EMPLOYMENT TRIBUNALS

Claimant: Mr Alex McDonald

Respondent: CAE (UK) PLC

Heard at: London South **On:** 25 and 26 April 2022

Before: Employment Judge Sekhon (sitting alone)

Representation

Claimant: In person
Respondent: Mr Tim Dracass, Counsel

RESERVED JUDGMENT

The Judgment of the Tribunal is that: -

1. The respondent has shown that the claimant was dismissed for the potentially fair reason of redundancy.

2. The respondent's decision to dismiss the claimant by reason of redundancy was fair in the circumstances. The claimant's claim for unfair dismissal is not well-founded. This means that the claimant was not unfairly dismissed by the respondent.

REASONS

Introduction

1. The claimant was employed as Synthetic Flight Instructor ("SFI") at the respondent's site in Burgess Hill and he was responsible, through his Training Manager, for the delivery of simulator training and conducting regulatory examinations from 1 April 2016 until he was dismissed on 31 October 2020

2. He notified ACAS under the early conciliation procedure on 16 December 2020. The ACAS certificate was issued on 17 December 2020.

3. In summary, by a claim received on 19 January 2021 (pages 8-22 of the bundle), the claimant seeks compensation for unfair dismissal as he was told that his role was redundant and therefore accepted voluntary redundancy. He stated at the outset of the hearing that he does not accept that there was a genuine redundancy for his role as an SFI. He also states that he was not offered suitable alternative roles by the respondent.

4. The respondent resists the claim in their response dated 24 February 2021 (pages 25-36) and submits that the claimant was dismissed by reason of redundancy in accordance with section 98(2) of Employment Rights Act 1996 (ERA) or in the alternative the dismissal was, in any event, fair for some other substantial reason in accordance with section 98(1)(b) ERA, namely due to a business reorganisation. The respondent relies on the fact that the claimant applied for voluntary redundancy and the respondent acted reasonably in all the circumstances in dismissing the claimant for redundancy and it was not a requirement to offer the claimant alternative employment.

Claims and Issues

5. The claimant brings a complaint of unfair dismissal in the context of redundancy. The respondent accepts that the claimant was dismissed on 31 October 2020.

6. This case has not been previously case managed by the Tribunal and there was no agreed list of issues prior to the hearing. At the outset of the hearing, I spent some time discussing the issues with the parties in order to agree a list of issues that need to be resolved at the hearing. It was apparent that there was a dispute as to whether the redundancy claim was genuine. The claimant particularised his claim further and expanded on the information he had given within his claim form and subsequent witness statement, and this is recorded in the agreed list of issues.

7. In determining a claim for unfair dismissal, the Tribunal must consider whether the respondent acted reasonably in all the circumstances, in treating redundancy as a sufficient reason to dismiss the claimant and will usually consider, in particular:
   i. Did the respondent adequately warn and consult with the claimant?
   ii. Did the respondent adopt a reasonable selection decision, including its approach to the selection pool?
   iii. Did the respondent take reasonable steps to find the claimant suitable alternative employment?
   iv. Was dismissal within the range of reasonable responses?

8. No real issue was taken with the consultation in general or the selection pool, though the claimant referred to the fact that he felt pressured to take voluntary

redundancy. The claimant's complaint essentially relates to the processes followed by the respondent after he agreed to take voluntary redundancy and, specifically, what he says was a failure to offer him suitable alternative employment.

9. Both parties agreed that the Tribunal would determine the following issues at the hearing which are as follows:

Liability Issues

Reason for dismissal

1. *What was the reason for C's dismissal? Was it a potentially fair reason under section 98 (1) (b) or (2) ERA 1996? In this case, the respondent relies on redundancy, or alternatively, 'SOSR' (business reorganisation), as the potentially fair reason for dismissal.*

Based on the claimant's case, was redundancy the real reason or was it a pretext to "get rid of him". The claimant relies on the fact that: -

(a) From 1 July 2020 the respondent employed ad hoc staff to do his job;
(b) The respondent told him that if he did not like it, that they would terminate his contract when he raised questions in response to being furloughed and in relation to his retention bonus being paid

The claimant states that: -

(c) 2 further SFI instructors were externally hired within a month of him being made redundant.
(d) The respondent was aware at the time of the leavers letter on 16 October 2020 that they were getting simulators so there was not a diminution of his role.
(e) Within three months of the claimant being made redundant, eleven additional SFI instructors were employed by the respondent.

Fairness of dismissal

2. *Was the claimant's dismissal fair within the meaning of section 98 (4) ERA 1996? Did the respondent act reasonably or unreasonably, in the circumstances, in dismissing the claimant for that reason (having regard to the equity and substantial merits of the case)?*

3. *In particular in the context of this case, to what extent, if at all, was the respondent required to continue to follow the steps generally expected of a fair compulsory redundancy process (for example, by considering suitable alternative employment opportunities for the claimant) after the point at which the claimant willingly entered into a mutually binding agreement to accept voluntary redundancy?*

The claimant says he would have been suitably qualified for alternative roles had he been provided with training as other colleagues were (Tom Preuss

Jones).

4. *To what extent should any compensatory award be reduced to reflect the principle in Polkey (i.e., The likelihood that the claimant's employment would have terminated in any event, even if a fair process had been followed)?*

5. *To what extent should any compensatory award be reduced on the grounds of contributory fault?*

Potential remedy issues (not being heard at the hearing on 25 and 26 April 2022)

Compensation

6. *What level of compensation should be awarded in the event of a finding of unfair dismissal?*

   Note - C has already received an enhanced redundancy payment, encompassing his statutory redundancy entitlement/ basic award.

7. *In terms of the compensatory award, what sum does the Tribunal consider it just and equitable to award C having regard to the loss sustained in consequence of his dismissal?*

Reinstatement/ reengagement

8. *Is the claimant still seeking reinstatement as a form of remedy?*

9. *If so, in deciding whether to exercise its discretion to make an order for reinstatement (or re-engagement) does the Tribunal consider that it is practicable for the respondent to comply with such an order and/ or that is just to make such an order (s. 114 (1) and (3) ERA 1996). In particular in the context of this case, would it be practicable to order reinstatement or reengagement in circumstances where C appears to harbour negative opinions and a lack of trust towards his former employer?*

Procedure and Hearing

10. The case was listed for a 2-day public final hearing and took place by CVP. The main agreed bundle for the hearing totalled 262 pages and three unpaginated witness statements were sent separately to the Tribunal. Due to the time taken to case manage the hearing and agree a list of issues at the beginning of the hearing and technical IT issues at the Tribunal, it was apparent that it was unlikely that there would be sufficient time for evidence, submissions, Judgment and remedy and I indicated that I would hear evidence and submissions in respect of liability only and hear evidence on the issues of Polkey and contributory fault, if relevant.

11. Further the claimant confirmed at the hearing that he would be seeking an order for reinstatement / reengagement and the respondent witnesses would need to deal with this in detail in their witness statements setting out the current position as to whether this was practicable. The claimant had not served an updated schedule of loss with any documentary support in relation to his financial losses or a statement setting out details that would be required for a remedy hearing. He provided a very short email dated 25 November 2021.

12. At the Hearing, the claimant was not represented and gave sworn evidence. The claimant had provided a 2-page statement for the purposes of these proceedings.

13. The respondent was represented by Counsel, Mr Dracass, who called sworn evidence from Ian Cheese, Local Head of Training Business Aviation Europe and Becky King, HR Business Partner, in the Business Aviation Training division of the respondent company. I was also referred to, and considered, witness statements from each witness who gave oral evidence and documents contained in a bundle. Both parties directed me to the documents they considered relevant during the course of the hearing.

14. I also had the benefit of oral closing submissions on liability from Mr Dracass and the claimant. Throughout this Judgment, I have referred to page numbers in brackets indicating the page number of the document in the bundle to which I refer.

Finding of fact

15. I make the following material findings of fact based on the documentation provided to me at the hearing and the witness evidence before me. The respondent prepared a chronology of events and the claimant confirmed that he had no objections to the chronology and a copy of this is attached to this Judgment. The facts are largely not in dispute.

