EMPLOYMENT TRIBUNALS

Claimant	Mr David Stephens	
Respondent	Qatar Airways Group QCSC	
Heard at	Wales Employment Tribunal by CVP	**On**: 3, 4 and 21 February 2022.
Before	Employment Judge Othen (sitting alone)	

Representation

Claimant	Mr Westwell, of counsel
Respondent	Mr Pourghazi of counsel

RESERVED JUDGMENT ON LIABILITY

The Claimant's claim of unfair dismissal is not well founded and is dismissed.

REASONS

Introduction

1. The Claimant was employed as an Airport Services Manager from 4 June 2018 at Cardiff Airport until 30 April 2021.

2. The Claimant claims that his dismissal was unfair within section 98 of the Employment Rights Act 1996.

3. The Respondent contests the claim. It says that the Claimant was fairly dismissed by reason of redundancy.

4. The Claimant was represented by Mr Westwell of counsel and gave sworn evidence. The Respondent was represented by Mr Pourghazi of counsel, who called sworn evidence from Keith Perera ("KP"), Gary Kershaw ("GK") and Jessica Shennan ("JS"). I considered the documents from an agreed, 331 page Bundle of Documents which the parties introduced in evidence.

Preliminary matters

5. In cross-examination on the first day of hearing, KP attempted to communicate with the Respondent's legal team via a WhatsApp group. He sent three messages: "*Am I getting this wrong*", "*Hi*" and "*I'm seeking advise* [sic]". The Respondent's legal team did not respond and removed KP from the WhatsApp group.

6. The Respondent's counsel promptly asked for the hearing to be paused while the issue was addressed. On hearing oral submission from the parties, I ordered KP to produce a witness statement about the extent of his communications and asked that evidence of all communications be sent to me and the parties. Claimant's counsel was then given an opportunity to cross-examine KP about the communications.

7. During cross examination, he confirmed that he had not had any other communications while giving evidence. He stated that he was under the impression that he was permitted to communicate in this way. He accepted in cross-examination that he had heard my warning at the start of the hearing that witnesses should not communicate with anyone while giving evidence under oath but asserted that he had misunderstood that this message extended to legal representatives.

8. I was referred, in submissions, to the following:

8.1 Rule 41 of The Employment Tribunal Rules of Procedure (ET Rules) provides in relation to the Tribunal's general power to control procedure (including in relation to evidence) that:

8.1.1 "The Tribunal may regulate its own procedure and shall conduct the hearing in the manner it considers fair, having regard to the principles contained in the overriding objective..."

8.2 Under rule 2 of the ET Rules, the overriding objective is "*to enable Employment Tribunals to deal with cases fairly and justly*".

9. Claimant's counsel referred me to the following case: Hughes Jarvis Ltd v Searle [2019] 1 WLR 2934, in which Patten LJ considered the approach which a judge in proceedings governed by the Civil Procedure Rules should take where a witness has communicated with a third party about their evidence. He stated at para 28 that:

9.1 "*The obvious sanction open to a judge who discovers that a witness has communicated with some third party about his evidence during the course of the trial is to ascertain what was discussed and, if appropriate, to discount or give no weight to the evidence*."

10. Claimant's counsel submitted that KP's conduct raised doubt as to the reliability of his evidence and less weight should therefore be given to it.

11. The Respondent responded that this was a misunderstanding about which he was open and honest and not a case where KP acted dishonestly, but also that

KP received no information or advice from anyone: he was immediately removed from the WhatsApp group and his evidence cannot have been tampered or affected in any way.

12. Having reviewed the evidence of the communications and heard these submissions, my conclusions were and are as follows:

12.1 There was no evidence that there had been any dialogue with KP: the extent of the messages was as set out above and no more;

12.2 As such, I do not find that his evidence was affected by the messages in any way;

12.3 In general terms, I find that KP was an honest and reliable witness and I believe his assertions that, as this was his first employment tribunal hearing, he did not understand that the prohibition on communications while giving evidence did not extend to his legal advisers;

12.4 I find that there was no unfairness or prejudice to the Claimant as his counsel was given full opportunity to examine the evidence, cross examine KP and make submissions to me;

12.5 As such, I do not feel it appropriate to discount the weight of the witness evidence given to me by KP.

13. It is worth saying that the messages from KP were posted at a time which appears consistent with cross examination and questioning about whether and how the Respondent considered any selection pools for redundancy. His evidence on this issue was unclear and confused (although I do not find it to have been dishonest). I have taken this into account in my findings of fact on this issue.

Issues for the Tribunal to decide

14. The parties had agreed a written list of issues for me to decide before the hearing and a copy was sent to me which I have copied below (agreed issues are highlighted in bold) :

14.1 "*What was the reason (or, if more than one, the principal reason) for the Claimant's dismissal, and was the reason for dismissal a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("the ERA")?* ***It is agreed between the parties that the reason was redundancy****.*

14.2 *If so, was the dismissal fair or unfair for the purposes with s. 98(4) of the ERA? In particular, was the Respondent's decision to dismiss the Claimant within the range of conduct that a reasonable employer could have adopted in the circumstances ("the band of reasonable responses")?*

14.3 *The issue in paragraph 2 falls to be determined by reference to the following sub-issues:*

15. *Whether the Respondent adequately warned and consulted Claimant in relation to the proposed dismissal for redundancy.* ***The Claimant does not dispute that the Respondent did so****.*

15.1 Whether the Respondent adopted a fair pool from which selection for redundancy was to be made. The Claimant says that the Respondent did not do so because it:

15.1.1 failed genuinely to apply its mind to the problem of who should be included in the selection pool; or

15.1.2 even if it did genuinely apply its mind to the appropriate pool, its decision to place the Claimant in a selection pool of one (rather than in a pool with all Airport Service Managers in the UK and Ireland) was not within the band of reasonable responses.

