dedicated resources.

<u>You pointed out that there are currently two drivers fully employed on WFS even with current volumes</u> and I explained that neither of these roles were able to be fully routed and that again this was unsustainable for us as a business.

We discussed that, as you are aware we have also been consulting with another pool of drivers who support aviation work but, this is flexible and as and when required and these drivers do a mix of work and activity as required. Again, given the significant reduction in volume, our anticipated need for this work to support aviation flexibly will not be available or required to the same level and so we have also been in consultation to reduce the number of these roles.

I responded to the proposal that was made during or meeting on 14th July 2020 that we should pause our consultation process and not make any decision until after 31st August 2020, as you felt that deferring the decision would provide a clearer idea of future volumes and that any costs resulting from this could be partly reduced by utilising furlough.

I explained that whilst I had considered this carefully, I did not believe that it is appropriate to do this as it would entail continued costs to the business and that there is no business confidence in the short, medium or even long-term volume and that I did not believe that a deferral until 31st August 2020 would give us any further clarity or confidence of volume beyond that point. I explained that I have to make decisions based on the information I have available and act for the long-term stability of the company.

You queried why Paul Noble had written to Sandy Smart, Unite Regional Officer on 16th April 2020 combining your bargaining unit with another. Rob Dyal explained that this letter had been issued in error and Rob Dyal confirmed that Paul Noble and Sandy Smart had a telephone conversation to clarify this at the time and confirmed the discrete nature of the WFS drivers as a completely distinct bargaining unit. This letter was part of the discussions regarding our furlough arrangements.

You asked why the letter inviting you to your initial consultation meeting had referred to a selection process and yet there had been no discussion

of a selection matrix or process. In response to this, I explained that the inclusion of a reference to selection criteria was an error and I apologise for that. No selection was required in this process as all five of the driver roles, including your own, which are dedicated to the WFS contract were at risk of redundancy and unfortunately as the proposal did not include the continuation of any of those roles, there was no selection to be made.

I shared again that there was no indication from WFS that volumes would increase to any level which would sustain any roles dedicated solely to WFS work and that as discussed previously any volume that is available will be delivered through flexible resource. This resource is employed to work on a range of contracts which would continue to include some WFS work but only as and when required. I again reiterated that this pool of drivers had also been in consultation to reduce as a result of the significant reduction in aviation work that they support.

You queried the agreement that had been made previously in the discussions between you, Paul Noble and myself regarding our furlough arrangements and whether it was agreed that any dedicated WFS drivers would be returned from furlough before any Flexifleet Drivers when WFS aviation volumes required this. Roby Dyal said he couldn't see anything in the notes from that discussion which confirmed this, but I confirmed that I agree with you, this was the case and I also confirmed that no Flexifleet Drivers have returned from furlough. We then discussed the two collective grievances that you had raised on behalf of your members …

You then asked why WFS fuel had been delivered into Newcastle from Kindsbury and not Grangemouth in the last week which was against the collective agreement in place between your bargaining unit and Hoyer, which is the subject of the second collective grievance raised. I explained that as this was subject to an independent grievance process it would be discussed and answered within that process.

I checked to ensure that this answered all of the questions you had regarding your consultation and you confirmed that you did not have any further questions. I asked if you had any further proposals which could mitigate the need for redundancies and you said that you had no new proposals."

66. The Tribunal is satisfied that that the factual representations Mr. McLeod made in his dismissal letter to Mr. Thomson were true at the time made.

Appeal

67. By email on 28 July 202 at 11:38, Mr. Thomson forwarded to Mr. Noble his letter of appeal [Bundle, p.121]. Mr. Thomson's letter set out six grounds on appeal: (i) failure to comply with Turner's recognition agreement (ii) failure to comply with grievance process (iii) failure to recognise local agreements signed off by Hoyer that any volumes assigned to the North contract are done by the 'core 5 drivers' before any additional resources can be utilised (iv) failure to respond in writing to the counter proposal put forward for the 'Avoidance of Dispute Grievance' (v) failure to follow the process as set in writing by Hoyer (vi) "*failure to follow the agreement entered into in good faith with yourself and all other driver groups dated April 16th*".

68. The WFS drivers' counter-proposals had two elements, both of which the Respondent had previously considered and rejected: first, for one WFS driver (Mr. Graham) to take voluntary redundancy if that would save the other 4 posts; and second, in conjunction with that, for the Respondent to stand down the WFS redundancy process until 31 August 2020 then reconsider at that point the need for redundancies on the assumption that WFS' need for future deliveries would be clearer (and hopefully larger) by then.