16. The respondent is a registered company which provides specialist training for the aviation, defence and security and healthcare industries. The respondent's UK headquarters are based in Burgess Hill, West Sussex. The claimant was employed by the respondent from 1 April 2016 as a Synthetic Flight Instructor ("SFI") at the Burgess Hill site. He was a qualified instructor on two different types of aircraft: the Falcon 2000 and the Falcon 900. The claimant's duties were to deliver training (both in a simulator and a classroom environment) to pilots and in addition to carry out pilot assessments to ensure competency. A contract of his employment (pages 47 – 59) is signed by the claimant and Ms King on behalf of the respondent on 21 March 2016.

17. A disciplinary hearing took place on 18 September 2019 with the claimant, Mr Ian Cheese, Local Head of Training and Hearing Manager for the Disciplinary Hearing and Ms King, HR Partner and note taker of the meeting. A recording was taken of the meeting and notes of the meeting commence at page 62 of the bundle. The purpose of the Hearing was to review the text messages the claimant sent Mrs Kelleher on 13 August 2019 as well as the voice and video calls the claimant attempted to have with Mrs Kelleher. The respondent wished to determine whether the claimant's behaviour was in line with the respondent company's expectations as outlined in their Code of Conduct and Staff Handbook, whether it brought the respondent company into disrepute, whether it had an impact on the respondent's trust and confidence in the claimant and whether these behaviours were undertaken with loyalty, integrity and good faith as referred to in the Company's Code of Conduct and Staff Handbook.

18. Following the hearing, the respondent upheld the allegations made against the claimant and confirmed by letter dated 23 September 2019 (pages 77-78) that,

    "the outcome of the disciplinary proceedings is that you have been given a written warning. This warning will remain live on your file for a period of 12 months from the date of this letter, after which it will automatically lapse. Should we see any reoccurrence of unacceptable behaviour however, or any behaviour that is deemed contrary to our Code of Conduct, then further disciplinary action will be taken against you and a possible sanction could be a final written warning or your dismissal."

    The letter also stated,

    "Therefore, in order to address this, for the next 6 months we will be directing you to step down from your Lead Instructor duties (whilst still retaining the salary uplift that this role brings) with a view to you employing the strategies that you have identified to help you manage these inappropriate behaviours. After the 6-month period, if we have seen no further demonstration of these inappropriate behaviours then, following a review and discussions with yourself, consideration will be given to you resuming your Lead Instructor duties."

19. The claimant did not appeal the disciplinary outcome.

20. Following the onset of the covid-19 pandemic, the President and Chief Executive of the respondent company addressed employees online on 20 March 2020 and sent a message to all employees on 23 March 2020 setting out the effect the pandemic had on the respondent's business and the measures they intended to take to manage this. The email stated that the COVID-19 pandemic has,

    'created unprecedented uncertainty in the global economy and in our business. All our customers are facing significant challenges for the foreseeable future,

and the airline industry is forced to reduce capacity and ground aircraft in response to travel bans, border restrictions, and weakened demand for air travel. This is having a significant and rapid impact on our all businesses, and CAE needs to adapt by quickly reducing its operations in many locations. We need to act now and work together to protect CAE …….. This is an unprecedented crisis, and as difficult as it is, we need to take the extraordinary measures".

21. The measures included temporary layoffs by way of furlough, a salary freeze, temporary salary reductions for all employees effective from 29 March 2020 for three months and, further strategies to contain the respondent's costs by reducing overtime, global hiring, travel, external consultants, employee training activities and discretionary spend.

22. There was a further all employee briefing from Samantha Rowley on behalf of Tom McGrath, Operations leader, on 30 March 2020 (page 88) stating,

"A plan has been formulated whereby each of us will be impacted by one of 3 measures. These are as follows:

1. The original planned pay reductions.

2. Reduced Hours

Reduced hours/days, possibly in the form of rotating work days. This will be communicated by the managers.

3. Furlough, this will be for the majority of our people and comes into effect from 1 April…….

I must emphasis these measures are sadly non-negotiable"

23. The claimant was one of 82 of the respondent's employees (and 34 Instructors) who were placed on furlough from 1 April 2020.

24. The claimant was sent an email from Ms King on 30 March 2020 (page 99 to 100) stating that the respondent required him to cease working effective from 1 April 2020 and to remain at home until further notice as he had been placed on furlough. The claimant was told that he would continue to receive 80% of his salary (up to the Government's cap of £2,500 per month). He was asked acknowledge receipt of the email by 3 April 2020 stating that he had read and understood the email and that he agreed to the change to his salary.

25. With this email a Frequently Asked Questions ("FAQ") document (which commences at page 90) was circulated to employees on 30 March 2020. Page 92 of that document states,

"Yes, doing training is permitted while you are furloughed. You can also undertake volunteering activity while you are furloughed. If you wish to undertake some training during your period of furlough, please contact us and we will discuss with you whether that will be possible."

26. The claimant contacted Ms King on 30 March 2020 (page 101) in response to this email and stated,

"I acknowledge receipt of your email. I don't agree with your actions, I don't think you have stuck to seniority or full-time workers over part time.

I think the company endangered an older worker and that the company has acted irresponsibly. Once again, I feel totally let down by CAE."

27. The claimant also wrote to Ms King on 30 March 2020 in a separate email to find out if he would be paid a bonus. He wrote again on 1 April 2020 (page 102) stating,

" Hi, I didn't get an answer. Requires an answer. My contract says 4 years, get bonus. Told by Thirkettle, verbally "accept furlough, or be terminated" interesting that he couldn't email that but threatened me verbally. How can a company not comply with a contract? I'm a bit surprised that CAE say if you have any questions contact HR. But they don't respond. In my formal warning 6 months ago I was told that I had impacted the company's trust and confidence in not complying with your contract with me the company has " impacted my trust and confidence". Actually just not complied with the contract, there isn't a clause stating that the bonus can be deferred. I welcome any response……."

28. Ms King replied on 2 April 2020 (page 103),

"In respect of your retention bonus, I can confirm that, as was advised to you by David, regrettably given the unprecedented situation we find ourselves in that your retention bonus payment will be deferred to a point in time later in the year when we find ourselves in a more "normal" state. Please note that all bonuses to employees will be, at a minimum, deferred."

29. The claimant contacted Ms King on 3 April 2020 (page 105) stating,

"Hello Becky
I acknowledge receipt, thank you very much I understand what you are saying, it's better for the company to keep my money."

30. There was further email correspondence with Ms King and the claimant on 5 April 2020 regarding the government guidance in relation to furlough. The claimant stated that he could not find reference to the employer terminating the contract if the employee refused to be put on furlough. Ms King responded on the same day to the claimant's personal email account as he was on furlough. An extract of this email is as follows: -

"in respect of your final question. when changing employment contracts. if an employee doesn't agree to the change the employer would need to have an Individual consultation with the individual to see if they can reach some agreement. If they are unable to reach agreement, an employer can terminate the current employment contract and offer re-engagement under new terms and conditions. The employee then needs to decide if they accept these new terms or not. This is not specific to Covid-19 but is standard practice in employment law……..."

31. The claimant contacted Ms King on 8 April 2020 which was entitled, "in order to avoid my contract being terminated" agreeing to defer his retention bonus.

32. The claimant wrote to Mr Cheese on 17 April 2020 (page 107),

"I feel like I have had to agree to furlough, my bonus (deferred until normality) otherwise " terminate my contract "

I realise these are extraordinarily times, but I suspect that CAE now wants to get rid of me. It's not doing wonders for my anxiety, any chance of a chat?"

33. In response Mr Cheese wrote to the claimant on the same day,

"Thanks for the email, rest assured there are no hidden agendas from either Becky or myself. Can we take some time to catch up on Monday?

