



EMPLOYMENT TRIBUNALS

Claimant:

Mr G Johnston

v

Respondent:

International Airlines Group Cargo Limited

Heard at:

Reading

On: 18 - 20 December 2023

Before:

Employment Judge Anstis (sitting alone)

Appearances

For the Claimant: In person

For the Respondent: Mr S Purnell (counsel)

RESERVED JUDGMENT

The claimant was unfairly dismissed.

REASONS

INTRODUCTION

Introduction

1. The claimant was employed by the respondent at Heathrow airport as a resource planning analyst until his dismissal, which took effect on 7 November 2020.
2. The respondent sells and optimises cargo capacity on behalf of International Airlines Group airlines (including British Airways).
3. The respondent says that the claimant was dismissed by reason of redundancy, or alternatively that there was some other substantial reason for his dismissal (a reorganisation of duties within his team).
4. The claimant started work with British Airways on 1 August 2020, and maintained continuity of employment on his transfer to work for the respondent. He worked part-time, on a close to 50% contract.

The issues

5. The claimant's claim is of "ordinary" unfair dismissal only. The reason for dismissal is in dispute, as are various aspects of the fairness of his dismissal.

6. Although the claimant's dismissal took effect following a TUPE transfer, and he has said that his dismissal was influenced at least in part by his status as a part-time employee, there is no claim of either automatic unfair dismissal for a reason relating to the transfer nor of dismissal or detriment contrary to the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

The hearing

7. The hearing of this case was listed in-person for three days from 18 - 20 December 2023. After a period of initial discussion and reading at the start of the first day I heard evidence from the claimant and from Lorna Jeffrey and Mark Reeves for the respondent. Evidence was completed by the end of the second day. I had a hearing on another case listed for the morning of 20 December, but the hearing was able to reconvene (by CVP) on the afternoon of 20 December for closing submissions (including written submissions from the respondent). Having made arrangements for a further case management hearing (on a provision basis, in case I needed to go on to consider a remedy for the claimant) I reserved my decision.

THE FACTS

Background

8. Before the reorganisation that led to the loss of his job, the claimant worked as one of a team of six resource planning analysts reporting to Mark Reeves, the Resource and Manpower Planning Manager, who in turn reported to Stuart Hatton, Head of Strategy.
9. Following Covid lockdown in March 2020 and the introduction of the furlough scheme, the claimant was one of two of the six in his team who were placed on furlough. This took effect on 8 April 2020. At that time he was employed by British Airways. Most of the team he worked with were employed by British Airways, although it is clear that they had worked as part of the overall IAG Cargo structure for a number of years.
10. The Covid pandemic and worldwide lockdown and travel restrictions that followed from that had an unprecedented effect across a number of industries. Outside of healthcare and the emergency services perhaps no line of work was more affected than air travel. Passenger traffic dwindled to almost negligible levels. The claimant points out that cargo traffic was much less affected, and may even have increased given the need for urgent imports of, for instance, PPE. In some cases passenger aircraft were converted to freighters to meet this demand. What is clear is that this was a period of great uncertainty in the industry. It was unclear when travel restrictions would be lifted, and, if they were lifted and there was some sort of return to normality, how quickly passengers would return. Cargo operations is not something that can be viewed in isolation since much of the work of IAG Cargo was in filling spare capacity in passenger

planes with cargo. Dedicated freighter aircraft seem to have been the exception rather than the rule.

11. While it seems the claimant enjoyed his job and would have preferred not to be on furlough (he says he suggested some sort of rotation of furlough amongst him and his colleagues) I do not see that the respondent did anything wrong in putting him on furlough, nor that this decision foreshadowed his later dismissal or suggested that he was unpopular with management.
12. The claimant's furlough was extended on various occasions until his dismissal.

The TUPE transfer

13. On 9 June 2020 BA notified the relevant Unite representative concerning the "proposed transfer of cargo management and certain clerical functions from BA to IAG Cargo". The reasons for the proposed transfer are given as:

"IAG Cargo sells and optimises cargo capacity on behalf of all IAG airlines. It manages commercial activity, customer service and is the face of all IAG airlines to cargo customers. The Cargo Head Office and UK operational management roles contribute to IAG Cargo as a whole.

British Airways has provided IAG Cargo with management services in Finance, Transformation and Operational management, together with certain clerical functions performed within the Cargo Revenue Accounting and HDQ teams.

The impact of Covid-19 on capacity, market demand, cargo volumes, investment and affordability has caused IAG Cargo to consider the most efficient way for it to manage its services going forward.

IAG Cargo has informed us that it considers that simplification of the overall cargo management structure, together with certain clerical functions, will improve customer service and be more efficient.

It is, therefore, proposed to transfer these management and clerical functions and therefore roles from BA to IAG Cargo."

14. The notification says that the transfer is envisaged to take place by 31 July 2020. It is said to be a TUPE transfer. The notification was accompanied by a detailed "measures letter" from the respondent, as transferee. This contemplated significant reorganisation and job losses, with over half of the 380 management grade roles (across the combined business) being lost.
15. British Airways employees working in cargo (including the claimant) were the subject of collective bargaining with the trade unions Unite and the GMB. The claimant was not a member of either union, but it does not seem to be in dispute that he was nevertheless within an area of work for which the trade unions were recognised. Accordingly, for him the TUPE notification appears to have been

correctly given to the union, with consultation following with the union rather than directly with employees or with employee representatives.