15.2 *Whether the Respondent took reasonable steps to find the Claimant alternative employment. The Claimant says that it did not in that:*

15.2.1 It did not take sufficient steps to find alternative roles for the Claimant within its organisation or to facilitate the Claimant's application for those roles;

15.2.2 It failed to take the steps in respect of alternative roles summarised as "Options one to six" (inclusive) in the Claimant's written appeal dated 9 February 2021 at pp.136-138 of the Hearing Bundle; and

15.2.3 *In its approach to the search for alternative employment for the Claimant, it was unreasonably influenced by the fact that a complaint had been raised against the Claimant by another employee*."

Findings of fact

16. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. References to page numbers are to the agreed Bundle of Documents.

17. The Respondent is an international airline headquartered in Doha, Qatar. On 4 June 2018 the Claimant commenced employment as an Airport Services Manager ("ASM") at Cardiff Airport. The Claimant's role required him to supervise the ground services team at Cardiff Airport. Employees for the Respondent have roles graded from band 01 to band 13, with band 13 being the most senior. At the time of his dismissal, the Claimant's ASM role was in band 07.

18. Cardiff was/is a small airport and the Claimant was responsible for 5 flights per week. The Claimant's line manager was KP (Regional Airport Services Manager, UK & Ireland Airports).

19. The Claimant's contract of employment included a mobility clause as follows:

"3. *Place of Work / International Mobility Clause*

3.1 The Employee's normal place of work shall be Cardiff. The Employee may be transferred to another location either within the United Kingdom, or abroad to any other country, within the Company's discretion and as the Company may reasonably determine, either on a temporary or permanent basis. The Company's Relocation Policy and local terms & conditions will apply."

20. Before March 2020 there was an ASM role at each of the Respondent's seven airports in UK & Ireland: Birmingham, Cardiff, Dublin, Edinburgh, London Gatwick, London Heathrow and Manchester

21. The Coronavirus pandemic led to the suspension of all the Respondent's flights from Cardiff from 27 March 2020 and its employees there were put on furlough. A letter to the Claimant from KP dated 29 May 2020 confirmed this with effect from 1 June 2020 and stated:

"*Given the impact of COVID-19 on our business, the Company needs to take urgent measures to reduce its employee costs in order to delay the need for redundancies or lay-offs" (74). He remained on furlough until 3 September 2020*.

22. Thereafter, from mid-September 2020 to 18 January 2021, the Claimant worked in temporary ASM roles at Edinburgh and London Gatwick ("LG") airports, a day's cover at London Heathrow Airport and was on furlough from 16 November 2020 to 7 December 2020. From 8 December 2020 to 18 January 2021, he worked as an interim ASM at LG. During this time period, the flight frequency of all the Respondent's flights at its operating airports was significantly reduced.

23. On 9 November 2020 KP notified all staff under his management that permanent ASM roles were available at Manchester and LG Airports, saying: "*If you are interested, I encourage you to apply*"

24. The Claimant applied for the role at LG. In his witness statement, the Claimant says that he was not made aware that he could apply for both roles and that he applied for the LG role as it was closer to his home in London. In cross examination he stated that it was "*frowned upon*" to apply for more than one role at the same time but on questioning by the Tribunal, could provide no explanation or evidence as to why that would be the case. I find that the Claimant did not apply for the role in Manchester because he was not interested in it and wanted instead, to procure the role at LG. This conclusion is consistent also with further evidence and findings of fact, later in the factual chronology below.

25. On 7 December 2020 Lisa Simpson of the Respondent's HR team sent an email to (among others) KP's line manager, Philemon Azer (Regional Manager Network Stations, Ground Services), stating that:

"*we have received confirmation that we need to proceed with preparation for closure of BHX and CWL stations*" (Birmingham and Cardiff).

26. The email included a list of affected employees at Birmingham and Cardiff.

27. Five employees were shown at Cardiff, including the Claimant. The sixth employee in the Claimant's team at Cardiff, Mr Hussein Alghazali (HA) (Airport Services Supervisor), was not included in the list. In his evidence, KP explained that HA was originally a Grade 5 Supervisor at Cardiff and had applied for a transfer to London Heathrow airport, which had been accepted. There was no evidence about exactly when this transfer had taken place. KP explained this role varied from that of ASM as the latter was a leadership role.

28. Interviews for the Manchester ASM role were conducted in December, although there was only one candidate, Mr Jonathan Bryce, a previous ASM, who had been covering the Manchester ASM role temporarily having been posted by the Respondent from Cambodia. At the time, the airport in Cambodia was suspended (which remained the case at the time of the hearing) and as such, Mr Bryce's role would also have been likely to be at risk of redundancy.

29. Around the same time, in mid-December, 2020, the Claimant was interviewed for the Gatwick role. His witness statement confirmed that this interview went well and there is no evidence to the contrary.