34. A discussion took place between Mr Cheese and the claimant on or about 20 March 2020.

35. An employee of respondent, Ebbie Jahedian, wrote to Mr Cheese on 29 April 2020 and sent a copy to the claimant asking whether the company would consider swapping instructors on furlough to keep the instructors current, make things financially fair and not feel as though they had been forgotten. The claimant responded to Mr Cheese on 29 April 2020 stating that he agreed with Ebbie and stated,

"I am not personally bothered and would like the guys who don't have a BA pension or another job to get a look in, I think Ebbie's point of " fairness " is very valid."

36. Mr Cheese responded on the same day, stating that based on the claimant's feedback he would undertake to update people's individual status over the coming week.

37. There was an email exchange between the claimant and David Thirkettle, Falcon Training Manager, on 21 May 2020 (page 112) where the claimant stated that he was not willing to return to work if he is offered a 50% reduction in pay followed by a further reduction which he had understood to be the

position from colleagues. Mr Thirkettle responded and told the claimant that this information was incorrect.

38. An email was sent from Ms King to all employees on 22 May 2020 (page 113) confirming that retention bonuses due in April 2020 would be paid in the October payroll and those due in May would be paid in the November payroll.

39. The claimant contacted Mr Thirkettle on 14 June 2020 (page 116) requesting staff training in order to stay current. This email also stated,

"*Whist I understand that you could not reply to me and seem to have no interest in keeping me current, I nonetheless have an idea."*

40. On 15 June 2020, Mr Thirkettle responded to the claimant explaining that as the claimant had not sent emails to his work email address, he had not been able to respond quickly. The claimant apologised for sending emails to his Hotmail account but explained they he was desperate to stay current. Mr Thirkettle confirmed it would be discussed at a meeting that afternoon and he would respond as soon as he could after that.

41. On 16 June 2020, Mr Thirkettle wrote to the claimant,

"I will ask Darren to complete the SRGIIOOF on Thursday. This will extend your LPC to EllSt October 2020 in accordance with the ORS4 #1374 Exemption.

We are currently not in the position to offer or conduct any instructor training. This is the case across all platforms and applies to those who are currently working within the business and to those furloughed. The expiry of all instructor training is being closely monitored with derogations put in place as required. There has been a couple of cases where we have bought individuals back to complete Initial Type Ratings where we have had a single client."

42. The claimant responded on the same day saying he understood and appreciated this.

43. A further update to all employees was sent on 25 June 2020 (page 123-125) from Ms King setting out that from 1 July 2020 the Government had introduced the concept of "flexible furlough" and explaining that it would be possible to bring furloughed employees back to work on a part-time basis with the remainder of the time remaining on furlough. The email set out information on holiday pay whilst on furlough and stated that,

"all annual leave that has accrued during any period you are on furlough leave (or flexible furlough leave going forward) will be deemed to have been taken. ……..As identified in previous FAQs, should you have booked annual leave

during any period of furlough, this will be cancelled and credited back in to your annual leave balance."

44. The claimant contacted Ms King on 25 June 2020 clarifying whether any leave he had booked had been cancelled and she responded stating that those on furlough cannot take leave. The claimant asked whether the leave he had booked in July 2020 was cancelled and whether this was in line with government guidance as he had not been given notice of this. Ms King responded stating that notice had been given on 8 April 2020. On 26 June 2020 the claimant disputed that he had given notice to cancel his leave in July as the notice given on 8 April 2020 referred to between March and June only. Ms King responded and stated that the holiday referenced the period of furlough and not any specific months and therefore continued to apply.

45. In his email of 5 July 2020, the claimant stated that he would like to work but if there was nothing for him then he would like to request 2 days holiday. His manager, Mr Thirkettle, approved 2 days leave.

46. On 22 July 2020, the respondent held two staff meetings to explain decisions that had been made by the respondent in reaction to the pandemic and how this would affect staff. The meetings were led by Tom McGrath (Operations Leader of Burgess Hill, Amsterdam and Shanghai) and Jose-Maria Garcia Elipe (Finance Director). An all-employee recording and briefing was sent to all employees on 23 July 2020 (page 139-140) from Ms King on behalf of Tom McGrath setting out changes to the business and the way the respondent will work. This states in terms of Workforce reduction,

    "As we see reduced demand for our services and products globally, this will require us to reduce the workforce size in locations and departments across the business including at Burgess Hill. Regrettably, it is likely that this will result in some positions being made redundant. To this end, we will soon begin a process of consultation. It should be noted that in these circumstances, we are committed to try and utilise the government Job Retention Scheme for as long as it is available.

    In terms of change in work practices, the need to cover training and administrative functions both cost effectively and flexibly. This confirmed that a consultation process would take place and a follow up email from H.R will make this process clear, and managers will hold team meeting to provide more information." This letter stated that consultation with employee representatives was required before any final outcomes are reached.

47. On 23 July 2020 Ms King sent a letter to all employees (page 144) seeking volunteers to act as employee representatives as the changes were to affect more than 20 employees' contracts of employment and therefore the respondent needed to collectively consult with a group-of specially elected

representatives for a minimum period of 30 days. 3 employee representatives were sought from the instructor department where the claimant worked.

48. Becky King wrote to all employees on 31 July 2020 and 3 August 2020 setting out the names of employee representatives that had been appointed in each department. The three employees appointed in the claimant's department were Scott Makin, Richard Bradshaw and Rod Line.

49. Ms King on behalf of the respondent completed an HRI: Advance Notification of Redundancies form on 5 August 2020 (page 173) for the Insolvency service, noting the likely number of redundancies in each department and stating the reasons for redundancy included "lower demand for products and service", "completion of all or part of contract", "changes in work methods or organisation" and Other, setting out the names of the employees consulted with. This noted that a possible reduction / change in terms of employment of 49 employees were required from 63 in the professional group in which the claimant's job title of STI would sit.

50. Whilst on the furlough from 1 April 2020 the claimant was not asked to work at the respondent premises save for, he was asked on 4 August 2020 to attend on 5 August 2020 to operate as Seat support for a test to assist a client. There is a dispute as to whether Mr Thirkettle was aware of this request and / or made this request. The claimant contacted the instructor, Darren Audet, on 4 August 2020 by text asking if it would be possible for him to come into work at the half time break to meet the client. Mr Audet agreed. The claimant attended the respondent's premises and carried out a practice session. On 5 August 2020, he received a call from his manager, Mr Thirkettle telling him not to attend on 5 August 2020 and that he had breached the respondent's policy. The claimant wrote to Mr Thirkettle on 5 August 2020 explaining what happened. Mr Thirkettle received a text from Mr Audet explaining that he had misunderstood the claimant's texts and that he shared the blame for what happened and apologised for this.

51. The first collective consultation meeting took place on 5 August 2020. In preparation for this meeting a comprehensive document in the form of a set of slides (pages 152- 172) was shared with employees. The respondent explained at this meeting that the main reason for consultation was to discuss and consider ways in which compulsory redundancies could be avoided as far as possible. A key focus was therefore on seeking volunteers for redundancy from within the affected areas. The saving requirements at that time included a reduction of 6 Full Time Equivalent ("FTE") headcount for instructors. The respondent asked for requests for voluntary redundancy to be made by Thursday 13 August 2020 and that the company would respond to any such request by 21 August 2020. The set of slides used for the presentation was sent to the employee representatives on 5 August 2020 together with an FAQ

document (commencing at page 180) on 10 August 2020 and placed on SharePoint. The representatives were asked to share this with the personnel in their department they represent. The claimant saw these documents.

52. A further consultation meeting regarding the impact on Instructor roles was then held on 11 August 2020. At page 185 of the bundle there is a document setting out the agenda for an instructor consultation on 11 August 2020 and a FAQ document prepared and sent to the employee representatives on 17 August 2020 which was also put on SharePoint and shared with employees. A further FAQ document (page 207) was sent to employee representatives on 24 August 2020.