69. The Tribunal notes many of Mr. Thomson's grounds of appeal were essentially procedural in nature, and Mr. Thomson took no issue with the factual assertions Mr. McLeod had made in his dismissal letter.

70. On 11 August 2020, Mr. Thomson's redundancy appeal meeting was held, which began at 9.10am and ended at 12 noon. In attendance were Paul Noble (appeal officer), Hannah Brook (HR Manager), Mr. Thomson and Lyn Turner (Unite).

71. A broadly accurate minute of the appeal meeting (what was said, by who, in what order) is at Bundle pp.123-130. Although it could fairly be said that more heat than light was generated in certain parts of the exchanges recorded, it is relatively clear that looked at in the round, a genuine discussion and interchange about Mr. Thomson's grounds of appeal (i) [Bundle, pp.123-124], ground of appeal (ii) [Bundle, p.124], ground of appeal (iii) [Bundle, p.124-125], ground of appeal (iv) [Bundle, pp.125-127], and ground of appeal [vi) [Bundle, pp.127-129] was conducted.

72. Because of the slightly cryptic way in which certain matters were discussed in a relatively free-flowing exchange, it is not wholly clear that ground of appeal (v) was discussed. However, it is clear that at the end of the appeal hearing, Mr. Noble asked Mr. Thomson and Mr. Turner whether there was anything they wished to add, in response to which certain additional questions were asked and answered, and Mr. Thomson then said "*there is nothing to add*". Accordingly, the Tribunal is satisfied that Mr. Thomson had the opportunity at his appeal hearing to advance all his grounds of appeal and say everything which he (and Mr. Turner) wanted to say in support of them.

73. By letter dated 20 August 2020, Mr. Noble dismissed Mr. Thomson's appeal. Like the dismissal letter, the 20 August 2020 letter was not a bare pro forma; it again gave detailed consideration to each of Mr. Thompson's grounds of appeal – summarised in 16 points at the beginning of the letter - explaining why they were not sufficient to overturn the decision to dismiss.

74. Mr. Noble's letter dismissing the appeal is too long to quote in its entirety. However, it is worth highlighting that Mr. Noble explained why he rejected Mr. Thomson's contention that the Respondent had "*used the pandemic to make*

core [WFS] drivers redundant, Mr. Gareth Sterland, Divisional Director, advised you that the North contract would need to be subsidised by the South when Hoyer took over the contract and since then Hoyer have been intention on replacing core [WFS] drivers with cheaper labour to save costs." [Bundle, p.131]:

"*It is my belief that if the Company was intent, from the point of TUPE transfer (or indeed otherwise), on removing core drivers from the business to avoid ongoing losses then a redundancy consultation process would have commenced far sooner than it did. My view is that the Company engaged with your driver group through furlough consultations in March 2020 in order to avoid redundancies at that point in time. The Company devised a mechanism to cope with the devastating downturn in volume and invested a significant amount of time into keeping all of the drivers in your group in employment and fully paid with basic pay for three months over April, May and June 2020. These are not the actions of a Company who are intent on wiping out expensive drivers as alleged, in fact my firm view is quite the contrary, there is no evidence to suggest any redundancies across your driver group were pre-meditated, rushed through in any way or that the Company used the pandemic as an excuse to remove your driver group*." [Bundle, p.132]

75. Mr. Noble addressed why there needed to be redundancies in the WFS group in the following terms:

"*You then argued … that it was well known and accepted amongst Hoyer management that core drivers should be routed ahead of any additional resource. When dedicated to WFS, obviously this is the work that was allocated to you and your colleagues. That was prior to the damaging effect of Covid-19. The Company then had to look critically at how it needed to operate in light of a great deal of uncertainty and heavily reduced aviation demand in order arrest the significant financial losses being endured. The Company entered into consultation with you to*

explain that given you only carry out WFS work you are [a] dedicated resource and cannot be deployed on any other work. Indeed, I understand that you and your colleagues have always maintained that you work solely on WFS work and nothing else. There has been a huge reduction in WFS demand since April 2020 of over 90% when compared with 2019, there is a distinct lack of certainty as to when activity and volumes will return to anywhere near normal across the whole aviation industry and our contacts in WFS are unable to provide accurate forecast information to give any reassurance of what the future might hold in terms of volumes required. As such it is clear to me that it could not be guaranteed that sufficient work would be available and evenly spread across the coming weeks and months and it was clear that the Company could not afford to stand the cost of any hours under guarantee for dedicated drivers who could not be redeployed." [Bundle, p.133]