Redundancy Selection - Pools

30. In the advent of the closure of Cardiff, KP's witness statement states that "*we considered if it would be appropriate to pool all ASMs nationally but found that it would be too disruptive to the business*".

31. During examination in chief, he stated that a pool hadn't "*been the directive from Head Office*" and that in the past, selection pools had not been used in similar situations, recounting a previous closure at LG when affected employees had been considered on a local basis. He gave the reasons for this as follows:

31.1 That there were too many "variables" between ASM roles at different airports, with the result that different airports required different skill-sets, and that ASMs could not be transferred easily from one airport to another. The variables he referred to were flight frequency, the volume of customers using the airport, the customer type, infrastructure at the airport, and the types of third-party handler contracts at each airport (e.g. in respect of cleaners, baggage handlers, check-in teams, lounge staff); and

31.2 Different ASMs were employed on different contracts (of employment): some local (UK based) and others posted (from abroad).

32. When questioned in cross examination and by the tribunal, KP could not recall any specific discussions on the subject of pooling. He theorised that they "*would have*" taken place but could not be sure what had been discussed, when and between whom. There were no documents which supported any such discussions.

33. I find that there were no specific discussions on whether to pool all ASMs on a national basis as part of this specific redundancy selection process. I find that, with the announcement of the closure at Cardiff airport, the Respondent

considered that the Claimant's role was at risk of redundancy and that this did not affect any of the other ASM roles. As such, it followed previous procedure, for the reasons given by KP and did not consider any wider selection pool.

Redundancy Consultation

34. On 4 January 2021 the Claimant's first redundancy consultation meeting took place, with KP and Laura Tait from the Respondent's HR team. The minutes (94) state that the Claimant was told:

" *many of our routes remain commercially unviable due to a significant drop in global demand for air travel. In the UK, this has impacted the schedule of our Cardiff station, which as you know was suspended for the IATA Winter 2020 schedule (October 2020 – March 2021). Unfortunately, we now have confirmation that the station will be further suspended for the IATA Summer 2021 schedule (March 2021 – October 2021). A further review will be conducted prior to IATA Winter 2021. Due to these market conditions, the Company is proposing redundancies of all roles in Cardiff Ground Services. If the proposal is adopted, there will no longer be a requirement for your role; this will impact all Ground Services employees at Cardiff. Accordingly, with regret, you are now "at risk" of redundancy*."

35. It is recorded that the Respondent would try to find a suitable alternative role for him and his ongoing application for the LG role is noted.

36. A letter of the same date (96) summarises the above information and states:

36.1 " *If there are any suitable alternative positions that you think we should consider you for, please let me know*." Also: "*If we are unable to identify any alternatives to the redundancy, it is likely that it will take effect on 31 January 2021. However, the consultation process will continue for as long as there are issues to discuss*."

37. On 12 January 2021 the Claimant attended a second consultation meeting. According to the notes, KP stated that: "*we have identified a suitable alternative role which is the ASM role at London Gatwick*". The Claimant is recorded in the notes as having said, "*I'm not limited to LGW, I was in Abu Dhabi for a significant amount of time*" and "*I'd like LGW, I would also like to keep my options open*".

38. The Claimant also asserts that he raised the Manchester ASM role as an alternative at this meeting, although this is not recorded in the notes. I find that the Claimant did not raise the Manchester role at this meeting. My reasons for this are given in later paragraphs on this subject.

39. A letter from 13 January 2021 (107), states:

39.1 *" If we are unable to identify any alternatives to the redundancy, it is likely that it will take effect on 31 January 2021*."

40. On or around 14 January 2021, the Respondent's flights from LG were suspended for the winter season (until March 2020). An email dated 14

January 2021 from Laura Tait in HR to Philemon Azer (Regional Manager Airport Services) (100) states that the Claimant "*has been informed*" that the ASM role had been "*placed on hold*" and that his last date of employment was expected to be 31 January 2021. The Claimant has denied the Respondent's assertion that he was told of this on 14 January 2021, despite this email and another consistent email from the Respondent dated 11 January 2021.

41. On 19 January 2021 the Claimant was placed on a further period of furlough leave. On the same date, the Claimant was notified of two alternative roles at London Heathrow: Duty Officer and Supervisor at grades 5 and 6 respectively but the Claimant confirmed that he was not interested in applying for either.

42. On 24 January 2021 the Claimant sent an email to KP expressing interest in ASM roles in Abu Dhabi and North America "*based on the confirmed suspension of CWL station….and the current suspension hold on LGW station*"

43. I find on balance that the Claimant was aware of the suspension of services at Gatwick and his application for ASM being placed on hold from mid-January for the following reasons:

43.1 He was on furlough from his temporary ASM role at Gatwick from 19 January onwards, having been in that role from December 2020 onwards;

43.2 He clearly knew by at least 24 January 2021, as the above email of that date from him to KP (see paragraph below) expressly refers to this;

43.3 In general terms, I did not find the evidence from the Claimant about what and when he was told about LG to have been reliable in comparison to the contemporaneous documents. This is further referred to in paragraph 47 and 56 below.

44. KP replied to the Claimant's email of 24 January 2021, informing the Claimant that "*Philemon is managing these types of movements within our network whether they be temporary and permanent so he will reach out to you if something becomes available*". On or around 1 February 2021, the Claimant also applied for an ASM role in Seattle and Laura Tait from HR assisted him with an enquiry regarding this and wished him good luck (120-121).