53. I set out below an extract of the "Frequently Asked Questions document" dated 15 August 2020 (which commences a page 194),

Question 7
"If the business turns around there would be a greater cost to the business if we needed to re hire people in 6 months' time vs letting people go. Is this the right thing to be doing?
The response was, "We understand that this is a risk especially as we don't know the real turnaround time for Covid and the impact at a local level in Burgess Hill. The actions we are taking are not just about what is occurring in Burgess Hill, but they are to support the wider business. The Commercial Aviation Training and Simulator Products side of the business will likely be more significantly impacted than Business Aviation Training and we need to help the wider business now. Business Aviation Training may see a more rapid recovery, but as an overall business we are not expecting it to be quite as rigid especially with the aviation market not predicted to return to 2019 levels until 2024."

Question 12
"If the business recovers and there are new opportunities for hiring, will people be given first refusal to come back?" it is stated that "In the event of VR (voluntary redundancy), this would be unlikely because they would have opted to take the redundancy package. In a CR (compulsory redundancy) situation there would be no barrier to individuals returning. There may still need to be an interview conducted etc".

Question 17
"If I apply for voluntary redundancy, could I get an ad hoc instructor contract to allow me to consider delivering training in the future?" The response stated, "Yes, we would offer this but there would be no guarantee of any work and there would be a break in service before any ad hoc contract was introduced".

54. Following a request from Peter Ryall on 11 August 2020 for the scoring criteria for redundancy, Ms King responded on the same day (page 184) stating that,

    "-In respect of the scoring criteria, we will not be in a position to provide the full scoring criteria for each department at this stage. As discussed, this would ordinarily come towards the end of any collective consultation period should we find ourselves in a situation where compulsory redundancies are unavoidable. However, we have listened to your request and in the spirit of collaboration I can give you some high level indications of what we anticipate might be included.

    Capability - for example, transferable skills/knowledge/qualifications.

    Performance - for example, team player, attitude, flexibility.

    Conduct - for example, live formal disciplinary warnings.

    Whether someone is considered a high potential.

    Specific items that might be attributable to the particular role.

    Please note these aren't finalised and are subject to change"

55. Ms King also wrote to Maria Foster on 11 August 2020 (page 186) stating that, *"traditionally I can confirm this is how scoring is done with some categories having stronger weightings that the others. Some of course would be a positive number, but some may be a deduction (for example, a live formal disciplinary)".*

56. Selection criteria for instructors for Compulsory redundancies is set out on page 220 of the bundle and states that anyone with a live disciplinary on file would get a raw score of 5 and this would be considered in conjunction with the scores given under the other different headings.

57. Applications were invited for voluntary redundancy ("VR") from all employees in an attempt to avoid compulsory redundancies. The claimant sought points of clarification from Ms King on 13 August 2020 (page 192) of what would be the financial position if he applied for voluntary redundancy and what would happen to his licence. Following a response on the points raised by the claimant from Ms King the claimant requested that he be considered for voluntary redundancy on 13 August 2020.

58. Ms King confirmed by email on 21 August 2020 (pages 203-204) that the claimant's application for voluntary redundancy had been successful. This confirmed that the last date of the claimant's employment was 31 October 2020, and the period of notice would take effect from 1 September 2020 together with financial details of how the claimant's voluntary redundancy package would be calculated. This also stated, *"As we now have a bunding agreement the decision cannot be varied unless by mutual agreement by both parties".*

59. On 21 August 2020, the claimant wrote to Ms King to state that there may be a mistake with his redundancy payment which instead a figure of £5,861 should be £8,791 and Ms King replied on the same day confirming that this sum was correct and apologising for the mistake.

60. The claimant wrote to Ms King on 26 August 2020 asking whether he could forgo his notice period and pay for that period by mutual agreement. Ms King wrote on 7 September 2020 stating that she would discuss this with Mr Cheese if the claimant confirmed what timeframe he wished to forego. He did not respond.

61. On 16 October 2020, (page 227), Ms King wrote a letter to the claimant by post setting out the final details of his employment. This included: -

- His last date of employment was 31 October 2020.
- His notice period commenced on 1 September 2020, and he served 2 months.
- He would be paid £6,349.42 subject to the usual tax and NI deductions in lieu of one months' notice payment.
- He would receive a top up furlough payment of £3,849.42.
- His redundancy payment would be £8,791.50 and would be paid in the October payroll. The first £30,000 of redundancy pay is paid tax free.
- He would be paid 4-year retention bonus of £20,000 and pro-rated retention bonus of £2,916.67. Both of these would be paid in the October payroll and are subject to the usual tax and NI deductions.
- He would be paid 155.5 holiday hours (inclusive of bank holidays) and the top up amount equates to £3,453.37 gross.
- £295.40, BUPA payment would be deducted.
- A P45 would be posted to his home address.
- Company property in his possession should be returned.

This letter also stated,

"Finally, I wish to say that you may have joined in the All Employee Town Hall meeting recently whereby he advised that we have approached the Amsterdam Works Council with a proposal to relocate the three BAT simulators in their centre to Burgess Hill. This is still under consultation and will be for a few more weeks as a minimum. This leaves me to say that presently there is no alternative to the redundancies being made in V Burgess Hill. However, should we get agreement from the Amsterdam Works Council in the future and the simulators move to Burgess Hill, if vacancies become available as a result and you are interested in applying, then of course we would look favourably on any application."

62. The respondent accepted 5 STI requests for voluntary redundancy, 3 were part time employees and 2 full time employees which meant that the equivalent of 3.85 employees were made voluntarily redundant. In addition to this, 2 STI's resigned so the respondent reduced their headcount for STI's by 5.85. They were seeking to reduce the headcount by 6 Full time equivalent STI's at the

outset of the redundancy process. No compulsory redundancies were made in the STI team. Voluntary redundancy requests were made from 2 other STI's but these were not accepted by the respondent as they had met the reduction in headcount that they sought. 4 compulsory redundancies were made in the Business Aviation Training and finance team at Burgess Hill, 2 in the finance team and 2 in the client experience team. Further redundancies were made across the business.

63. The government announced an extension to the flexible furlough scheme on 30 October 2020.

64. Peter Treadway tendered his letter of resignation on 16 September 2020 as full time SFI at Burgess Hill and he requested his last day be 16 October 2020. Malcolm Paul tendered his letter of resignation on 30 October 2020 as full time Synthetic Flight / FAA Lead instructor and requested his last day be 31 January 2021.

65. A job offer was made by the respondent to Mr G Capon on 1 November 2020 as a Synthetic Flight Instructor and his contract of employment stated that his employment commenced on 17 November 2020 (page 230).

66. A job offer was made to Mr BJ Dundon by the respondent on 16 November 2020 as a Synthetic Flight Instructor and a contract of employment stated that his employment commenced on 17 November 2020 (page 238).

67. Both Mr Capon and Mr Dundon would require training in order to undertake their roles as SFI on the aircraft simulation equipment they would be working on. The claimant would have required the same training had been employed for either role.

68. The jobs offered to Mr Capon and Mr Dundon were to replace the roles of Mr Treadwell and Malcolm Paul who had both resigned. These vacancies were not offered to internal candidates and advertised externally only.

69. An email dated 10 December 2020 from Arthur Appelo, Area Operation Leader for CAE Central Europe, confirmed after an extensive an extensive advisory process the Board and Works Council had reached an agreement on the intended restructuring within CAE Amsterdam.

70. The claimant wrote an email to Ms King on 12 December 2020 (page 242), stating,

"I found out today that CAE Burgess Hill are recruiting SFI's. I'm not surprised by this given how I was treated. How are you feeling about the way that the company treated the people it made redundant, do we feel that the company " made an effort to find alternative employment " for those made redundant.

3 new Global instructors?

whilst cross training a Falcon guy (Tom Preuss Jones) onto the Global platform and ignoring me.

Any update?"

71. Ms King wrote to the claimant on 19 December 2020 (page 243) stating,

"We had a couple of resignations on the Global platform and so yes, we had to make the decision to replace the two individuals. These are outside the redundancy process as their resignations were unexpected.