16. The respondent did not recognise a trade union, at least for management grade employees, so on its side the consultation was carried out with elected employee representatives.
17. A theme of the claimant's evidence was that he was not fully aware of the TUPE transfer or its implications at the time. It seems he found himself in a difficult position: being represented by trade unions he was not a member of, and being on furlough so not as involved in general office gossip or chatter as he would otherwise have been. However, the respondent was correct in conducting its notification and consultation with trade union representatives in the claimant's case.
18. It is the respondent's case that there was a Teams meeting open to all affected staff held on 10 June 2020 (with similar follow up meetings). During the hearing the respondent produced various papers in relation to this. The notification of this was sent to the claimant's work email address. Mr Purnell took the claimant through questions of his access to work emails during furlough. It is clear that the claimant retained access to his work emails during furlough. There are instances in the bundle where he has replied to emails about, for instance, his furlough arrangements. The claimant did have access to emails and was invited to a briefing about the TUPE transfer. He did not attend. It seems to me most likely that he either missed or ignored the invitation on the basis that he was not expecting it to have much impact on his day-to-day work, having already worked within the respondent's structures for some time.
19. The ultimate effect of this is that the claimant was not fully aware of the TUPE transfer and its implications, but this was not the respondent's (or British Airways's) fault.
20. The TUPE transfer took effect on 1 August 2020. From that point onwards he was employed by the respondent. He remained on furlough.
21. In parallel with this, collective consultation was taking place concerning the redundancies that were to follow the TUPE transfer. The arrangements for this were similar to the TUPE notification and consultation and seem to have caused the claimant similar difficulties with being neither a member of the unions who were being consulted with, nor represented by the respondent's elected employee representatives. As with the TUPE notification and consultation, this difficult situation was not the respondent's fault.

The reorganisation

22. It is clear from the numbers involved that the reorganisation would have had a dramatic effect in areas of the respondent's business. However, on the face of it the impact on the claimant's team was limited. Mark Reeves was to remain as Resource and Manpower Manager, reporting to Stuart Hatton. He was to

continue with six people in his team. The only difference was that rather than six resource planning analysts he was to have two capacity planning managers and four manpower planning managers reporting into him. In fact, the whole “strategy” structure under Stuart Hatton was to be subject to very little change. Apart from the changes described in the claimant’s team (which did not involve a reduction in the number of employees), two people were to be redeployed to carry out possibly the same jobs in a separate area of the business and three vacant performance analyst roles were to be reduced to one vacant performance analyst role.

23. In answer to my questions Mr Reeves said that before and after the reorganisation the work undertaken by the team who reported to him did not reduce. The team carried out the same functions as before, and took on one other element of work from another team. What seems to have happened is that the team were rearranged on more specialist lines. After the reorganisation, some elements of the work that had generally been shared amongst the team fell exclusively to either the new capacity planning managers or the new manpower planning managers.

The selection process

24. It is not clear when this was finalised, but at some point the respondent settled on its “selection process” for those who were to be dismissed. It is included in note form in the bundle and set out in full below:

“IAG Cargo: Selection Process - FINAL

- *We will support our people through the change*
- *The process will be fair, non-biased, transparent and legal*
- *There will be a controlled and managed appointment process*

Overall principles:

- *All Open roles within the proposed organization will be available for applications from any ‘at risk’ colleagues*
- *If open roles remain unfilled, they would be entered into the normal recruitment process. This must be done on an internal IAG only basis in the first instance for a minimum period of 2 weeks.*
- *Preferences will be taken into consideration, but the business reserves the right to place colleagues in suitable alternative roles as a way of reducing redundancies.*
- *Support will be available to colleagues to complete their preference and applications forms and prepare for interviews, if applicable. Reasonable time off (Maximum 1 day will be given to prepare, if required).*

- *Preference form - colleagues can preference for up to 2 roles in priority order.*
- *For Open/Restricted roles - colleagues must submit a CV (up to 2 pages), in a pre-determined, standardised format.*
- *For Open/Restricted roles - colleagues must submit answers to 2 application questions (500 words max)*

Selection Process to follow:

Colleagues submit:

Selection methodology:

All CLT/CLG/CMT Open and Restricted Roles

- *Paper screening:*
- *CV*
- *2 Applicable questions*
- *Performance ratings (2018 and 2019)*
- *Absence management (triggers in the period Jan 2018 - December 2019)*
- *Interviews will be used if following paper screening there is a tie break between applications or where further information is needed*

Assessment and Scoring (applicable for all roles):

Each element will be assessed and scored in the following way:

- *CV: -Where applicable*
- *CV indicators are determined by the skills and experience as highlighted in the JD.*
- *Total score for the CV is based on the number of indicators ticked: 0 1 if all indicators are ticked, 2 if most, 3 if half, 4 if less than half and 5 if there is no evidence*
- *Application questions:*
 - One question will be set against the skills and capabilities required for the role*
 - One question will be behaviour based*

o Candidates will score a 1 if all criteria are met, 2 if most, 3 if half, 4 if less than half and 5 if there is no evidence

- *Competency based interview (where required):*
- *Interviews will be assessed based on the number of indicators met for each competency*
- *Performance Rating:*
- *Last 2 years performance ratings (2018/2019) will be used. Where performance data does not exist the performance rating will be left blank and scores for the other elements will be weighted more highly to account for the % rating.*

Anyone with less than 6 months service in any one performance year will have the 10% related to that year allocated to the application questions. As for the above questions, the substantive role should have been the one used in the performance review. If individuals have concerns, they should discuss these at the individual one to one session.