<u>Appointment to Manchester ASM role</u>

45. An email from 1 February 2021 from Roshin Karunaratne, Recruitment Specialist at the Respondent, states that in relation to the Manchester ASM role, Mr Bryce "*has been offered the MIN of the UK scale, but wants to negotiate*" (132). KP's witness statement states that "*during January 2021 the [Manchester ASM] role was offered*" to Mr Bryce. KP accepted that it was possible that the offer had been made to Mr Bryce after the Claimant's first consultation meeting on 4 January 2021, or after the second meeting on 12 January 2021, but said that he could not confirm or deny this as he did not know when the offer had been made. It is clear that the offer had been made to him sometime during January 2021, although it is impossible to state exactly when

Seattle ASM Role

46. On 1 February 2021, the Claimant applied for the role of ASM in Seattle (143). On 4 February 2021, Laura Tait emailed Maham Mukhtar in the Respondent's US offices, referring to the Claimant's application and to also ask about any other US-based suitable roles. A reply on the same date states that the Claimant had also been in touch with Mr Mukhtar directly but explained the difficulties with proceeding with his application, those being uncertainties with VISA sponsorship applications and delays in granting VISAs (127). This was later clarified on 8 February 2021 when it was confirmed that the Respondent was suffering from an acute staff shortage in the US at that time and could not delay recruitment for this position (128).

Final consultation meeting

47. On 4 February 2021 the final consultation meeting with the Claimant took place. KP stated that as no suitable alternative positions had been identified, his role would "*end by reason of redundancy*" on 30 April 2021. The Claimant is noted to agree that: "*there are no suitable alternatives, but there are roles across the network…that are advertised externally*" (122). Laura Tait confirmed that the LG role was cancelled. The Claimant insisted in cross-examination that he was not told about this cancellation until after this meeting; until 11 February 2021 but later retracted this assertion when referred to the minutes.

48. The Claimant's case is that he also mentioned the Manchester role at this meeting although he did not ask for it to be included in the notes. I do not find that assertion credible. The Claimant asserted that at other stages, he either did not know that he could apply for this role (see paragraph 24) or specifically enquired about it as a suitable alternative role (at the second consultation meeting). This argument is not consistent with any of the documents or other evidence and is only raised by him in writing for the first time at his appeal. I find that the Claimant showed no interest in the Manchester role before his dismissal and did not consider it as a suitable alternative role during redundancy consultation, only raising it for the first time during his appeal.

49. A letter of dismissal dated 5 February 2022 was sent to the Claimant and confirmed his effective date of termination would be 30 April 2021 (124).

Ramp Ops Role -

50. On 7 February 2021, the Claimant applied for this role and this was chased by Laura Tait on 17 February and 23 March 2021 before she was informed that the application had been rejected because the relevant recruiter was looking at internal candidates with more experience of ramp operations (206). This was passed on to the Claimant (213)

Events following Final consultation meeting

51. On Monday 8 February 2021 an employee at Birmingham Airport contacted KP to say that she had received a phone-call from the Claimant that afternoon and that he had asked her inappropriate question about the redundancy

consultation process which had made her feel uncomfortable. KP informed Ms Tait who spoke to the employee. She then suggested that the Claimant's email access should be cut off immediately instead of at the end of that week as initially planned (two days earlier then intended). Access was removed on 10 February 2021. On 10 February 2021 Ms Tait wrote to the Claimant warning him in relation to "*unsolicited calls to other employees … including your subordinates, regarding the recent redundancy process*" and asking him to cease contacting colleagues in this regard (139). The Claimant did not respond.

52. In his witness statement, the Claimant denied making any calls to staff members. Given the contemporaneous documents, I do not find this assertion credible.

Appeal

53. On 9 February 2021 the Claimant lodged an appeal against his redundancy (135). In the introduction to this letter he recounted a chronology of the consultation meetings and said of the second meeting:

"*Also mentioned was 'We will follow up on the Airport Services Manager – London Gatwick process and come back to you as soon as possible'. I am yet to receive any outcome on my interview process for this*."

54. He challenged the fairness of the final consultation meeting, saying that he had not been warned that this was final.

55. He also raised six options for avoiding redundancy:

55.1 being kept on furlough at Cardiff airport;

55.2 being pooled with the remainder of the London Gatwick team;

55.3 a transfer to the Manchester ASM role;

55.4 being slotted into ASM roles in Seattle, Bucharest or Abuja;

55.5 the possibility of being placed in a role in Abu Dhabi or another airport in one of the Gulf Cooperation Council countries; and

55.6 the possibility of being placed in a role in Doha.

56. It is worth noting that the Claimant had, by then, been informed of the cancellation of the LG role, so the assertion that he still awaited an outcome of his application was misleading.

57. On 17 February 2021 the Claimant attended a redundancy appeal hearing with GK, Regional Manager UK & Ireland, and JS of the Respondent's HR team.

58. On 3 March 2021, GK wrote to the Claimant dismissing his appeal and responding to all the grounds (195).

Perth ASM Role

59. The Claimant applied for this on 23 February 2021 after suggestion from Laura Tait. He was informed on 24 February 2021 that, as a local contract, he would need to be eligible to work in Australia which he was not.