I'm actually reasonably satisfied with how well the Company managed to find alternative roles for individuals who were put "at risk" of redundancy given we are in a pandemic which has affected aviation (and CAE) at large. Of course it is always very sad when we can't do it for everyone as avoiding redundancies for all would be the absolute ideal, however we managed to secure alternative roles for at least 5 people which is a significant proportion of those at risk.

With respect of cross training, you will be aware that this has always been something we have done during the normal course of business. And now with the change to the instructors terms and conditions so that pay is driven by their client direct time, there is even more emphasis on cross qualifying all our instructors.

As I said in my final letter to you, we have been undergoing consultation with Amsterdam about relocation of their sims. This was not a certainty in my letter, but we anticipate moving forward with this in the new year and, as my letter stated then, if any vacancies become available and you are interested in applying then of course we would consider your application. Please keep an eye out on our website for details."

72. The claimant signed a contract of employment dated 18 December 2020 (commencing at page 249) with Air Alsie to commence employment on 3 Jan 2021 for a one-year secondment as Commander on an AA operated aircraft in Malaysia. The claimant is no longer employed by Air Alsie.

73. There are social media messages in the bundle at pages 261-262 between the claimant and Peter Treadaway, a former employee of the respondent on 19 April 2022. The claimant wrote,

"Brilliant, for what it's worth I heard that resignations are "through the roof" they are still looking for people and they had to cancel "client direct"….I'm very pleased not to be there anymore and intend to cause as much mayhem in my tribunal as I can . Will let you know how it goes!"

Relevant Legal Principles

74. Section 94 of the Employment Rights Act 1996 ("ERA") states that an employee has the right not to be unfairly dismissed by their employer.

75. Redundancy is one of the potentially fair reasons for dismissal listed in Section 98 ERA:

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the ***employee was redundant,*** *or*

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment."

[Tribunal's emphasis]

76. Section 139 ERA 1996 Redundancy states:

"(1) For the purposes of this 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.

[Tribunal's emphasis]

77. A tribunal is entitled only to ask whether the decision by an employer to make redundancies was genuine, not whether it was wise.

78. If the employer fails to show a potentially fair reason for a dismissal it is unfair. If a potentially fair reason is shown, the general test of fairness in section 98(4) ERA must be applied which states that:

"the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) —

(a) depends 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

(b) shall be determined in accordance with equity and the substantial merits of the case".

79. The ERA requires the claimant to prove that he has been dismissed. The burden then shifts to the employer to prove the reason for the dismissal. If the respondent succeeds in showing a potentially fair reason for dismissal, there is a neutral burden for the purposes of determining whether or not the dismissal was fair.

80. When considering the general test of fairness in section 98(4), the helpful test is the range or band of reasonable responses, a test which originated in the misconduct case of British Home Stores v Burchell [1980] ICR 303, but which has been subsequently approved in a number of decisions of the Court of Appeal.

81. The manner in which the employer handled the dismissal is important in considering whether the respondent acted reasonably in all of the circumstances in treating that reason as a sufficient reason for dismissing the claimant. A Tribunal will therefore be keen to find out that the process which led to the claimant's dismissal was affected in an appropriate way, i.e., within the range of reasonable responses applicable to an employer of the size of the respondent with such administrative resources available.

82. When considering the question of reasonableness, The EAT stressed, that in determining the question of reasonableness it was not for the employment Tribunal to impose its standards and decide whether the employer should have behaved differently. Instead, it had to ask whether 'the dismissal lay within the range of conduct which a reasonable employer could have adopted'. In

addition, the guidelines are not principles of law but standards of behaviour that can inform the reasonableness test under S.98(4). British Leyland (UK) Ltd v Swift 1981 IRLR 91, CA; Iceland Frozen Foods Ltd v Jones 1983 ICR 17, EAT; Foley v Post Office HSBC Bank plc (formerly Midland Bank plc) 2000 ICR 1283, CA.29.

83. It is important that in carrying out this exercise the Tribunal must not substitute its own decision for that of the employer.

84. In Williams and ors v Compair Maxam Ltd 1982 ICR 156, EAT, the EAT laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals. These were:

- whether the selection criteria were objectively chosen and fairly applied
- whether employees were warned and consulted about the redundancy
- whether, if there was a union, the union's view was sought, and
- whether any alternative work was available.

85. In relation to the issue of alternative employment, the reasonableness test under s98(4) requires a tribunal to consider whether the employer's actions lay within the range of responses of a reasonable employer.

86. If the issue of alternative employment is raised, it is for the employee to say what job, or what kind of job, he believes was available and give evidence that he would have taken it - Virgin Media Ltd v Seddington and Eland UKEAT/0539/08/DM.

87. An employer is required to take reasonable steps to find the employee alternative employment. The Employment Appeal Tribunal in Lionel Leventhal Limited v North [EAT 0265/04] said that "it can be unfair not to give consideration to alternative employment within a company for a redundant employee even in the absence of a vacancy". It held that whether it is unfair or not to dismiss for redundancy without considering alternative and subordinate employment is a matter of fact for the Tribunal.

Discussion and Conclusion

The principal reason for dismissal

88. Turning to the agreed list of issues that are to be resolved at this hearing. In relation to what was the reason for the claimant's dismissal, the respondent accepts that the claimant was dismissed by reason of redundancy or in the alternative for SOSR namely a business reorganisation. The claimant stated at the outset of the hearing that this was not a genuine redundancy. However, he made several concessions in his evidence when under cross examination.

89. He accepted that every business was affected by the covid pandemic to some degree due to the national restrictions and that there was a reduced demand for training in business aviation. Mr Dracass led the claimant through the array of documentation in the bundle which includes emails to all employees setting out the respondent's concerns for the sustainability of their business as this had been significantly adversely affected by the covid-19 pandemic which culminated in a National Lockdown on 23 March 2020. I have referenced in my finding of fact relevant excerpts of emails from Ms King on behalf of Mr McGrath, operations manager, on 30 March 2020, 25 June 2020 and 23 July 2020 which sets out the key information that was relayed to employees by the respondent about the effect the pandemic was having on their business and the respondent's challenges at that time. I find that the covid—19 crisis created unprecedented uncertainty for businesses, to which the aviation industry was particularly vulnerable.

90. The claimant was also referred by Mr Dracass to the comprehensive slides which were used for the presentation on 5 August 2020 and subsequently circulated to all employees. This included a graph at page 157 which set out the respondent's view on the likely recovery of their business following the pandemic and the possibility of a second wave of covid cases. This highlights further the uncertainties that the respondent faced. The claimant accepted that this was the case. The claimant also accepted that correspondence in the bundle supported that the respondent carried out a collective consultation and appointed employee representatives as the changes they intended to make would affect more than 20 employees' contracts of employment.

91. During cross examination of the respondent's witnesses, the claimant did not seek to challenge that the redundancy was not genuine. The claimant was without legal representation, and I raised this with him in order to provide him with an opportunity to do so but no real challenges were made to the respondent's witnesses on this issue. In light of the concessions made by the claimant and the lack of challenge to the evidence, I asked the claimant to clarify his position on whether his view remains that this was not a genuine redundancy after he summed up his case. The claimant accepted that at the time that he took voluntary redundancy on 23 August 2020 that the respondent was carrying out a genuine redundancy process. He clarified that this was the case up to 23 August 2020 but that the situation changed after that.

92. Based on the claimant's amended position and his acceptance that this was a genuine redundancy, I no longer have to consider that this was a sham process labelled redundancy to get rid of him and I therefore do not need to rule on the following in the list of issues: -

    Based on the claimant's case, was redundancy the real reason or was it a pretext to "get rid of him". The claimant relies on the fact that: -

(a) From 1 July 2020 the respondent employed ad hoc staff to do his job;
(b) The respondent told him that if he did not like it, that they would terminate his contract when he raised questions in response to being furloughed and in relation to his retention bonus being paid."

93. Turning to the other points made by the claimant in the list of issues, namely by October 2020 and December 2020 this was no longer a genuine redundancy as the respondent was hiring additional staff and the position had changed. I deal with each in turn.