- *Absence Management:*
 - *Absence management triggers received within the period January 2018 to December 2019 1 point given for stage 1 trigger, 2 points for stage 2, 3 points for stage 3*

Outcomes:

The total score will be calculated in 4 parts, as below.

- *Part 1 (20%) — CV (Skills and Experience)*
- *Part 2 (40%) — Application questions (equal weighting on each question)*
- *Part 3 (20%) — Performance rating (2018-10%, 2019-10%)*
- *Part 4 (20%) — Absence management (2018-10%, 2019-10%)*
- *Minimum Standards: Grades of 1s or 2s meet the minimum, 3s are reviewed and may meet the minimum or be invited to an interview to allow more information to be gathered, 4s and 5s have failed to provide sufficient evidence and therefore are unsuccessful.*

Special Cases

- *Maternity leave — colleagues on maternity leave will be treated in accordance with our legal obligations and will be undertake individual*

consultation regarding the proposal, including the identification of any roles that may be available to them.

- *When considering the suitability of a vacancy as noted above, we would consider objective factors such as: skills, aptitude, experience, as well as the terms of the alternative role (i.e. grading, pay/benefits, status, location, etc.).*
- *Long term sick — make reasonable adjustment to the selection process (for example, conversations by phone if appropriate, assistance with preferencing, paper-based assessment)*
- *Annual Leave - make reasonable adjustments to the process (for example, extension to deadlines).*
- *Secondments — colleagues in secondments will be considered by their contractual role and not their seconded role. If a colleague's contractual role is not in scope, the individual will not be in scope and cannot apply for any roles (unless vacancies are put into normal recruitment processes).*
- *Acting up into higher graded roles — the substantive grade would be considered when applying for roles not the grade they were acting up into.*
- *Fixed term contracts — individuals will be treated the same as permanent employees*
- *Disability— will make reasonable adjustments”*

25. The document goes on to outline an appeals process.
26. This “selection process” was relied upon by the respondent as leading to the claimant’s dismissal.
27. The process refers to “open”, “restricted” and “closed” roles, which are not terms generally used in the law relating to redundancy. The respondent’s “proposals” documents sets out what they are intended to mean:
 - Open role: Proposed new role or roles that have changed significantly [by more than 30%].
 - Restricted role: Roles that are proposed not to have changed significantly [by more than 30%] but number of roles has reduced, and the roles only open to a limited specified redundancy pool.
 - Closed role: Roles which are proposed not to have significantly changed [by more than 30%] and therefore individuals are out of scope.

28. There is also a “*displaced role*”: “*a role that has been proposed will not exist in the new structure*”.
29. These categories do not map well onto a traditional understanding of the law in relation to redundancy, except to say that someone in a “closed role” is not at risk of redundancy, albeit they may participate in collective consultation as someone affected by redundancies.
30. The respondent identifies the claimant’s former role as a “displaced role”.
31. It was the respondent’s position that this had been agreed with the trade unions. However, the best evidence that they had on that was Ms Jeffrey saying she thought it had been agreed because usually they would not proceed without union agreement.
32. It was identified early on in the hearing that the question of union (or other) agreement to this process may be of significance. On my enquiry as to what there was to demonstrate that this was an agreed process Mr Purnell (who had only recently been instructed) said that his understanding was that there were thousands of pages of material documenting the consultation process and that it had been regarded as disproportionate and unnecessary to disclose this. Although the respondent did produce, overnight, material in relation to individual consultation with the claimant there remained no documentary evidence showing that this process had been agreed by the trade union (or any other representatives). If this was the culmination of such an exhaustive consultation process I am surprised that there is no one document, nor even minutes of a final meeting, recording union (or other) agreement to this process.
33. As we shall see, a further problem with this is that the note form of this selection process gives little guidance on how it is in practice to be applied, and there are areas where either it was applied in a different way to that contemplated in the notes or (as Ms Jeffrey put it) the note of the selection process does not accurately record what was intended.

The 70/30 analysis

34. The selection process also omits a key element of the process, that is, the identification of “open”, “restricted” or “closed” roles.
35. Ms Jeffrey says in her witness statement:

“One of the principles discussed with the reps is the extent to which new roles in the structure were similar to a role someone was already doing, such that they should be automatically placed into them. In the claimant’s case, his role of resource planning manager would disappear but the new roles of manpower planning manager and capacity planning manager would be available. To determine whether these new roles should be deemed to be “open roles” – new roles which all employees could apply for – rather than “restricted” or “closed” roles, a 70/30

assessment was carried out. This entailed determining whether or not there was a 30% difference in the old and new roles.”

36. Ms Jeffrey explained that old and new job descriptions would be compared by HR to see if more than 30% of the job had changed. If it had, the role would be considered to be “open”, with the effect that any employee could apply for it. The assessment by HR was essentially a desk-based assessment looking at the paper job descriptions. The HR decision on this would then be reviewed and signed off (or challenged) by line management and senior managers at the company. It was also Ms Jeffrey’s position that the 70/30 analysis would be subject to agreement by the trade union or employee representatives. For now it is sufficient to proceed to Ms Jeffrey’s conclusion that:

“As a result of the 70/30 assessment, IAG Cargo concluded that the new roles [in Mark Reeve’s team] should be ‘open’ roles. This was discussed with the unions and elected employee representatives during collective consultation. It was also communicated to impacted employees. No challenge was raised during the consultation regarding this approach, either by the unions, elected reps or employees generally.”