Terminal Operations Manager – Doha (Grade 8)

60. The Claimant made this application on 26 February 2021 and this was chased by Laura Tait on 2 March 2021 (200). On 11 March 2021, a response from the relevant recruiter informed Laura that his application had been unsuccessful because of his "*limited experience in Terminal and Airport Operations*".

ASM role Abu Dhabi

61. The Claimant applied for this role on 2 March 2021 and this was chased by Laura Tait on 23 March 2021 (242). On 24 March 2021, it was confirmed that recruitment for the position was on hold and may be removed. The role was not filled until October 2021 due to uncertainties cause by the COVID pandemic.

62. The Claimant's effective date of employment was 30 April 2021.

Events following termination of employment

63. On 2 June 2021 the Claimant emailed Mr Rossen Dimitrov, the Respondent's Chief Officer of Customer Experience to ask for help in finding further employment with the Respondent and raising allegations of unfairness. He said, amongst other things that:

"*During the 4-month period of redundancy consultation and notice period, I made a significant conscious effort to apply for as many vacant ASM roles across the network, which I have had no replies to whatsoever. I openly made it clear to my Line Manager Mr Keith Perera (RASM UK&I) that I was willing to be relocated or transferred to any QR station that required an ASM, but unfortunately this request was ignored, with no discussion or effort made to try and avoid my redundancy from the company to take place, even though positions were available*."

64. A meeting took place with Mr Joe Beattie, Mr Dimitrov's subordinate and acting Vice President of the Respondent, on 14 July 2021. The Claimant alleges that Mr Beattie informed him that his applications were being blocked because of a grievance raised against him. He allegedly said, "*once you have a grievance against you, there is no room for re-employment*" and said that he would investigate the Claimant's situation.

65. An email from the Claimant dated 26 July 2021 asked Mr Beattie for an update and a response from Mr Beattie dated 5 August 2021 suggested a conversation in the following week. On 7 August 2021, Mr Beattie emailed the Claimant stating that he had "*now been informed that [the Claimant had] taken out a grievance against the company" (referring to the Claimant's ACAS EC referral)* and *"it no longer seems appropriate that we continue this conversation*".

66. Mr Beattie did not give evidence for the Respondent, having left employment in September 2021.

Applications outstanding on Effective Date of Termination.

67. As well as the Abu Dhabi ASM role, the Claimant had three outstanding applications on 30 April 2021 (which did not include applications for the roles of Bucharest or Abuja, for which he did not apply):

67.1 ASM at Gassim Airport, Saudi Arabia: this recruitment was placed on hold indefinitely;

67.2 ASM at Damman Airport, and Manager Cargo Freighter Operations at Doha Airport: both of these were recruitment processes were delayed and his applications rejected on 4 October 2021 and 27 July 2021 respectively.

Relevant law

68. Mr Westwell and Mr Pourghazi provided me with written and oral submissions which I have considered and refer to where necessary in reaching my conclusions

69. Section 94 of the Employment Rights Act 1996 (ERA) confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111.

70. Section 98 ERA deals with the fairness of dismissals and Section 98(4) with fairness generally, which provides that the "*determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and shall be determined in accordance with equity and the substantial merits of the case"*.

General case-law principles

71. The leading case on reasonableness in relation to redundancy is Polkey v A E Dayton Services Ltd [1987] IRLR 503 in which the House of Lords held that an employer will not normally act reasonably (and a dismissal will therefore be unfair) unless it:

71.1 Warns and consults employees, or their representative(s), about the proposed redundancy;

71.2 Adopts a fair basis on which to select for redundancy;

71.3 Considers suitable alternative employment.

72. For a redundancy dismissal to be unfair, the decision to dismiss must fall outside the range of reasonable responses. In other words, the tribunal must

be satisfied that no reasonable employer would have dismissed the Claimant by reason of redundancy in the particular circumstances of the case.

Selection pools

73. There are a great many cases which have considered the question of selection pools and fairness. I was referred to various cases by counsel in this case. I have referred here to the ones and to their principles which I consider most relevant.

74. A tribunal cannot substitute its own view of what the appropriate pool should be: Hendy Banks City Print Limited v Fairbrother UKEAT/0691/04/TM. Further, A tribunal must judge the employer's choice of pool by asking itself whether it fell within the range of reasonable responses available to an employer in the circumstances: Thomas & Betts Manufacturing Ltd v Harding [1980] IRLR 255, CA.

75. Mr Pourghazi referred me to the relevant EAT passage in Kvaerner Oil and Gas Ltd v Parker and ors EAT 0444/02 at [20]:

'*different people can quite legitimately have different views about what is or is not a fair response to a particular situation… In most situations there will be a band of potential responses to the particular problem and it may be that both of solutions X and Y will be well within that band*.'

Failure to consider a pool

76. There have been, and will be cases in which an employer does not consider a selection pool at all. This is a key issue in this case. I was referred to the case of Wrexham Golf Co Ltd v Ingham EAT 0190/12 in which the EAT discussed this issue in detail by reference to the circumstances of the case before it and also, precedent case law.