76. Mr. Noble rejected Mr. Thomson's contention that there was sufficient WFS work to provide sufficient work for at least one WFS driver in the following terms:

"*I can confirm that, having assessed volume delivered from Grangemouth in July 2020, the overall working hours used were not sufficient to fully deploy one driver within your dedicated group. Volumes are still significantly reduced when compared with 2019. I noted your claim that the first four days in August 2020 were 'busy' and that there was now enough work for four drivers, however it is not clear to me that this is the case. My view, in light of the uncertainty around travel and quarantine rules and local lockdowns being implemented at short notice, is that you cannot assume that demand will rise at all or that it will even be steady or consistent for any given length of time, let alone assume four days' demand can be used to predict activity over an entire month. I note that children are back at school now in Scotland and this could potentially further reduce demand. At the present time, the indicators are that there is no imminent increase in demand. In any case I do not accept your*

assertion that the operation is 'busy' as when compared with 2019, this is simply nowhere near the case. Whilst there is still some volume, this is significantly reduced year on year and the uncertain pattern of the demand means it is nowhere near the levels to sustain your roles and the WFS work. We are currently reacting to weekly and daily fluctuations of planned and executed orders. Each of our airports has a defined and agreed job time which when multiplied by the number of loads into each location results in the total hours needs which is significantly less than the guaranteed hours of the drivers in this [Grangemouth] location. The reduction of work which has been evidenced sees a huge increase in the underutilised hours of the drivers who are unwilling to perform work for other clients and the cost of these hours is unsustainable." [Bundle, p.133]

77. Mr. Noble addressed Mr. Thomson's claim that the Respondent failed to reasonably consider the proposal to make one WFS driver redundant then halt further redundancies until 31 August 2020:

"*I can conclude that I do not believe we failed to reasonably consider this proposal nor respond to you on the matter. The Company did not take the decision to enter into a redundancy consultation process with you lightly and, as forementioned, held off as long as possible before having to take this regrettable course of action. Between April and July the Company supported colleagues through the furlough scheme at a significant cost to the business, particularly for your driver group as the Company committed to 'top up' wages given your basic pay exceeded the amount available to claim through the … (CJSR). With the lack of certainty in demand and the prospect of significantly increased costs associated with the CJRS, for example the need for employers to take on National Insurance and Pension Contributions for any staff on furlough from 1st August 2020, it is clear to me that the financial losses became unsustainable and there was no other way to mitigate them. During the hearing you mentioned that you had not received a response as to why*

*we didn't accept this counter proposal but I can confirm that a response was included in the notice letter issued to you from Mr. McLeo*d." [Bundle, p.133]

"*I have considered the suggestion that the Company should have waited until the end of August 2020. I do not believe that would have been an appropriate decision to have made in July 2020 and that is further supported by the current demand levels and continued reduction in air travel and thus aviation fuel demand*." [Bundle, p.134]

Post-dismissal events

78. Two post-dismissal events are of note:

79. First, at some point in 2020 after the WFS drivers had been dismissed, the Respondent lost its contract to supply aviation fuel to Emirates Airline, a major long-haul carrier. Although precise details of the impact of that loss on the Respondent were not provided, this was plainly a significant commercial loss for the Respondent.

80. Second, in the first five months of 2021, the Respondent's deliveries of fuel to WFS continued to be in volumes far smaller than the deliveries in the comparable periods for 2019 and 2020 had been [Bundle, p.144A]:

Month	**2019 – total WFS deliveries**	**2020 – total WFS deliveries**	**2021 – total WFS deliveries**
Jan	376	424	19
Feb	330	397	22
March	356	267	25

April	427	8	35
May	386	31	67

81. Although the Respondent did not and could not know in July-August 2020, when it dismissed the Claimants, that WFS deliveries in 2021 would be in these low quantities, these figures suggest that Mr. Noble's judgment on 20 August 2020 that there was no guarantee that WFS volumes would significantly increase after 31 August 2020 given the uncertainties in the aviation fuel market was reasonable and subsequently vindicated by events – as a matter of fact, they plainly did not. The WFS delivery volumes the Respondent achieved in January – May 2021 (total: 168) remained, in both absolute and relative terms, far below the delivery volumes the Respondent achieved in the comparable periods in 2019 (total: 1875, 90% reduction) and 2020 (total: 1,127, 85% reduction).