37. Ms Jeffrey points to the 70/30 analysis undertaken by one of her colleagues in HR in relation to the claimant’s role and the intended new roles.
38. These take the form of a side-by-side comparison of the job descriptions, with differences highlighted and a “conclusions” section.
39. In comparing the resource planning analyst role against the capacity planning manager role, the conclusion is:

“The new role (Capacity Planning Manager) is more than 30% different from the current role (Resource Planning Analyst) Key differences:

- *New role will be strategically focussed with a key component of financial and forward planning.*
- *This role will be accountable for medium and long term goals and no longer be required to look short term.*
- *This will also have a project focussed element to satisfy a missing link between capacity of the variables and the performance of the overall operation*
- *This role no longer has a roster element in this and will not just work solely with the OM’s*
- *There is no requirement to plan manpower.”*

40. Comparing the resource planning analyst role against the manpower planning manager role, the conclusion is:

“The new role (Manpower Planning Manager) is more than 30% different from the current role (Resource Planning Analyst) Key differences:

- *New role will be operationally focussed with a key component of immediate and short-term planning; there is no longer a requirement for long term planning*
- *They will manage a team of MLT*
- *There is no requirement to financial plan*
- *Focus on contingency plans and seasonal, industrial disruption on Manpower planning*
- *Shift based on 24.7 split*
- *Solely focussed on resource planning for the short term”*

41. I will discuss these differences in more detail later, but it is apparent that in some significant matters the differences are effectively mirror images of each other. The manpower planning manager role will be *“operationally focussed”*, relate to *“short-term planning”* with *“no requirement to financial plan”*. The final bullet point of the differences is a useful summary – it is *“solely focussed on resource planning for the short term”*.
42. The capacity planning manager differences are the mirror image of this. It is to be *“strategically focussed”* with *“a key component of financial ... planning”* for *“medium and long term goals”* and will *“no longer be required to look short term”*. *“There is no requirement to plan manpower”*.
43. According it is clear that many (but not all) of the differences are simply the existing job being split into two parts: short-term operational manpower planning (the manpower planning manager) and medium/long term strategic and financial planning (the resource planning manager).
44. The combined effect of all of this is that the respondent had reached a position whereby it considered the claimant’s former role of resource planning manager to have been abolished and to have been made redundant. The claimant would therefore be dismissed subject to him obtaining alternative employment through the “selection process”.

Individual consultation

45. The claimant says that the first he knew of his role being made redundant was in a Teams meeting in early August 2020. He had first seen the earlier materials relied upon by the respondent in preparing for the tribunal hearing. I accept this as a fact, but I also accept that the respondent had done what was necessary so far as collective notification was concerned, alongside earlier attempts to

notify the claimant of their plans, and that it was not their fault that the claimant was not aware of the plans earlier.

46. My impression is that this early August 2020 notification did not significantly concern the claimant. He appears at the early stage to have been confident of obtaining other work with the respondent, perhaps because of the idea that six roles in his team were to continue.
47. Voluntary redundancy was offered to affected employees in mid-August 2020.
48. The first formal individual consultation meeting took place between Mr Reeves and the claimant on 26 August 2020. The claimant covertly recorded the meeting. He says this was simply so that he could refer back to the details of the meeting without the need to take full notes at the time.
49. In this meeting Mr Reeves acknowledges the possible communication problems faced by people in the claimant's position:

“MR So being in that collective consultation, it's been a little bit difficult I think for people that have been in the TUPE consultation, because there hasn't been as much direct information coming out of those sessions as there would have been if you were an IAG Cargo employee all the way through.

GJ Okay

MR So, IAG Cargo employees have voted for employee reps that have been sending notes because under your BA contract you have collective bargaining then your representation was coming from the trade unions which would have been Unite, GMB.

GJ Yeah

MR But their overall approach to the consultation hasn't been particularly engaged.

GJ No, it wasn't the best.”

50. Market conditions are discussed between Mr Reeves and the claimant. Mr Reeves identifies *“three open roles within our current structure, which you're able to apply for”*. He describes these as the *“Resource Planning Manager role, the Capacity Planning role and then the Performance [Analyst] role”*. A colleague had resigned since the new structure was planned, so there were two rather than only one Performance Analyst roles that were vacant. Resource planning manager was, of course, the claimant's existing role, so it seems Mr Reeves must have meant that to be the Manpower Planning Manager roles. Mr Reeves says that under the selection process the claimant can, at this initial stage, apply for up to two roles. The claimant asks for *“a bit of a steer as to*

which of those jobs I would have the most chance of getting on a part time basis". Mr Reeves replies:

"Yeah, so my view is that I need the overall HCE to do the role, so 2HCE to do the capacity planning, 4HCE to do the resource planning, you know, I shouldn't be showing any discrimination against somebody because of their contract type, be that part time, be that job share in terms of their ability to carry out the role and apply for the role, so there shouldn't be any steer from me that says it doesn't work. I think on a practical basis, because there's more people doing the Resource Planning analyst, it would probably favour being able to work that through and finding somebody to do the additional hours that are left by your part time hours ... More straightforward than if we have got two people and one of those being part time, until we can match it through in terms of other hours, so I think it's probably more workable within the Resource Planning, but I think it's got to be more around what you want to apply for and where you think your skills are best ... utilised and what gives you the most out of the role, more than anything else I think at this stage. There's nothing I can steer you in to say that you know I just can't accept part time working, I am not sure I would be allowed to do that sort of thing even if I had full intention to do so ..."

51. The claimant presses Mr Reeves for advice "*off the record*" – although as Mr Purnell pointed out the claimant was recording the conversation. Mr Reeves says "*the resource one comes in a little bit better ... I would steer your off the record to look at ones which there are large groups of people in, I think, but there might be other people that want to also look at reduced hours anyway after doing, working from home and weighing up the scenarios etc*".
52. The claimant says he would be happy to do any role. He discusses the application process with Mr Reeves.