(c) 2 further SFI instructors were externally hired within a month of the claimant being made redundant

94. The facts are not disputed that Mr Capon was offered a job as a SFI with the respondent on 1 November 2020 and commenced employment on 17 November 2020 and Mr BJ Dundon was offered a job as a SFI with the respondent on 16 November 2020 as a Synthetic Flight Instructor and commenced employment on 17 November 2020 (page 238). The claimant's evidence is that he had no knowledge of their resignations until December 2020.

95. I accept Mr Cheese's evidence that during the pandemic there was great reduction in the number of clients seeking training as the regulators had globally extended licences for a further 6 months and there was no longer a requirement to come in and do a test as this was the based on a paper exercise. There were also cancellations due to client sickness and travel issues. The respondent's identified a need to have a reduced number of instructors as their customers (namely airline companies whose pilots conduct their training with the respondent) imposed large scale pay cuts and redundancies and as a result there was subsequently a significant reduction in the need for pilot training.

96. I accept and there was no challenge to Ms King's evidence that the respondent accepted 5 STI requests for voluntary redundancy, 3 were part time employees and 2 full time employees which meant that the equivalent of 3.85 employees were made voluntarily redundant. In addition to this, 2 STI's tendered their resignations so the respondent reduced their headcount for STI's by 5.85. They were seeking to reduce the headcount by 6 full time equivalent STI's at the outset of the redundancy process. No compulsory redundancies were therefore made in the STI team.

97. I am persuaded by Ms King's evidence that both Mr Capon and Mr Dundon were hired to directly replace the roles of Mr Treadwell and Malcolm Paul, both SFIs who tendered their resignations on 16 September and 30 October 2020 respectively. The timing of these resignations was after the respondent accepted the claimant's application for voluntary redundancy on 23 August

2020 but whilst he was still employed, his last effective date of employment being 31 October 2020. Ms King evidence was that these hires fell outside the redundancy process which had completed by the time that both Mr Capon and Mr Dundon were interviewed and subsequently hired. I note that she also confirmed this in her email to the claimant on 19 December 2020 in which she stated, *"We had a couple of resignations on the Global platform and so yes, we had to make the decision to replace the two individuals. These are outside the redundancy process as their resignations were unexpected."*

98. Turning to the definition of redundancy in section 139 and whether there was a redundancy situation whilst the claimant was still employed (namely before 31 October 2020) within the meaning of section 139 of the Employment Rights Act, more precisely, whether there was an actual or anticipated diminution or cessation in the need for work of a particular kind, I find that there was based on the respondent's need to reduce the headcount of STI's by 5.85 full time equivalent workers. By hiring Mr Capon and Mr Dundon as direct replacements for employees whom the respondent had not anticipated would leave still resulted in them still having a reduction in their headcount of 5.85 FTE STI's.

(d) The respondent was aware at the time of the leavers letter on 16 October 2020 that they were getting simulators so there was not a diminution of his role

(e) Within three months of the claimant being made redundant, eleven additional SFI instructors were employed by the respondent.

99. The claimant refers to a letter to him from Ms King dated 16 October in which she states,

"Finally, I wish to say that you may have joined in the All Employee Town Hall meeting recently whereby he advised that we have approached the Amsterdam Works Council with a proposal to relocate the three BAT simulators in their centre to Burgess Hill. This is still under consultation and will be for a few more weeks as a minimum. This leaves me to say that presently there is no alternative to the redundancies being made in V Burgess Hill. However, should we get agreement from the Amsterdam Works Council in the future and the c simulators move to Burgess Hill, if vacancies become available as a result and you are interested in applying, then of course we would look favourably on any application."

100. The claimant received this letter on 16 October 2020, after his application for voluntary redundancy on 23 August 2020 but before his last day of employment on 31 October 2020. He accepted that upon receipt of this letter he did not ask if his voluntary redundancy application could be withdrawn or seek further information from the respondent on what jobs were likely to become available and when these would be available.

101. However, the claimant's submission is that on 16 October 2020, the respondent knew that they would be getting work from Amsterdam and should have halted / reversed the redundancy process and used alternative solutions such as flexible furlough which the government extended beyond 31 October 2020 until September 2020. He states that this influx of new work Into Burgess Hill that there was no longer a redundancy situation.

102. It is not in dispute that job vacancies were then advertised in January 2021 for 12 SFI's as three flight simulators were being relocated from one of the respondent's training centres in Amsterdam. The claimant states he did not apply for these jobs as he had already accepted a job offer at Air Aslie and signed a contract of employment on 19 December 2020.

103. Ms King's evidence was at the time she wrote the letter to the claimant on 16 October 2020 that it was merely a proposal to relocate three simulators and that it was not commercially viable for the respondent to delay making redundancies in Burgess Hill until such time as a firm decision was reached as this may not have resulted in any further vacancies had the proposal not gone through. I accept at the time of writing to the claimant; the position was uncertain, and I accept that the contents of Ms King's email on 16 October 2020 was probably as much information that could be shared at that stage.

104. I am persuaded by Ms King's evidence that none of the 12 vacancies later advertised in January 2021 were available or confirmed prior to the termination of the claimant's employment on 31 October 2020. I consider that her letters dated 16 October 2020 and 19 December 2020 to the claimant provide evidence of this.

105. I find that a final agreement was not in fact reached until 10 December 2020 about what simulators would be transferred to Burgess Hill from Amsterdam and accept that the sent from Arthur Appelo, Area Operations leader of CAE Central Europe dated 10 December 2020 provides clear evidence of this. confirming that after an extensive an extensive advisory process the Board and I find that a decision of this magnitude and involving offices outside of the UK would have taken time and no doubt that extensive internal discussions would have been required.

106. I am persuaded that until the respondent had made a firm decision about the work carried out in Amsterdam which concluded on 9 December 2020, it would not have been possible to commence or consider the potential headcount in Burgess HIll required to service the work from Amsterdam. I also accept Mr Dracass' submission that the respondent would also have had to consider their workforce in Amsterdam and whether any personnel wished to relocate when deciding their recruitment needs and this would have taken time such that the position would have been uncertain until the appropriate discussions /

consultation with employees in Amsterdam had taken place.

107. I therefore accept whilst the claimant was still employed up to 31 October 2020, the definition of redundancy is satisfied, namely that there was still an actual or anticipated diminution or cessation in the need for work of a particular kind carried out by the respondent and, in this instance, this related to work carried out by SFIs at Burgess Hill.

108. I do not accept the claimant's argument that the respondent should have stopped/ sought to reverse the redundancy process at that stage because I accept that there was a real uncertainty of whether the proposal would go through to transfer simulators from Amsterdam and there were also concerns about how the respondent's business would be further affected by the covid pandemic and the possibility of a second wave which would potentially affect the recovery of the respondent's company.

109. To some degree, the respondent considered this as a potential issue in their "Frequently Asked Questions document" dated 15 August 2020, in which it is stated,

Question 7
"If the business turns around there would be a greater costs to the business if we needed to re hire people in 6 months' time vs letting people go. Is this the right thing to be doing?
The response was, "We understand that this is a risk especially as we don't know the real turnaround time for Covid and the impact at a local level in Burgess Hill. The actions we are taking are not just about what is occurring in Burgess Hill, but they are to support the wider business. The Commercial Aviation Training and Simulator Products side of the business will likely be more significantly impacted than Business Aviation Training and we need to help the wider business now. Business Aviation Training may see a more rapid recovery, but as an overall business we are not expecting it to be quite as rigid especially with the aviation market not predicted to return to 2019 levels until 2024."

110. The respondent did not have the benefit of hindsight and could only respond with the information they had at the time. Ms King explained that the flexible furlough scheme was only extended on 30 October 2020, on the eve of when it was supposed to expire, and the respondent could not therefore rely on this being extended with any certainty. The Corona Virus Job Replacement Scheme of 2020 enabled employers to retain staff they might otherwise make redundant, as a matter of social policy, but it did not oblige them to do so, and an employer may decide there are business reasons for not retaining staff, even at reduced cost. It is not within the remit of the Tribunal to consider whether the decision by an employer to make redundancies was wise, only that it was genuine and it is not for the Tribunal to consider or challenge the

business decisions of the respondent.