Claims

82. By an ET1 and Paper Apart [Bundle, pp.23-25] presented on 7 November 2020, as clarified by their Further and Better Particulars dated 19 April 2021 [Bundle, pp.47-48], the Claimants (represented by Thompsons Solicitors) asserted two claims against the Respondent:

83. First, a claim of automatic' unfair dismissal under reg 7 of TUPE 2006 on the basis that the reason/principal reason for their dismissal was not redundancy but the 1 May 2018 TUPE transfer.

84. Second, a claim of 'ordinary' unfair dismissal under s.98(4) of the Employment Rights Act 1996 (**ERA 1996**), the precise allegations the Claimants raised in support of that claim being reduced to an agreed List of Issues by the parties,

which EJ Tinnion further refined with the consent of the parties' legal representatives – see paragraphs 89-96 below.

Response

85. By its Amended Grounds of Resistance [Bundle, pp.49-54] the Respondent denied the 2018 TUPE transfer had been the reason for the Claimants' dismissal, contended there had been a genuine redundancy situation in 2020, further contended that the Claimants had been fairly dismissed on grounds of redundancy following a fair redundancy process, and alleged – esto - that even if the Claimants had been unfairly dismissed, they would have been fairly dismissed had a fair redundancy procedure been followed.

Agreed matters

86. The parties agreed a joint 'Statement of Facts'.

87. At the commencement of the hearing, the parties' representatives agreed (a) Mr. Thomson's evidence would stand as the evidence on behalf of all Claimants, as all five relied on the same facts (b) the outcome (so far as liability is concerned) in the other Claimants' claims would be the same as that in Mr. Thomson's claim (if he won on liability, they also won; if he lost, they also lost).

88. At the commencement of the hearing, the Tribunal granted the Respondent's application, joined by the Claimants, to determine liability as a preliminary issue, it being accepted that whilst liability issues were common and identical to all Claimants, remedy issues may differ from Claimant to Claimant (eg, whether a Claimant discharged his duty to mitigate any loss arising from his dismissal).

List of Issues

89. Prior to the hearing, the parties agreed a List of Issues for the Tribunal's determination. On 5 July 2021, EJ Tinnion emailed the parties' representatives a revised draft List of Issues to closer reflect what the Claimants' pleaded unfair dismissal complaint was (as set out in the ET1 Paper Apart and Further and Better Particulars), which was discussed at the commencement of the hearing on 6 July. Following those discussions, EJ Tinnion emailed the parties' representatives a revised List of Issues, which the representatives agreed and addressed in the course of closing submissions.

90. The issues which it was agreed the Tribunal has to determine in light of the parties' respective statements of case are as follows:

91. *Automatic Unfair Dismissal*: was the Respondent's reason (or if more than one principal reason) for dismissing the Claimants their 2018 TUPE transfer to the Respondent?

92. *Ordinary Unfair Dismissal*: First, has the Respondent shown that the Claimants' dismissal was wholly or mainly attributable to the fact that the requirements of its business (i) for employees to carry out work of a particular kind, or (ii) for employees to carry out work of a particular kind in the place where the Claimants were employed, had ceased/diminished or was expected to cease/diminish?

93. Second, subject to the above, was the Claimants' dismissal on redundancy grounds within/outwith the band of reasonable responses open to the Respondent at the time because it failed to implement a fair and reasonable redundancy selection process by:

    a. failing to provide the Claimants with a rationale for:

i. how the Respondent had determined how many of its employees were going to be dismissed as redundant;

ii. how the Respondent had identified a pool of employees from which those dismissed would be selected;

iii. how the Respondent had decided to select which redundancies from that pool were to be dismissed;

b. failing to take advantage of the CJRS and put the Claimants on furlough rather than make their posts redundant and dismiss them;

c. failing to properly consider alternatives to redundancy which were suggested during the redundancy process?

94. Third, if the Claimants' dismissal was procedurally unfair, was there a chance – and if so how great a chance – that the Claimants would have been fairy dismissed had a fair redundancy process been applied?

95. Although Mr. Thomson's witness statement complained about the fact that the Flexifleet drivers were not included in the same redundancy pool as the WFS drivers, it is important to note that the Claimants' statements of case did not allege that the Claimants' dismissal was unfair because the Respondent's choice of redundancy pools and/or the decision to have a separate redundancy pool of all 5 WSF drivers (and only those 5 WFS drivers) had been unreasonable.

Evidence

96. The evidence in this case was heard via CPV over two days and consisted of (a) written and oral evidence from Mr. Thomson (b) written and oral evidence from three witnesses for the Respondent – Mrs. Nichola Blenkinsop (HR Director), Mr. J McLeod (dismissing officer) and Mr. Noble (appeal officer) (c)

a joint production bundle consisting of approximately 210 pages of documents.