The claimant's first round applications

53. On 4 September 2020 (the deadline for initial applications) the claimant submitted his applications for the roles of Performance Analyst and Manpower Planning Manager.
54. The selection process requires that these applications were done by submission of a CV (in a standard form) and the answers to two application questions. The selection process sets out that "*CV indicators are determined by the skills and experience as highlighted in the JD. Total score for the CV is based on the number of indicators ticked: 1 if all indicators are ticked, 2 if most, 3 if half, 4 if less than half and 5 if there is no evidence.*" For the application questions "*Candidates will score a 1 if all criteria are met, 2 if most, 3 if half, 4 if less than half and 5 if there is no evidence.*" Performance ratings for the last two years will be taken into account as will sickness absence (according to particular trigger points). The "application questions" carry greater weighting

than the other factors. *“Grades of 1s or 2s meet the minimum, 3s are reviewed and may meet the minimum or be invited to an interview to allow more information to be gathered, 4s and 5s have failed to provide sufficient evidence and therefore are unsuccessful.”*

55. Mr Reeves put it this way in his witness statement:

“In addition to receiving a score of between 1 and 5 for each of the selection criteria, employees were also awarded an overall score of between 1 and 5. In order to successfully obtain a new role, employees needed to achieve scores of 1 or 2 for each of the selection criteria. If an employee achieved a score or scores of 3 for any of the selection criteria, then the business could review the application again to determine if the minimum standard required for the role had been met, and/or invite the employee to an interview if it was considered there was a chance the employee's suitability for the role could be established with more information. Employees awarded a score of 4 or 5 for any of the selection criteria were confirmed as unsuccessful in their application. In other words, being awarded a 4 or 5 in any of the criteria was fatal to an application.”

56. Ms Jeffrey did not see things in quite the same way. Her understanding was that the question of an interview for a “borderline” 3 point mark only applied in respect of the CV and answers to questions. There would be no interview for a 3 scored for performance or attendance.

57. The scores for the CV and answers to questions were prepared by the relevant business manager(s) and were then compiled in a spreadsheet prepared by Ms Jeffrey. She was unsure of how the scores had been delivered to her by the managers. She would add the performance figure from the respondent's HR records. Exactly who was responsible for the attendance score was not clear. While one would expect that to be obtainable from HR systems it was Ms Jeffrey's case that this was not possible with the respondent's systems, so it was either up to the manager to identify attendance triggers or the absence would be so significant as to already be known by the HR manager who was compiling the spreadsheet.

58. The easier criteria to take a view on were the last two – performance and attendance. The respondent accepts that the performance grade was not something that an employee ever received in writing. While the appraisal system may result in a narrative document, the grade itself was stored on the respondent's systems and was only ever given orally to the individual. The claimant said, and the respondent was in no position to dispute, that in fact he had never been told of his performance grade for either of the relevant years. No document has ever been produced by the respondent that gives the grade. The only thing we have is the grade that appears in the spreadsheet. The claimant described this grade as being “un-auditable”, and that is true, at least so far as the material before the tribunal is concerned.

59. Although attendance points counted for 20% of the score, the spreadsheets presented to the tribunal contained no column for absence at all and appeared to take no account of it. Ms Jeffrey said that this was because meeting absence triggers was extremely rare and did not arise in the case of the claimant's team, so she had simply not included it in her calculations. Although not discussed during the hearing it does appear that the scores for the "overall application", which are effectively averages, have been calculated on the basis that everyone scored 0 for absence.
60. The role of performance analyst was the claimant's first preference. This was outside Mr Reeves's team, and reported to Stuart Hatton. Both Mr Reeves and Mr Hatton scored the claimant for this role, although Mr Reeves says it was Mr Hatton's scores that counted. Mr Reeves said that as the role reported to Mr Hatton it was Mr Hatton's responsibility to do the recruitment, and that Mr Hatton had drawn him in only as a second opinion on the scoring.
61. The "application screening form" completed by the managers consists of tick boxes against various criteria. Mr Reeves scored the claimant "2" against the CV and both questions, which would have comfortably qualified him for the job. The CV failed on only one point: "*CV influential as a personal statement (spelling/grammar/structure)*". If it had succeeded on this point it would have scored "1", on the basis that "all indicators" were met. Mr Hatton was less enthusiastic. He agreed with the score of "2" for the CV but graded the answers to both questions at "3", commenting that "*role-specific question did not give sufficient qualification of problem and outcome. Application did not credibly demonstrate skills beyond Excel. Values question lacked specific examples.*"
62. The claimant got a "3" for performance and effectively no score for absence for the reasons set out above.
63. Mr Reeves says there were four candidates for two Performance Analyst roles, but one of them was successful in applying for another role and decided to take that one rather than the Performance Analyst role. That left three candidates (including the claimant) for two roles.
64. In relation to the scores, Mr Reeves says that there was one outstanding candidate, though they were not appointed. Mr Reeves presumes that was because they got a role elsewhere within the organisation. Mr Reeves says that a second candidate had an average score of 1.9, was interviewed and appointed. Mr Reeves says the claimant was the lowest scoring of the three candidates who remained and "*his application was deemed not to have reached the required standard, so the claimant was unsuccessful for the role*".
65. The scores of the candidate in question across CV/Q1/Q2/Performance 2018/Performance 2019 were 2:2:3:N/A:N/A, as against the claimant's scores (according to Mr Hatton's scoring) of 2:3:3:3:3. Setting aside the N/A marks, the claimant had scored one grade lower on one question than the appointed candidate. The selection process provides that "*3s are reviewed and may meet*

the minimum or be invited to an interview to allow more information to be gathered". Taking Ms Jeffrey's position that this only applied in relation to the CV and question scoring, it is not at all clear what steps were taken to review the claimant's score, nor why he was not invited to an interview. The appointed candidate had one relevant 3 and was invited to an interview. The claimant had two and was not. The reason for this has not been explained by the respondent.