111. What is clear from the evidence before me is that the events that led to the claimant's dismissal started with the Covid-19 pandemic and the consequential diminution of business aviation work required due to the pandemic which led to the respondent needing to make savings across their business.

112. The test under section 139(1)(b) ERA 1996 for whether a dismissal will be a redundancy in circumstances such as these is if the dismissal is wholly or mainly attributable to the fact that the requirements of the business for employees to carry out work of a particular kind have diminished, even temporarily. An employer does not need to demonstrate financial hardship or a downturn in work to establish this. In this case, the business requirements for the number of STI's diminished. I find that at the time of the claimant's dismissal the respondent did not need as many STIs because that work had diminished. As to the question of whether the dismissal was wholly or mainly attributable to that situation, I find as a matter of fact that it was.

113. I am satisfied that the Claimant was redundant within the meaning of section 139(1)(b)(i) and that redundancy was the reason for dismissal. Thus, the respondent has established a potentially fair reason for dismissal under section 98(2)(c) of the Employment Rights Act. The question as to whether the dismissal was fair or unfair is discussed below.

Fairness of the dismissal

114. Turning to whether the claimant's dismissal was fair within the meaning of section 98(4) Employment Rights Act 1996, the agreed list of issues states, "Did the respondent act reasonably or unreasonably, in the circumstances, in dismissing the claimant for redundancy (having regard to the equity and substantial merit of the case?"

115. As set out above, I have found that there was a clear downturn in work for the respondent as a result of the pandemic, with losses sustained and reduced customers. The respondent provided no details of its size or administrative resources but in any event did not seek to suggest that this affected the process they followed in any way. The respondent carried out a collective consultation procedure. They launched a redundancy process and the claimant applied for the voluntary redundancy scheme. Voluntary redundancy is a valuable tool to avoid redundancies where people who are content to leave with a redundancy payment can put themselves forward.

116. Mr Dracass confirmed that he is not submitting that this is a case of mutual termination by consent, where the employee agrees, without compulsion, to accept voluntary early retirement, offered by the employer on terms more

generous than under the ordinary redundancy payments scheme and where it is understood that the normal statutory rights are not to apply in addition as there is no dismissal. Mr Dracass confirmed that the respondent accepts that the claimant had been dismissed by way of redundancy and that the fact that an employee in an ordinary redundancy case volunteers to be made redundant does not, mean that there is no dismissal, and thus he may claim a redundancy payment in the ordinary way.

117. In a case of dismissal for redundancy this involves a consideration of the redundancy process and specifically whether there was a fair process involving warning and consultation and the opportunity to appeal and the case law suggests consideration of: -
    (i) whether the selection criteria were objectively chosen and fairly applied,
    (ii) whether employees were warned and consulted about the redundancy,
    (iii) whether, if there was a union, the union's view was sought, and
    (iv) whether any alternative work was available.

118. Mr Dracass submitted that as this case involved seeking voluntary redundancy applications from all employees at Burgess Hill that point (i) does not apply and that in any event the case law provides guidance for the redundancy process that should be followed for compulsory redundancies and not voluntary redundancies as is the case here. Mr Dracass submitted that the respondent was therefore under no duty to offer the claimant alternative employment. Mr Dracass could not refer me to any case law or authority on this point. I accept that this is an unusual set of facts.

119. In this case, the fairness of the selection criteria is not in dispute nor are there any complaints raised about the how the claimant was warned or consulted about the prospect of compulsory redundancies, or the request made for employees to seek voluntary redundancies. What is disputed is whether the claimant felt pressured into accepting a voluntary redundancy and whether once 2 STI jobs became available in October 2020 these should have been offered as suitable alternative employment to the claimant before his last date of employment on 31 October 2020. I deal with each in turn.

Pressure to accept Voluntary redundancy

120. Turning firstly to whether the claimant was pressured into accepting voluntary redundancy. The respondent denies this was the case. The claimant was included in email correspondence and provided slides and FAQ documents as were all other employees. The respondent submitted that there was no specific communication with the claimant to put him under duress or pressure to accept voluntary redundancy.

121. The claimant's evidence was that he took voluntary redundancy as he had been informed that he was at risk of being dismissed if compulsory redundancies were required and although he was reluctant to make this decision, it was the lesser of two evils. Under cross examination, the claimant stated that Ms King spoke to Mr Bradshaw, an employee representative for his department, and that Mr Bradshaw then told him that he was at high risk of being selected for compulsory redundancy. Other than this discussion, I found that the claimant was unable to refer to any specific incident that would have indicated to him that the respondent had "marked his card" and that there would only be one outcome if a compulsory redundancy process took place, namely that he would be selected. Further the claimant provided no details of such incidents in his witness statement and did not seek to include this as an issue in the agreed list of issues discussed on the morning of the hearing.

122. The claimant was informed that the proposed scoring criteria that the respondent intended to use for compulsory redundancies included a score for live disciplinary matters and that he had a live disciplinary on his file which would adversely affect his overall score. It is understandable that this would concern him and that it would have been his perception that he was at risk from a compulsory redundancy if the process proceeded as, it was not in dispute that this would affect his score. However, I do not find that the respondent communicated to the claimant at any time in such a way to make him feel he had no other choice other than to take voluntary redundancy as if he did not, he would be selected for compulsory redundancy. He was simply in a pool of candidates and the selection criteria would be applied to all employees.

123. The respondent wrote in email correspondence to the employee representatives that the scoring criteria for compulsory redundancy would take into account a number of factors including capability, performance, conduct and whether someone is considered a high potential. There was no suggestion from the claimant that it was unfair for the respondent to adopt these criteria or to give them the weight that they chose. Further the claimant did not raise an issue with the disciplinary warning that he was given or suggest that this was not appropriate or unfair and he did not appeal the disciplinary outcome given to him on 23 September 2019.

124. The claimant's evidence was that he knew of only one other employee with a live disciplinary issue on their record and this is why he felt he would be chosen for compulsory redundancy. However, he cannot have known how he would score compared to his colleagues under each heading relating to capability, performance, and potential.

125. The claimant accepted that he had to weigh the options and that he felt that voluntary redundancy was the lesser of two evils. His evidence was that he felt pressured as he had no information on which of his colleagues had applied for

voluntary redundancy and how many applications the respondent had received. I do not accept that it would have been appropriate for the respondent to breach confidentiality and discuss with the claimant who had applied for voluntary redundancy or the number of people that had chosen to do so. The process the respondent had put in place was that any employees interested in applying for voluntary redundancy should apply by 13 August 2020 and all the employees were therefore in the same position. I am not persuaded by the claimant's explanation that any pressure and certainly not any undue pressure was placed on him to accept voluntary redundancy.

126. I find that the claimant had to carry out a balancing exercise as did all the respondent's employees of the benefits of taking a voluntary redundancy package which as set out on page 162 of the bundle confirmed that the voluntary redundancy package would exceed the statutory requirement. The claimant accepted that by taking voluntary redundancy he received up to three times the amount he would have received had he made compulsorily redundant. The claimant had to weigh this up against the fact that if enough voluntary redundancy requests were not received that a compulsory redundancy process would then take place and there was a risk that he may be selected. As the situation evolved, the respondent did not need to make any compulsory redundancies and refused 2 applications for voluntary redundancy as they were able to fulfil their headcount reductions of approximately 6 full time equivalent STIs.

Alternative employment

127. In relation to whether the respondent was required to continue considering suitable alternative employment opportunities for the claimant after the point at which the claimant willingly entered into a mutually binding agreement to accept voluntary redundancy on 23 August 2020, I find that the respondent's decision not to do so was fair in all the circumstances.

128. The respondent hired 2 SFI's who commenced work on 17 November 2020 to replace 2 SFI who had resigned on 16 September and 30 October 2020. I note that the timing of the second resignation was on the eve of the last day of the claimant's employment and in practical terms there was probably little that the respondent could do before the claimant's last day to consider this role as available whilst he was still employed. The claimant can say however that at least one vacancy arose prior to his employment ending and that he was not told of or offered this role.