97. Although the Tribunal did not accept all of the witness evidence given, the Tribunal finds that all four witnesses sought to assist the Tribunal by giving their best, honest recollection of events.

98. At the hearing, the Claimants were represented by solicitor Mr. M Briggs (Thompsons) and the Respondent by solicitor Mr. S Harte (Weightmans). The Tribunal is grateful to the representatives for their submissions and the straightforward way they put their respective clients' cases.

The Law

Automatic unfair dismissal

99. Reg 7(1) of TUPE 2006 states that where either before or after a relevant transfer any employee of the transferor or transferee is dismissed, that employee shall be treated for the purposes of Part X of ERA 1996 (unfair dismissal) as unfairly dismissed if the sole or principal reason for their dismissal is (a) the transfer itself, or (b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce.

Redundancy

100. Sec 139(1) of ERA 1996 states that for the purpose of that Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to (a) the fact that his employer has ceased or intends to cease (i) to carry on the business for the purposes of which the employee was employed by him, or (ii) to carry on that business in the place where the employee was so employed, or (b) the fact that the requirements of that business (i) for employees to carry out work of a particular kind, or (ii) for employees to carry out work of a particular kind in the

place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.

Reason for dismissal

101. A reason for dismissal is a set of facts known to and/or beliefs held by the employer which cause it to dismiss an employee. Abernethy v Mott, Hay & Anderson [1974] ICR 323.

Jurisdiction

102. Provided a genuine redundancy situation arises, the Tribunal does not have jurisdiction to determine whether an employer's decision to have redundancies either at all or in the numbers decided upon rather than take an alternative course of action was unfair or unreasonable, or decide an unfair dismissal claim on the basis that that decision was unfair or unreasonable. In a genuine redundancy situation, the decision whether or not to make posts redundant is a business decision for the employer. Moon v Homeworthy Furniture (Northern) Ltd. [1976] IRLR 298.

Fairness of dismissal on redundancy grounds

103. Williams v Compare Maxam [1982] UKEAT/372/81. Where employees are represented by an independent union recognised by their employer, reasonable employers will generally seek to act in accordance with the following principles:

104. First, the employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and if necessary find alternative employment in the undertaking or elsewhere.

105. Second, the employer will consult the union as to the best means by which the desire management result can be achieved fairly and with as little hardship

to the employee as possible. The employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.

106. Third, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency, experience or length of service.

107. Fourth, the employer will seek to ensure that the selection is made fairly in accordance with these criteria, and will consider any representations the union may make as to selection.

108. Fifth, the employer will seek to see whether instead of dismissing the employee the employer could offer the employee alternative employment.

109. Sixth, the factors above are not present in every case, and can be departed from where good reason is shown.

110. There is no obligation on an employer to use redundancy selection criteria where the employer proposes to dismiss on redundancy grounds all employees in a particular pool.

Pleadings

111. The parties to a Tribunal claim must set out the essence of their case on paper in the ET1 and the answer to it. The Tribunal must take care not to be diverted into thinking the essential case is to be found other than in the pleadings. Chandhok v Tirkey [2014] UKEAT/0190/14 (para.17-18).

112. Although there may be exceptions (eg simple cases where the parties are not legally represented and there has not been extensive case management), the Tribunal is generally not required in every redundancy unfair dismissal claim

to investigate and determine whether there was unfairness in the selection process, lack of consultation and/or failure to seek alternative employment on the part of the employer if not specifically pleaded or raised in an agreed list of issues. Remploy Ltd. v. Abbott [2015] UKEAT/0405/14/DM.

Conclusions – 'Automatic' Unfair Dismissal

113. The Tribunal finds (as a fact) that (a) the Respondent's sole or principal reason for dismissing Mr. Thomson and the 4 other Claimants in 2020 was not the 1 May 2018 TUPE transfer by which their contracts of employment TUPE-transferred to the Respondent nor was it a reason connected with that transfer (whether an economic, technical or organisational reason or otherwise) (b) the sole reason why the Respondent dismissed the Claimants in 2020 was because of a redundancy situation which arose in 2020 because of the Covid-19 pandemic and the effect that had on client WFS' demand for aviation fuel deliveries from the Respondent. On that basis, the Tribunal finds this claim not well-founded and dismisses it.

114. The Tribunal's reason for reaching conclusion (b) above are set out at paragraphs 129-135 below. The Tribunal's reasons for reaching conclusion (a) above are set out at paragraphs 115-126 below.