77. In Wrexham, the Claimant worked as club steward, with various responsibilities. The Respondent employer decided that it would combine its bar and catering functions, and the club steward's duties could be divided among other staff, so that the Claimant would be redundant. The EAT overturned the Tribunal's decision that the dismissal was rendered unfair because the Respondent had failed to consider the issue of a pool and whether other bar staff should have been placed at risk together with the Claimant. The following passages are taken from that judgment (my emphasis):

77.1 "*The word "pool" is not found in section 98(4) of the Employment Rights Act 1996. But it is well known to employment lawyers and those who work in human resources. It gives expression to a key decision which has to be made when an employer has decided that its requirements for employees to carry out work, or work of a particular kind, have ceased or diminished. Which employees will be considered for selection? The group of employees from whom the selection will be made is often called "the pool".* ***There is no rule that there must be a pool: an employer, if he has good reason for doing so, may consider a single employee for redundancy***" *[21];*

77.2 *"The Tribunal did not criticise the conclusion of the Club that the role of Club Steward should cease. Its reasoning seems to proceed from its finding that the Club did not consider developing a wider pool of employees. At this point the Tribunal needed to stop and ask: given the nature of the job of Club Steward, was it reasonable for the Respondent not to consider developing a wider pool of employees? Section 98(4) requires this question to be addressed and answered. On its face, it would seem to be within the range of reasonable responses to focus upon the holder of the role of Club Steward without also considering the other bar staff. The Tribunal does not say why it was unreasonable to do so. This may be because the Tribunal had in mind the words of Mummery J in Taymech which we have quoted; but no judgment should be read as a statute.* ***There will be cases where it is reasonable to focus upon a single employee without developing a pool or even considering the development of a pool. The question which we do not think the Tribunal really addressed was whether this was such a case***" [25].

Effect of mobility clauses

78. Lomond Motors Ltd v Clark EAT 0019/09, considered the effect of mobility clauses in redundancy dismissals on closure of a geographical workplace. It discussed the fact that a redundancy at an employee's workplace is not rendered less genuine by the existence of a mobility clause which would have allowed the employer to send the employee elsewhere to work. It extended this reasoning to the determination of the selection pool: '*It is not a question of considering what, historically, the position was… nor is it a matter of considering what, at some indefinite future date, the position might be. It is a matter of examining what actually is the position at the time of redundancy*.' The EAT therefore concluded that there was 'considerable force' in the submission that mobility clauses are not relevant to an assessment of whether or not an employer has acted within the band of reasonableness in selecting the pool.

Closure of geographical work locations

79. The final case which I considered to be of particular relevance was Halpin v Sandpiper Books Ltd EAT 0171/11 in which the Respondent had asked the Claimant to relocate to China from London. It subsequently closed its China office and made the Claimant redundant. The EAT upheld the tribunal's decision that the Claimant had been fairly selected in so far as he was in a pool of one given his unique position dealing solely with sales and based in China and rejected the argument that no reasonable employer in these circumstances would (a) automatically limit the pool to those workers whose work had itself diminished; (b) exclude those with interchangeable skills in other offices that were not closing in the UK; and (c) dispense with a post and automatically decide that the person holding it must be dismissed. In fact, limiting the pool to one person was the "logical" decision given the closure of the China office.

Consideration of alternative work

80. As is consistent with the case law principles above, the scope of the employer's duty is to take "*such steps as may be reasonable to avoid or minimise redundancy by redeployment within [its] own organisation*": Polkey v AE Dayton Services Ltd [1987] 3 All ER 974, 984 (HL).

Conclusions

81. Having considered the above principles I apply them to the facts in this case and come to my conclusions as follows:

82. The Respondent admits that it dismissed the Claimant (within section 95(1)(a) ERA).

83. It is not in dispute that the Respondent dismissed the Claimant by reason of redundancy.

84. I must therefore consider the application of S98(4) ERA.

85. The Claimant does not dispute that the Respondent adequately warned and consulted Claimant in relation to the proposed dismissal for redundancy.

Fair Selection and selection pools

86. The Claimant says that the Respondent did not select him fairly because it:

(a) failed genuinely to apply its mind to the problem of who should be included in the selection pool; or

(b) even if it did genuinely apply its mind to the appropriate pool, its decision to place the Claimant in a selection pool of one (rather than in a pool with all Airport Service Managers in the UK and Ireland) was not within the band of reasonable responses.

87. I disagree with his assertion.

88. I have found that the Respondent did not genuinely apply its mind, at the time of the Claimant's selection for and/or dismissal, to the question of who should be the selection pool. I have found that it did not consider pooling all ASMs nationally and then selecting from that pool. However, I do not consider this approach to have been unreasonable.

89. As determined by the above case-law principles, it is incumbent on me to determine, not whether I would, or could have devised a national pool of ASMs from which to select, or even whether that approach would have been fairer. I must determine whether selecting the Claimant, without including him in a pool, was a reasonable response in all the circumstances of this case. I have so concluded for the following reasons:

89.1 The Respondent's history of local pooling in similar situations with the same/similar roles which, although not a fair reason of itself, set a baseline precedent;

89.2 The Claimant's dismissal took place during a global pandemic which meant that the pressures on the Respondent to act swiftly, responsively and pragmatically, in order to safeguard its business operations and the majority of the jobs for its employees, were heightened.