129. Ms King wrote to the claimant on 23 August 2020 accepting his voluntary redundancy application and this stated,

"I confirm this email is the official confirmation that your employment will end

due to redundancy on 31 October 2020. As we now have a binding agreement the decision cannot be varied unless by mutual agreement by both parties."

130. This email is silent about future job opportunities. I accept Mr Dracass' submission that at this stage the agreement between the parties had crystallised. The respondent's view was that the redundancy process had come to an end and a binding contract between the parties was in place. The respondent accepts that it did not draw the claimant's attention directly to the vacancies and it is their view that they did not need to do so. The vacancies were advertised externally only and not offered internally or to any of the candidates that had taken up voluntary redundancy.

131. The FAQ document prepared by the respondent dated 15 August 2020 (page 196), deals with this issue when responding to queries about voluntary redundancy. This document was circulated to all employees through the employee representatives. The question raised is,

"If the business recovers and there are new opportunities for hiring, will people be given first refusal to come back?". The response was that, "*In the event of Voluntary Redundancy, this would be unlikely because they would have opted to take the redundancy package. In a Compulsory Redundancy situation there would be no barrier to individuals returning. There may still need to be an interview conducted etc"*

132. The respondent therefore set out to their employees the basis on which voluntary redundancies were being offered and that it was not their intention to give first refusal to those that take voluntary redundancy. They have sought to draw a distinction between those taking voluntary redundancy and those who would be subject to compulsory redundancy.

133. As set out in the findings of fact above, there is no evidence that the respondent 'hid' this vacancy from the claimant; it was advertised externally in the usual way. At no stage in correspondence that is before me in the bundle has the claimant sought information on alternative employment with the respondent either before he accepted voluntary redundancy on 13 August 2020 or afterwards. I note that he did not, for instance, apply for an ad hoc contract as other colleagues did, for example Mr Rogers and Mr Quaid worked for the respondent from November 2020 and were given work on an ad hoc basis with variable hours.

134. The claimant did not ask any questions about further potential work with the respondent in his email of 13 August 2020 when seeking to clarify information about the voluntary redundancy package or when he made his voluntary redundancy request that had made this decision with reluctance or regret. The respondent wrote to the claimant on 16 October 2020 informing him of a

possible restructure in Amsterdam, but the claimant did not respond or seek further clarification about what role/s might be available and when these would be available. The claimant also wrote on 26 August 2020 seeking to end his notice period earlier by mutual agreement. His evidence was that this was because he had a job opportunity at the time but that this fell through. I accept that this together with the claimant's lack of interest in establishing what job opportunities the respondent may have, did not give the respondent the impression that he wished to remain in employment with the respondent company and that he would be amenable to re-negotiating his voluntary redundancy agreement.

135. Whether it is unfair or not to dismiss for redundancy without considering alternative employment is a matter of fact for the Tribunal. I accept that as suggested by the claimant one option would have been for the respondent to offer any vacancies to the employees that had taken voluntary redundancy and if there was more than one candidate to set out an objective selective process to hire a candidate. This would have required both parties to renegotiate terms of the agreement that they had reached on 23 August 2020 as this could only be varied with the consent of both parties.

136. A proper application of the general test of fairness in section 98(4) is clear that the Tribunal must not substitute its own decision for that of the employer: the question is rather whether the employer's conduct fell within the "band of reasonable responses". I find that not offering alternative employment in all the circumstances of this case is within a band of reasonable responses.

137. This is in the context of the facts in this case which involves the respondent seeking voluntary redundancy applications, the claimant opting for an enhanced redundancy package and not expressing any desire to remain with the company. Once the respondent accepted the claimant's request for voluntary redundancy, both parties had entered into a legally binding agreement, and this could only be changed only by mutual agreement. The respondent had set out to those considering voluntary redundancy that if the respondent chose to hire for vacancies in the future employees taking voluntary redundancy would not get first refusal. Further the respondent had no communication from the claimant that he would be willing to take up alternative work/ roles with the respondent and would be willing to re-negotiate his voluntary redundancy package. The roles that did become available, did so towards the very end of the period for which the claimant was employed and the respondent did not offer these to internal employees but advertised for these roles externally only. The claimant could have applied for these roles.

138. It follows from my findings above that I need not consider the other issues relating to remedy, namely the likelihood that the claimant's employment would have terminated in any event, even if a fair process had been followed and what

extent any compensatory award would be reduced on the grounds of contributory fault. For the avoidance of doubt, I do however make the following observations.

139. The respondent hired 2 SFI's who commenced work on 17 November 2020 to replace 2 SFI who had resigned on 16 September and 30 October 2020. There was no dispute that had the claimant been offered either of these roles he would have required the same training as the two new employees and that their role of SFI was the same as the role that he carried out. The claimant states that as he was still in employment until 31 October 2020 that he should have been offered either of these roles and it was his evidence that he would have taken up this employment even though this would have been under different terms and conditions that he was previously on. Despite the claimant's evidence on this point, I am not persuaded that the claimant would have done so.

140. Based on the email correspondence between the claimant and Ms King, extracts of which I have included in my findings of fact above, I find that the claimant was upset, angry and frustrated at the respondent based on the brevity, tone and the language used during his communications. It was understandably a difficult and uncertain time for the claimant which resulted in a reduction in his pay and being placed on furlough from 1 April 2020 to 31 October 2020. He was unhappy about the being asked to go on furlough, that his retention bonus was being deferred for 6 months, that his holiday in July 2020 was cancelled and that he was asked not to return to work on 5 August 2020 as he had breached the respondent's policy. He was not happy with the way the respondent was managing their business during the pandemic. He told the respondent that he "did not agree with their actions" and that the company's decision not to pay his bonus had "affected his trust and confidence" in them and that they had kept his money.

141. The claimant would have had to agree to the different terms and conditions if an alternative role would have been offered to the claimant as all SFI's had to sign up to the terms set out in the slides circulated to all employees (Pages 152-172). I do not find that the claimant is likely to have agreed to terms that were not as beneficial as his previous role. He was clear to his manager, Mr Thirkettle, in May 2020 that he was not willing to return to work if he is offered a reduction in pay. He was unhappy about any changes to his contract or employment as demonstrated in his email exchanges with Ms King. As I have set out above at paragraph 132, the claimant did not take any steps to notify the respondent that he wished to explore opportunities of working with the respondent in alternate roles or on an ad hoc basis. The claimant was actively looking for another role in October 2020 but did not respond to Ms King's email of 16 October 2020 to seek further information about the possible roles from the relocation of simulators from Amsterdam.

142. The claimant's evidence at the Tribunal was that he liked his job, meeting the clients and this was near his home and would therefore have like to be reinstated. He accepted that he did not enjoy dealing with management, but this was a small part of his role. However, in direct contradiction to this, he stated in an social media post to Peter Treadaway, a former employee of the respondent, on 19 April 2022, shortly before the hearing,

"Brilliant, for what it's worth I heard that resignations are "through the roof" they are still looking for people and they had to cancel "client direct"….I'm very pleased not to be there anymore and intend to cause as much mayhem in my tribunal as I can . Will let you know how it goes!"

143. It may be with the benefit of hindsight it is the claimant's view that he would have opted to stay at the respondent company if offered a job as SFI in October 2020 but the evidence before me and set out above does not support this.

144. In conclusion, the Tribunal does not accept the claimant's submission that he was steered or pressurised into accepting voluntary redundancy. The choice was his to leave at that stage that he did with the package set out in Ms King's letter of 16 October 2020 which included an enhanced redundancy payment, pay in lieu of notice and holiday pay.

145. In accordance with equity and the substantial merits of the case the Tribunal concludes that the dismissal was fair. The respondent acted reasonably in treating redundancy as a sufficient reason for dismissing the Claimant. The claimant's claims are therefore dismissed.

Employment Judge Sekhon

Date: 11 May 2022