115. First, underpinning the Claimants' claim is a theory or assumption that the Respondent had a 'problem' with the WFS drivers' wages – in sum, that they were too high. On that central issue, the Tribunal makes a finding that the Respondent did not have a problem with the wages of any of the 5 WFS drivers after their 2018 TUPE transfer to the Respondent, and relies on the following undisputed facts in this regard:

    a. in 2019, the Respondent gave all 5 WSF drivers a pay rise;

    b. in 2020, the Respondent offered all 5 WFS drivers a pay rise;

c. in 2020, before the Covid-19 pandemic started to have an impact, the Respondent offered all 5 WFS drivers a further pay rise in 2021.

116. An obvious question arises – if the Respondent had a problem with the wages of the 5 WFS drivers, why did it agree (or at least offer) to increase their wages for 3 years in a row (2019, 2020, 2021) following their 2018 TUPE transfer to the Respondent? No satisfactory answer to that question has been provided by the Claimants. The Tribunal infers that is because there is no good answer.

117. In light of these annual pay rises, the Claimants might have tried to advance their case on the alternative basis that while the Claimants accepted their basic wages were going up in absolute terms over this period, their basic wages compared to their non-WFS driver peers were falling in *relative* terms. In the event, the Claimants did not seek to put their case this way.

118. Second, the Tribunal does not accept that the Claimants' terms and conditions of employment in 2020, including their wages, were superior "*to any of the terms and conditions of the Respondent's existing staff*" [Paper Apart, par. 6].

119. At the hearing, neither the Claimants nor the Respondent adduced specific, evidence about the wages and terms and conditions of *any* of the Respondent's other drivers – required for the purposes of any close comparison - except in the most general of terms. The entirety of Mr. Thomson's evidence in his statement on this subject was the following sentence: "*The people I transferred across with and I were on similar terms and conditions. We got paid about £12,000 per year more than they paid their own staff*."

120. So far as the evidence that was adduced at the hearing is concerned, the Tribunal accepts the Respondent's evidence – which the Claimants essentially did not dispute - that in 2020 in the period preceding the WFS drivers going on furlough:

a. approximately 600 of the Respondent's employees had a higher contractual base wage than the WFS drivers;

b. the Flexifleet drivers were on a lower basic rate, but were able to achieve higher, comparable levels of pay through overtime.

121. Ms. Blenkinsop's evidence that approximately 600 of the Respondent's employees had a higher contractual base wage than the WFS drivers was not challenged in cross-examination. That being the case, it is hard to believe that the Respondent would have been particular concerned about the level of basic wages of the 5 WFS drivers – less than 1% of that 600-strong grouping.

122. Third, no specific director, officer, manager or representative of the Respondent made any overt or covert criticism of the existing wages or contractual terms and conditions of the 5 WFS drivers in 2018 (after the TUPE transfer), 2019 or 2020. If there is any evidence to the effect that they did, that evidence was not put before the Tribunal.

123. Fourth, the Claimants have provided no satisfactory explanation as to why the Respondent, if it was minded to dismiss the Claimants because of their allegedly higher basic wages after the May 2018 TUPE transfer, took no steps to do so (a) in 2018 after the TUPE transfer (b) in 2019, or (c) in 2020 before the Covid-19 pandemic. The Tribunal refers to the Respondent's dismissal of the 'Newcastle drivers' in 2018, which shows that when the Respondent was minded to dismiss employees after a TUPE transfer, it actually went ahead and did so. From the fact the Respondent did not treat the WFS drivers the same way it treated the Newcastle drivers, the Tribunal infers that, at least in 2018, the Respondent had no intention of dismissing the WFS drivers because of their wages or terms and conditions.

124. Fifth, the Claimants have provided no satisfactory evidence as to why the Respondent, if it was minded to dismiss the Claimants because of their allegedly higher basic wages after the May 2018 TUPE transfer, initially put

some WFS drivers on furlough in 2020 rather than move to dismiss them immediately through a redundancy process. Putting WFS drivers on furlough, and topping up their furlough pay to meet their basic wage entitlement, suggests the Respondent's intention at the time was to see if it could take measures to keep the WFS drivers in its employment, even at some cost to the Respondent, not to dismiss them. Mr. Thomson's assertion that "*we were concerned that they would try to get rid of us at the first available opportunity, which is what the closure of the airspace gave them*" is contradicted by what the Respondent actually did, which was not to try to dismiss the Claimants immediately after UK airspace closed and a potential redundancy situation had clearly arisen.