89.3 The Claimant himself, did not raise the suggestion of this pool at all until he submitted his ET1. When cross-examined, the Claimant stated his reason for a pool of all national ASMs was because "*ultimately, we all had the same line manager*" which I do not consider to be a persuasive argument;

89.4 The Claimant was the only ASM that was directly affected by the closure of Cardiff;

89.5 The ASMs were all at very diverse geographical locations. Pooling all ASMs nationally would have meant that each time the Respondent suspended or ceased operations at one airport, all ASMs across the seven airports at which the Respondent operated in the UK and Ireland would be placed at risk of redundancy. In the context of the COVID-19 pandemic, and the uncertainty this was causing to the ongoing viability of airport operations everywhere, this would mean that every ASM employed in the UK and Ireland might constantly be moving from one redundancy consultation to another;

89.6 The Claimant's position would mean that each time there was a reduced need for an ASM in a particular airport, all reasonable employers would decide to put all ASMs of the same grade, at all airports nationally, at risk of redundancy, which I do not consider to be a reasonable proposition;

89.7 Even if it would have been reasonable to pool the ASM role at Cardiff with all other ASMs in the UK and Ireland, that does not mean that the Respondent's decision not to pool did not also fall within the band of reasonable responses;

89.8 The Respondent's seven airports in the UK and Ireland were different in terms of:

89.8.1 the number of flights the Respondent operated there per week,

89.8.2 the number of passengers the Respondent handled there,

89.8.3 the types of passengers ("passenger profile") who travel from that airport (e.g. holiday makers v high profile / VIP passengers such as politicians; passengers of particular nationalities; professionals or commuters, etc),

89.8.4 the airport's infrastructure (e.g. its size, layout, and security);

89.8.5 the number and types of 3rd party handlers with whom the Respondent dealt at the airport (including cleaners, baggage handlers, check-in staff, engineering contractors; lounge staff, etc);

89.9 Although all ASMs therefore shared the same job title and description, their role and responsibilities did vary according to their work station and there is a salary band for ASMs that reflect these differences;

89.10 The Claimant was able to provide much needed support at LGW and Edinburgh as an interim ASM during the height of the pandemic. I entirely empathise with the Claimant who may think that, when it served the Respondent's purpose to ask him to work elsewhere, it enabled this, but when it did not, it would not. However, the Claimant's move was only for a brief period, when both airports had significantly reduced flight frequency and passenger numbers due to the pandemic. The Claimant did not have a long or established work history for the Respondent during which he had worked as an ASM in other stations before the pandemic;

89.11 The Claimant's normal place of work was Cardiff. The submission for the Claimant point out that ASMs were contractually obliged to be willing to move to different airports by the mobility clause. However, this does not mean that it would be possible or reasonable for the Respondent to exercise this clause, especially during a global pandemic. In addition, it does not follow that all reasonable employers would rely on this clause to create a pool that paid no regard to whether this might:

89.11.1 require ASMs to move to locations they do not want to move to (potentially leading to ASMs refusing to move, resigning, or finding other employment); or

89.11.2 not be possible owing to the type of employment contract on which they are employed (whether UK-based or posted);

89.11.3 lead to ASMs being placed at airports at which they do not have suitable experience to work on a permanent basis.

90. For the above reasons, I find that in the circumstances of this case, it was not outside the band of reasonable responses for the Respondent to fail to consider selecting the Claimant from a pool of employees and I find that his selection for redundancy was fair and reasonable.

Alternative Employment

91. In the Agreed List of Issues, the Claimant has clarified the three grounds on which he argues that the Respondent did not undertake a reasonable search for alternative employment:

91.1 Issue 1: The Respondent allegedly did not take sufficient steps to find alternative roles for the Claimant within its organisation or to facilitate the Claimant’s application for those roles;

91.2 Issue 2: The Respondent allegedly failed to take the steps in respect of alternative roles summarised as “Options one to six” (inclusive) in the Claimant’s written appeal dated 9 February 2021 at pp.136-138 of the Hearing Bundle; and

91.3 Issue 3: In its approach to the search for alternative employment for the Claimant, the Respondent was allegedly unreasonably influenced by the fact that a complaint had been raised against the Claimant by another employee.

92. As such, although this ground of alleged unfairness has been divided and subdivided into various different allegations, I have regard to the fact that the Respondent's duty to find alternative employment should be considered overall, that is a duty to take reasonable steps to do so. Therefore, although much of the evidence and submissions were devoted to each individual allegation, my conclusions are not set out in the same level of specific detail.

Issue 1

93. I find that the Respondent did take reasonable steps to find alternative roles for the Claimant within its organisation and to facilitate the Claimant's application for those roles because:

93.1 In my findings of facts as set out above regarding all the applications made by the Claimant for alternative roles, the contemporaneous documents demonstrate that the Respondent:

93.1.1 Brought these roles to the Claimant's attention, either by way of internal IT services or emails sent to him by the Respondent's HR team

93.1.2 Facilitated the Claimant's applications so that they could be considered as required;

93.1.3 Either chased, followed up or enquired about the applications on behalf of the Claimant;

93.1.4 Where possible, facilitated feedback to the Claimant about the reasons for his rejection for the role.

93.2 In general terms, Mr Westwell complained on behalf of the Claimant that the Respondent was not proactive in its search for alternative employment and instead, engaged in a mere "box-ticking" approach. The evidence does not reflect this, insofar as it is relevant to any findings of reasonable steps taken by the Respondent. It is clear that, as well as taking the above steps, the Respondent's HR team did make proactive enquiries with and on behalf of the Claimant about alternative employment. It did not do this all the time and the Claimant also emailed HR and other recruiters and managers but this is reasonable in the circumstances. The Respondent, in my view, took reasonable steps.