66. This process started as four candidates seeking two roles. Two were appointable but did not take up the roles for various reasons. One was interviewed and offered the role. That seems to leave one vacancy and the claimant who had achieved borderline grades but was not interviewed. Mr Reeves says "*a later decision must have been made, I presume by Stuart Hatton, that two people in this role would be enough ... we have continued with two people only in that role and at times ... only one*". The reference to two people in the role accounts for the fact that in addition to the vacancies there was already one person in post who remained in post throughout this process.
67. The manpower planning manager role reported to Mr Reeves and he was responsible for the scoring. He says "*a version of the application screening form that I completed and submitted to HR is [in the tribunal bundle]. This does not show the final scores awarded.*" In this original version Mr Reeves has ticked all the boxes in the CV section, which should lead to a score of 1, but the score on the form is 2. The answers to the questions score at 2.5 and 2 respectively. His half-point for one of the questions was challenged by HR on the basis that half-points were not allowed. He revised this down to 3 and told me that this was because anything less than a 2 should be a 3. For the second question, Mr Reeves says that "*the claimant's score was moderated down to a 3*". In his oral evidence he described completing all the ticks in the CV box as a mistake, and said that his scoring should have been the same as for the Performance Analyst. That is why it was a 2. The scores eventually recorded by HR were 2:3:3, as opposed to original scores of 2 (which should have been 1):2.5:2.
68. There were six candidates for four vacancies. Four scored particularly well, but one of them accepted another job. Three were therefore appointed, leaving one vacancy. Mr Reeves says "*the claimant and one other internal candidate had received an overall score above 2, and were not deemed appointable. That meant that after this initial round, I had filled 3 of the 4 posts, and one post remained available*". The other unsuccessful candidate has scored a 4 for their CV, so would automatically be deemed unsuccessful under the "minimum standards" section of the selection process. The claimant's 3s would have brought him within those eligible for consideration for interview. He was not interviewed. Why he was not interviewed is not explained by Mr Reeves in his statement. In answer to my question Mr Reeves said that the reason he was not invited to interview was because of the "*overall strength of his application*". This is somewhat surprising given that on his original assessment Mr Reeves had scored the claimant above 3 for his CV and the questions, and 3 appears from the selection process to be a borderline grade worthy of further investigation or consideration. A subsequent round of internal recruitment was

unsuccessful, so at the time of the claimant's dismissal there remained one vacancy for a manpower planning manager.

69. The claimant was keen to emphasise his successful performance of the original resource planning manager's role, and it did not seem to be in dispute from the respondent that the claimant was at least satisfactory in the role. Even if the 70/30 analysis was correct, large parts of the resource planning manager's role were replicated in the manpower planning manager's role, as might be expected given that the work of the teams was, overall, not being reduced. I asked Mr Reeves whether, free from the constraints of the "selection process" he would have regarded the claimant being capable of carrying out the role. Mr Reeve's response was to the effect that there was nothing in the claimant's previous performance to suggest he would not be able to carry out the work of the new role.

The claimant's second round applications

70. The claimant was allowed to apply for a maximum of two roles in the first round of applications. He applied for the roles of performance analyst and manpower planning manager and was unsuccessful with both. In both cases it seems that the respondent preferred to leave vacancies unfilled rather than offer the role to the claimant.
71. The selection process says "*If open roles remain unfilled, they would be entered into the normal recruitment process. This must be done on an internal IAG only basis in the first instance for a minimum period of 2 weeks.*" This effectively created a second round of possible applications, not subject to the constraints of the selection process but to be dealt with by way of "*the normal recruitment process*".
72. The understanding seems to have been that people who had previously been unsuccessful in the first round of application were not eligible to apply for the same jobs again. However, there remained a vacancy for the role of capacity planning manager, which was the other kind of role that reported to Mr Reeves in the new structure. The claimant applied for that role. Although the selection process talks of this as being through the "normal recruitment process" in fact the same scoring procedure was adopted as with the first round of applications. It is not clear to me whether this is, in fact, the respondent's "normal recruitment process", but if it is it is not clear why the selection process goes to such lengths to explain how the "normal" recruitment process operates.
73. Mr Reeves's scoring for this is in the tribunal bundle. The claimant scored 2:2:3 across the CV and two questions. This time Mr Reeves gives a tick for the "CV influential ..." criteria, but there is no tick against "Evidence of relevant and recent skills (as outlined on the job description)". In the previous two applications Mr Reeves had given the claimant a tick for that. Mr Reeves's "additional comments" are:

“A good application links personal experience to requirements of the role

- Has taken onboard and made changes to application based on feedback from rejections for Resource Planning Manager*
- No specific example of ambitious performance standards*
- No evidence of past mistakes with remedial actions / improvements to prevent reoccurrence*
- Doesn't explicitly make a case for change with role specific question, but does outline a credible approach*
- Understands stakeholders but doesn't explain how he will gain their confidence and support. As a known candidate Gary has struggled to influence all stakeholders and can over engineer solutions producing tools and reports which do not gain long-term support*
- Whilst making reference to supporting outside of part-time hours, the requirements of the role does mean that I need 2xHCE in position. I don't have any other applicants requesting part-time hours to be able to share responsibilities.”*