125. Sixth, the Claimants' case as to why it took so long for the Respondent to dismiss them after the May 2018 TUPE transfer is that the Respondent was looking for an opportunity to dismiss them, and the Covid-19 pandemic provided that opportunity. While this is the Claimants' case theory, the problem from the Tribunal's perspective is that there is no real evidence which backs it up: there is no evidence the Respondent was looking for an opportunity to dismiss the Claimants before the Covid-19 pandemic (or reduce their wages), nor is there evidence that the Respondent sought to take opportunistic advantage of the Covid-19 pandemic to do something it allegedly already wanted to do. Plainly, it defies common sense to suggest that the Respondent was waiting for a worldwide pandemic in order to dismiss the Claimants (and in fairness to the Claimants, they never put their case that way). But if the Respondent was waiting for an opportunity to present itself to enable it to dismiss the Claimants, the question arises – what opportunity? The Claimants did not answer that question.

126. Seventh, the only time the Claimants' wages became a serious issue – other than in the course of normal annual wage negotiations - was after the Covid-19 pandemic took place in 2020, when the issue was not the level of their basic wages as such but the fact that there had been a precipitous decrease in (a) overall client demand for aviation fuel/aviation fuel deliveries (b) WFS'

demand for aviation fuel/aviation fuel deliveries for WFS, with the result that there was far less aviation fuel delivery work for the Respondent's drivers (including the WSF drivers) to do. It was in that context, and that context alone, in which the Respondent had to consider what it needed to do in order to reduce its ongoing losses by reducing costs, that drivers' wages became an issue.

127. The Tribunal does not go so far as to say that this claim is wholly without merit and should never have been brought – Mr. Thomson plainly genuinely believes the 2018 TUPE transfer and the allegedly higher basic wages of the WFS drivers was the real reason for their dismissal, and the real reason why the Respondent chose to make all 5 of the 5 WFS drivers redundant (and said so at his appeal hearing). For the reasons give above, however, the Tribunal does not accept that the evidence has been presented which supports Mr. Thomson's claims and beliefs to this effect.

Conclusions – 'Ordinary' Unfair Dismissal

128. For the reasons set out below, the Tribunal finds that the Claimants' complaint of 'ordinary' unfair dismissal is also not well-founded and is dismissed.

129. First, the Respondent has satisfied its burden of showing that the requirements of its business in 2020 for its WFS drivers to carry out aviation fuel delivery work for client WFS from Grangemouth Oil Refinery to Aberdeen, Edinburgh, Glasgow and Newcastle airports had substantially diminished.

130. Strictly speaking, the Tribunal did not have to decide the issue - the point was conceded by the Claimants' solicitor in closing submissions, Mr. Briggs accepting that there was a genuine redundancy situation (without prejudice to his clients' position that this was not true reason for their dismissal). If that concession had not been made, the Tribunal would have reached the same conclusion based on the overwhelming, undisputed evidence the Respondent has adduced on this issue, concisely summarised in the tables shown at Bundle, p.89. In brief, in 2020 the Covid-19 pandemic caused a very

significant reduction in the demand for flights, aviation fuel, and aviation fuel deliveries worldwide. WFS, one of the Respondent's aviation fuel clients, was one of the business badly affected by the worldwide drop in demand for aviation services. WFS substantially reduced its demand for aviation fuel from the Respondent. As a result, there was substantially less aviation fuel delivery work for the Respondent's drivers to do for WFS, whether those drivers were the WFS drivers, who pre-pandemic had conducted approximately 25% of the WFS delivery work, or the Flexifleet drivers, who had conducted the approximate 75% balance (while the WFS drivers conducted exclusively WFS work, it is common ground that they did not do it all).

131. Second, the Respondent has satisfied its burden of showing that the Claimants' dismissal was wholly or mainly attributable to the above. There was no threat or risk to the Claimants' posts before the Covid-19 pandemic. The Tribunal is satisfied that had the pandemic and its serious adverse effects on Respondent client WFS not occurred, the Claimants would most likely still be in the Respondent's employment today delivering aviation fuel to WFS. Pre-pandemic, the WFS drivers chose to do exclusively WFS aviation fuel delivery work – that was a legitimate choice, made for legitimate reasons. During the pandemic and the ensuing furlough/redundancy process, the Tribunal has found as a fact that the WFS drivers continued to resist doing fuel delivery work for any client of the Respondent other than aviation fuel delivery work for WFS - again, a choice they were entitled to make. However, choices have consequences, and one of the consequences of that choice was to render the Claimants especially vulnerable to dismissal on redundancy grounds if WFS' demand for aviation fuel deliveries from the Respondent declined substantially. The objective facts show this is exactly what happened in 2020.