Issue 2

94. I find that the Respondent did not fail to take reasonable steps in respect of the alternative roles which are set out in paragraph 55 above because:

94.1 It was not reasonable expect the Respondent to continue to employ the Claimant on furlough after 30 April 2021 because his/the ASM roles at Cardiff or at LG may become available at some point after that date. There were no plans at the point when the Respondent decided to dismiss the Claimant, or at any point before his effective date of termination to reopen either stations. Further, the status of the government furlough scheme was unclear at that

stage and there were direct and indirect operational costs to the Respondent in continuing to employ him beyond that point;

94.2 As far as the Manchester ASM role was concerned, this issue required my careful consideration. In his submissions, Mr Westwell made clear his assertion that if this role was open when the Claimant's redundancy consultation commenced, and the Respondent failed to consider him for the role or to allow him to apply for it, that failure by itself would constitute a failure to take reasonable steps to find him suitable alternative employment. Mr Westwell invited me to conclude that on balance, the offer of employment would not have been made to Mr Bryce by 4 January 2021 (the date of the Claimant's first consultation meeting) and as such, KP could and should have intervened during January 2021 to "slot" the Claimant into that role rather than Mr Bryce. I have scrutinised that submission and the facts pertaining to it and conclude as follows:

94.2.1 The role was made available for applications on 9 November 2020 and the Claimant chose not to apply for it, instead applying for the role at LG;

94.2.2 The Claimant never expressed any interest in or made any enquiries about the Manchester role during his employment. This was the case despite knowing, from mid-January 2021, that his Cardiff ASM role was at risk and that his LG application had been placed on hold with all flights suspended and no indication of when or if this may change;

94.2.3 The Claimant made enquiries about or applied for various ASM and other roles internationally from 24 January 2021 onwards, but did not do the same about the Manchester role;

94.2.4 It is impossible to know for sure from what exact date the Manchester role was filled by Mr Bryce and was therefore no longer available. It is clear that applications were invited on 9 November 202 and, being the only applicant, Mr Bryce was interviewed in December 2020. The evidence from KP is that Mr Bryce was a highly suitable candidate and was already covering the role on an interim basis. He was then appointed some time in January 2021;

94.2.5 I do not accept that it would have been reasonable for KP or for anyone else within the Respondent's organisation to circumvent the recruitment process that was underway and to "slot" the Claimant into the role, even if it was still available. Given the differences in the ASM roles between stations and that there was one suitable candidate already in situ, having been through the interview process, it would have meant reopening the recruitment process;

94.2.6 At the first and second consultation meetings, the Claimant was told that his role was at risk because of the closure of Cardiff; at that stage, his application for the LG role was still live and he was clearly hopeful of getting it. I believe that because of this, on the balance of probabilities, he would not have been interested in the Manchester role at that stage anyway, even if it had been expressly referred to. This is consistent with

the fact that he only started to enquire about other vacancies after he was aware that the LG role was on hold;

94.2.7 By that stage, on the balance of probabilities, the Manchester role was not available, having been offered to Mr Bryce, albeit maybe on an informal basis;

94.2.8 I do not consider that it would have been reasonable to retract any offer to Mr Bryce and to reopen the recruitment exercise at that late stage in all the circumstances of the case, especially as the Claimant did not make any enquiries to that effect.

94.3 The Respondent took reasonable steps to search for, procure, or advance applications for alternative employment for all the international roles which were available, or for which the Claimant applied before his effective date of termination. Those roles included those in the Gulf states, USA, Australia and Europe and specifically, those to which he referred as part of his appeal. There is no evidence that the reasons that the Claimant was not appointed into any of those roles was because of any unreasonable failures by the Respondent.

Issue 3

95. I do not find that in its approach to the search for alternative employment, the Respondent was unreasonably influenced by the fact that a complaint had been raised against the Claimant by another employee, because:

95.1 It is entirely possible that, in his meeting with the Claimant on 14 July 2021, Mr Beattie may have mentioned the complaint made about him in February 2021 by the Birmingham staff member, and that Mr Beattie may, incorrectly, have used the term "grievance" to describe this. However, on the balance of probabilities, I do not find it credible that this would then have resulted in an organised, orchestrated and company-wide, international initiative to prevent the Claimant from securing alternative employment within it; and

96. There is absolutely no evidence that the Respondent behaved unreasonably in its search for alternative employment, that it attempted to block or delay any of his applications or did anything to prejudice his chances of securing an alternative position.

97. In general terms, the Claimant was an extremely unlucky casualty of the COVID pandemic in that, like many other employees, he was employed in a sector which was (temporarily at least) devastated by its unprecedented effects. His assistance to the Respondent in helping it to continue its UK operations by moving, at short notice, to various airport stations throughout this period of uncertainty, was clear and commendable. I can entirely understand why he must have been devastated, and even aggrieved, by the loss of his job. However, to the extent that this resulted from the unreasonable conduct of the Respondent, as defined by the relevant legal principles, that is not consistent with my judgment.

98. I find, therefore, that the Claimant was fairly dismissed by the Respondent within section 98 of the Employment Rights Act 1996 and his claim fails and is dismissed.

Employment Judge Othen
14 March 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON 17 March 2022

FOR THE TRIBUNAL Mr N Roche