74. There was another candidate for the role who was at risk of redundancy. Their former role had been at a higher grade than the Capacity Planning Manager's role. They are shown as scoring 2:2:2. They were interviewed for the role and appointed.
75. Perhaps the interview is an indication that “normal recruitment process” was followed in this second round of applications. There is no provision in the selection process for anyone scoring 2 or more to be interviewed. The only time an interview is mentioned is in the possibility that someone scoring a 3 may be interviewed. If it is the first-round process that is being followed the respondent has placed itself in the awkward position of having interviewed someone there was no provision for interviewing and not having interviewed the person who was eligible for interview. Mr Reeves explained the interview for the other person on the basis that he wanted to ascertain their commitment to the role, given that it would be a step down for them. He says that if this more senior individual had not been appointed the claimant would have been invited to interview for the role.

Dismissal

76. Mr Reeves says:

“As the claimant had not been successful in his applications he was given notice of termination on 29 October 2020 ... the letter set out that his employment would come to an end on 7 November 2020 and he would receive payment in lieu of his notice.”

THE LAW AND ITS APPLICATION TO THE CLAIMANT'S CASE

The reason for dismissal - redundancy

77. It is for the respondent to prove the reason for dismissal on the balance of probabilities.
78. Under section 139(1)(b)(i) of the Employment Rights Act 1996, "redundancy" is the reason for dismissal where:
- "... the dismissal is wholly or mainly attributable to ... the fact that the requires of that business for employees to carry out work of a particular kind ... [has] ceased or diminished or is expected to cease or diminish."*
79. Circumstances such as this where there has been no actual reduction in relevant work nor in the number of employees carrying out the work require a focus on what might be meant by "work of a particular kind". This is a factual question and in Amos v Max Arc Ltd [1973] IRLR 285 it was said that "*Work of a particular kind ... means work which is distinguished from other work of the same general kind by requiring special aptitudes, skills or knowledge.*" We also see that "*Work of a particular kind' refers to the tasks to be performed, not the other elements which go to make up the kind of job that it is*" (Johnson v Nottinghamshire Combined Police Authority (1973) 8 ITR 411). I also note that "*a job title is not the same as work*" (E[402] Harvey on Industrial Relations and Employment Law).
80. While the dismissals in the claimant's team arose in circumstances where many people lost their jobs within the respondent, that does not mean that the claimant was dismissed by reason of redundancy.
81. Mr Reeves's team was not seeing any reduction in work, and was taking on some extra work. The number of people on the team was to remain the same.
82. For there to be a redundancy there must be a diminution in work of a particular kind or, more precisely, a diminution in the requirement for employees to carry out work of a particular kind.
83. In his closing submissions, Mr Purnell says:
- "The requirements of IAGC for employees to carry out work of the particular kind for which C was employed in the Resource Planning Analyst role were expected to cease or diminish, either permanently or temporarily, because that role was to be deleted from the organisation and replaced by the creation of two discrete workstreams – capacity planning and resource planning. 70/30 assessments were conducted in relation to both new roles to determine whether there was a change of more than 30% from existing roles within the organisation (see further below) and it was determined that there was. Insofar as is relevant to C, those assessments were not challenged during the consultation*

process, either by the unions, by the elected employee representatives, or by C himself, as he accepted in cross examination.”

84. As to the 70/30 analysis, Mr Purnell says that it was either agreed or not challenged at the time by trade unions, employee representatives or the claimant. He says:

“... it is not permissible for the Tribunal (or the Claimant) to attempt in these proceedings to undertake the 70/30 process afresh, three years later and with the benefit of hindsight which those involved in that process in the summer of 2020 did not have and in circumstances where no one challenged that process at the time.”

85. I accept that the 70/30 analysis was a time-honoured means of assessing whether a job had changed, used by both British Airways and the respondent. I accept that it was not challenged by the claimant and, although the evidence on this was not entirely clear, I am prepared to accept Mr Jeffrey’s evidence that the analysis was in some way reviewed or considered by the trade union and/or employee representatives.
86. The difficulty for the respondent is that even if all of this is true it does not answer the question of whether the requirement for employees to carry out work of a particular kind has reduced. The 70/30 analysis has never been expressed by the respondent as having anything to do with work of a “particular kind”. While it seems a role change assessed as less than 30% will result in the individual or their position not being at risk of redundancy there is nothing about the 70/30 analysis that gives it any special significance in addressing the legal question of whether the requirement for employees to carry out work of a particular kind has ceased or diminished. Even if the analysis was clearly endorsed by a trade union, employee representatives or the claimant himself that does not prevent what is now required – a factual analysis by the tribunal as to whether there is a diminished requirement for employees to carry out work of a particular kind. The material contained in the 70/30 assessment can, of course, be used in considering this.
87. Mr Purnell’s submissions are to the effect that the respondent had a diminished requirement for people to carry out work of the resource planning analyst kind.
88. As set out above, the material behind the 70/30 analysis suggests that, if this is the case, it is primarily because the former resource planning analyst role was being split into two – one focussed on short-term manpower planning and the other on medium/long term financial planning. The conclusions of the 70/30 analysis do not identify any element of the former resource planning analyst role that does not continue with either the manpower planning manager or capacity planning manager. Some additional duties are taken on, but nothing, or nothing material, is lost.