132. Third, the Respondent did adequately, and within the band of reasonable responses open to it at the time, provide the Claimants with a rationale for (i) how it had determined how many of its employees were going to be dismissed as redundant, and (ii) how it had identified a pool of employees from which

those dismissed would be selected. The Tribunal relies on three documents in particular to establish that the Respondent adequately discharged any duty to explain to Mr. Johnson what was happening and why: first, the WFS FAQ (see paragraphs 52-57 above); second, Mr. McLeod's letter dismissing Mr. Johnson (see paragraph 65 above); and third, Mr. Noble's letter dismissing Mr. Johnson's appeal against dismissal (see paragraphs 74-77 above). In these documents, the Respondent set out in clear, intelligible terms why the Respondent had chosen to make all 5 WFS driver posts redundant. The Tribunal infers that the Claimants' real complaint in this case is not so much the adequacy of the rationale the Respondent provided for making that decision but the substantial business merits of the decision.

133. Fourth, the Respondent did adequately, and within the band of reasonable responses open to it at the time, provide the Claimants with a rationale for how the Respondent had decided to select which of the WFS drivers were to be dismissed. It is clear that the Claimants were initially misinformed that redundancy selection criteria were to be used. However, that mistake was subsequently rectified, and Mr. Johnson (and presumably the 4 other Claimants) all knew that no redundancy selection criteria were to be used in light of the fact that the Respondent proposed to make the posts of all 5 WFS drivers redundant. The WFS drivers were not prejudiced by this mistake.

134. Fifth, the Respondent did not act outwith the band of reasonable responses open to it at the time by choosing not to take further advantage of the CJRS and put/keep the Claimants on furlough rather than make their posts redundant and dismiss them. The CJRS scheme was not cost-free to the Respondent, was becoming progressively more expensive/costly to the Respondent to participate in over time, and did not address the underlying problem, which was the fundamental lack of certainty over future aviation fuel demands from the Respondent's clients. The Respondent did not act unreasonably in determining that in light of its ongoing losses, the Respondent needed to address its financial problems head-on and it was not appropriate to defer them indefinitely by taking further advantage of the CJRS.

135. Sixth, the Tribunal does not accept that the Respondent did not reasonably consider the alternatives which were suggested to it during the redundancy process, the main two suggestions being (i) having only one redundancy, then waiting till 31 August 2020 to see what happened to aviation fuel volumes before deciding whether to continue with further redundancies ("*Another alternative was reducing numbers within the team. My colleague John Graham [ ] offered to accept voluntary redundancy. This would have left us with only four drivers*.") (ii) continuing to use the CJRS furlough scheme to avoid the need for redundancies ("*There were plenty of alternatives Hoyer could have gone for. One would have been to have put us on furlough until volumes picked up again*."). In Mr. Johnson's case, his dismissal letter and Mr. Noble's letter dismissing his appeal addressed those two alternatives in considerable detail and explained why the Respondent did not regard them as viable. The notes of Mr. Johnson's appeal hearing also suggest Mr. Noble engaged with these alternative proposals. The Tribunal finds that the Respondent's decision not to consider either of them as viable alternatives to the proposed redundancies were within the band of reasonable responses open to it at the time, and were adequately and reasonably explained to Mr. Johnson during his redundancy process.

136. Seventh, in light of the Tribunal's findings on liability, the *Polkey* issue does not strictly speaking arise. However, had that issue arisen for determination, the Tribunal's finding would have been that there was a 80% chance that the Claimants would have been fairly dismissed for redundancy had a fair redundancy process been applied, given the fact that (i) financial and business fundamentals were the main drivers behind the Respondent's decision to dismiss all five WFS drivers (ii) the Claimants' reasons for opposing dismissal on redundancy grounds were in large part speculative (they hoped aviation fuel deliveries would go up substantially, which later events showed did not happen) (iii) the realistic height of the Claimants' case was that the Respondent could have kept on at least one or two WFS drivers in full-time employment ("*If there was not enough work for all five of us at that time, there would definitely have been work at least one or two of us*."), a

position which if accepted would mean that three if not four out of the five WFS drivers would have been fairly dismissed on redundancy grounds. The Tribunal also notes that in 2020 the Respondent lost its fuel supply contract with Emirates Airlines.

Employment Judge: Antoine Tinnion
Date of Judgment: 16 July 2021
Entered in register: 21 July 2021
and copied to parties