89. Before the reorganisation six people carried out the tasks of the Resource and Manpower team, under the Resource and Manpower Planning Manager. After the reorganisation, six people carried out those tasks, and some additional tasks. All that changed was the division of those tasks amongst the members of the team.
90. Perhaps there are some circumstances in which a similar division of a role is so stark that there can be said to be a diminished requirement for work of a particular kind, although it is difficult at present to think of an example of that. On the facts of this case, however, the roles of capacity planning manager and manpower planning manager remain essentially comparable, and I find that there has been no reduction in the requirement for employees to carry out work of a particular kind. Dividing the work into areas of specialism does not imply a reduction in the requirement for employees to carry out work of a particular kind. Accordingly, the claimant was not dismissed by reason of redundancy.

The reason for dismissal – some other substantial reason

91. That is not the end of the matter. An employer will typically argue, as the respondent does here, that if not a redundancy the reorganisation involved in this case amounted to some other substantial reason for the dismissal of the claimant.
92. But as with the question of redundancy, it is not enough for the respondent to say that there was a reorganisation and the claimant was dismissed in the context of that reorganisation. There has to be “some other substantial reason” justifying the dismissal of the claimant. In his closing submissions Mr Purnell speaks of this as being a “*business reorganisation carried out in the interests of economy and efficiency*”, but there is no analysis separate from the analysis on redundancy that explains why this reorganisation justifies the claimant’s dismissal. It is not for me to criticise or second guess the respondent’s decision as to how its business should be structured, but it is clear from what is set out above that in the circumstances of the case the reorganisation did not amount to some other substantial reason justifying the dismissal of the claimant. The claimant was capable of carrying out the roles that remained. As described above, the respondent preferred to leave at least one role that the claimant could have carried out vacant, rather than give him the roles. There was nothing in this reorganisation that amounted to some other substantial reason justifying the dismissal of the claimant.
93. The respondent has not shown a potentially fair reason for the claimant’s dismissal. This means that his dismissal was unfair.

Fairness generally

94. If the respondent had shown that there was a potentially fair reason for the claimant’s dismissal there remain a wealth of reasons why the claimant’s

dismissal was unfair. Those will be evident to anyone reading through the facts found in the earlier section of this decision.

95. The primary problems of fairness arise from the respondent's documented selection process and its application in the claimant's case. Although presented as an agreed and rational approach to selection for redundancy it did not work in that way.
96. As set out above the 70/30 open/restricted/closed role process operated as at best an approximation for whether any particular role was redundant.
97. The ostensibly objective scoring process for applications was in fact opaque and unreliable. Amongst other things:
 - 97.1. The borderline 3s for interview were said by Ms Jeffrey to only apply in practice in respect of the CV and answers to questions, when the selection criteria document seemed to suggest they applied more widely. Exactly how a 3 would lead to an interview was completely unclear. As we can see, in one case one 3 lead to an interview but two did not, and in another case the individual with no 3s was interviewed and the individual with one was not.
 - 97.2. There was no consistent method of applying the attendance score as this was not derived from any records but instead relied on either HR or the manager (it was not clear who) identifying the individual in question as someone who was known to have poor attendance. In practice the absence score was so meaningless as a criteria that it was never included in the scores of the claimant or his colleagues.
 - 97.3. The performance grade is, as the claimant characterised it, "un-auditable".
 - 97.4. There was no clear path between the manager's scoring and HR's collation of the scores, making it unclear in what circumstances the claimant's "1" for his CV had been marked down to a 2, or how later his 2 on one question had been "moderated down" to a 3.
 - 97.5. There were circumstances (not provided for in the selection criteria document) in which more than one manager would score an individual. Often that would be considered to be good practice, but if it is to be done there ought to be a way of reconciling or moderating conflicting scores. There was no such method in this case, leading simply to the worst scores prevailing for the claimant. It may be that Mr Hatton was correct to seek a second opinion from Mr Reeves on the scores, but if so it then requires some explanation as to how Mr Hatton seems to have ignored that second opinion and progressed simply with his (worse) scores.
 - 97.6. What the "normal recruitment process" applicable to open roles that remained unfilled is is entirely unclear. Either the normal recruitment

process was not followed in the claimant's case or the normal recruitment process is the same as that outlined elsewhere in the selection process document for the first round of appointments, in which case it is not clear why the selection process document does not simply say that the process for such roles is the same as that for the first round of appointments under the selection process.

- 97.7. Finally, and most strikingly, the claimant was dismissed despite there being at the time of his dismissal a vacancy within his team for which he was suitable.
98. If there had been a potentially fair reason for dismissal the claimant's dismissal in these circumstances would still have been unfair.

CONCLUSION

99. The claimant's dismissal was unfair.
100. There was some discussion during the hearing of a reduction on a Polkey basis and/or a reduction for compensatory fault on account of the claimant's covert recording of meetings or discussions with managers. Those are matters of remedy and I express no view on them at this stage, though no doubt both (and particularly any Polkey reduction) will need to be argued by reference to the findings of fact in this decision.
101. In view of possible complexities around any remedy for the claimant's unfair dismissal it was agreed at the end of the hearing that a provisional case management hearing (rather than a provisional remedy hearing) should be listed for 12 March 2024 at 14:00. Unless remedy can be agreed between the parties before then, that will now take place and will make arrangements for a remedy hearing.

Employment Judge Anstis

Date: 26 January 2024

Judgment and Reasons

Sent to the parties on: 29 January 2024

For the Tribunal Office

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<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>