EMPLOYMENT TRIBUNALS

Claimant: Mr K Girdwood

Respondent: Cathay Pacific Airways Limited (UK)

Heard at: Manchester **On:** 5 and 6 June; 18 June 2018 (In Chambers)

Before: Employment Judge Howard

REPRESENTATION:

Claimant: Mr D Brogden, Trade Union Representative
Respondent: Mr B Cooper QC, Counsel

JUDGMENT

The judgment of the Tribunal is that:

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

REASONS

1. I heard evidence in support of the respondent from Scott McEwan, Head of Human Resources UK and Ireland, and Dominic Perret, General Manager, Air Crew. I heard from Mr Girdwood and in support of his claim, from Darren Brogden, pilot and representative of the Aircrew Officers Association Europe (AOAE), which is recognised by the respondent for collective bargaining purposes.

2. During the hearing I was referred to documents contained within an agreed bundle extending to some 700 pages.

3. Mr Girdwood was made redundant and redundancy was the potentially fair reason for dismissal identified in the response form. By email of 1 March 2018, the respondent notified Mr Girdwood that it sought to rely on SOSR as a potentially fair

reason for dismissal, in the alternative. Mr Girdwood objected and an Employment Judge directed that the issue be addressed at the outset of this hearing. Mr Brogden, opposed the application because, throughout the events at issue, the respondent had dealt with it as a redundancy situation and it was unfair to rely upon a different reason now. Mr Cooper argued that the facts giving rise to the decision to dismiss had not altered; the respondent's primary case remained that the reason for dismissal was redundancy, it was simply adding a further category of potentially fair reason; that leave to amend the response was not strictly necessary and that this was simply a relabelling exercise. Whilst I appreciated the point, I dealt with the matter as an application to amend the response and granted it. The factual matrix remained the same and the respondent relied upon the same matters in seeking to establish that a fair process was applied; the amendment was limited to relabelling of existing facts. Mr Girdwood had been aware that the respondent sought to rely on SOSR in the alternative since 1st March 2018 and there was no prejudice to him in allowing the application.

The issues

4. The list of issues to be determined were identified and agreed as follows:

Reason for dismissal

4.1 What was the reason or principal reason for the claimant's dismissal? The reason relied on by the respondent is the business decision to close the Manchester base and/or to cease to employ freighter pilots with Manchester as their home base.

4.2 Was the reason a potentially fair reason within ss98(1)(b) and/or (2) of the Employment Rights Act 1996 (ERA)? In particular;

4.2.1 Did it constitute redundancy within ERA ss98(2)(c) and 139(1)(a)(ii) and/or (b)(ii), on the basis that the dismissal was wholly or mainly attributable to the fact that the requirements of the business for employees to carry out work of a particular kind in the place where the claimant was employed ceased or expected to cease? This will require consideration of the following subsidiary questions:

(a) Where was the claimant's place of employment for the purposes of ERA ss139(1)(a)(ii) and/or (b)(ii)?

(b) Was his dismissal wholly or mainly attributable to the cessation of the respondent's business at the claimant's place of employment and/or of a requirement for employees to carry out work of that kind in that place within ERA s139(b)(ii)?

4.2.2 Alternatively, did it constitute some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the claimant held within ERA s98(1)(b)?

Reasonableness

4.3 For the purposes of ERA s98(4), did the respondent act reasonably in all the circumstances (including the size and administrative resources of the respondent) in

treating the reason as a sufficient reason for dismissing the claimant having regard to equity and the substantial merits of the case? In particular:

4.3.1 Was the decision to close the Manchester base and/or to cease to employ freighter pilots with Manchester as their home base genuine and taken for legitimate business reasons?

4.3.2 Was it reasonable for the respondent to identify the pool for potential redundancy/dismissal as freighter pilots employed with Manchester as their home base?

4.3.3 Was the process of collective and individual consultation carried out by the respondent, (including the conduct of the claimant's appeal), reasonable?

4.3.4 Were the steps which the respondent took to identify and offer alternative employment to the claimant reasonable having regard, in particular, to:

(a) Whether there were other suitable alternative positions that a reasonable employer should have offered to the claimant as alleged in paragraph 16 of the grounds of complaint, namely for:

(i) B747 captains to maintain the respondent's B747 service,

(ii) A350 captains to crew the A350 service to and from Manchester

(iii) B777 captains and first officers at London Heathrow and/or

(iv) The claimant's existing role but based from London.

(b) Whether in offering alternative employment based in Hong Kong the respondent unreasonably contravened or threatened to contravene a contractual entitlement to an expatriate allowance; and/or

(c) Whether in offering alternative employment the respondent unreasonably refused to honour an entitlement to protected pay and conditions?

5. It was apparent that, given the wealth of documentation and complexity of evidence, the length of hearing was not sufficient to determine remedy, as required. We agreed that this hearing would deal with issues of liability only and a further hearing would be listed to determine remedy if the claim succeeded.

The findings of fact relevant to the issues

6. The respondent is an international airline, headquartered in Hong Kong and operating under Hong Kong Civil Aviation Department regulations.

7. Mr Girdwood is an airline pilot. He was employed from 3rd February 2003 by Flight Crew Services (FCS) to fly the Boeing 747 aircraft, for Hong Kong Dragon Airlines Limited (KA) and was based in Manchester. In 2006 KA became a wholly owned subsidiary of the respondent and in January 2008 Mr Girdwood was offered various options for future employment. Mr Girdwood accepted an offer of employment with the respondent. The offer of employment was made by letter of 26th

March 2008, for 'First Officer (Rapid Command)', provided a date of joining of 1st July 2008 and a permanent home base of Manchester UK. The offer was conditional upon Mr Girdwood formally resigning from FCS, which Mr Girdwood accepted, with the effect that his employment with the respondent commenced on 1 July 2008. It was not submitted by either party to these proceedings, at any stage, that the TUPE regulations had any bearing on the date upon which Mr Girdwood's employment commenced. In September 2008, Mr Girdwood commenced training with the respondent and was given type rating training (as required to fly that specific aircraft type) on the Boeing 747-400 aircraft, largely flying passenger aircraft. Throughout his employment with the respondent, he continued to fly freight aircraft only; specifically, the Boeing 747.

Conditions of Service and related Policies

8. The offer of employment stated;

'you will receive salary at your existing annual increment on the applicable freighter salary scale. Your FCS DOJ (date of joining) will be retained for staff travel, HKG [Hong Kong] *medical and expatriation benefits.*

CPA-UK Conditions of Service 2008 [CoS]*, including salary scales will be sent to you via email. The Permanent Basings Policy Agreement* [PBPA] *2006 and the Freighter Aircraft Basings Policy* [FABP] *2000 will also be sent to you via email.'*

9. It is common practise within the airline industry for 'passenger command' (captaincy of a passenger aircraft), which normally attracts higher incremental pay and benefits than first officer status or freight command, to be allocated to pilots based on seniority. Each airline maintains a list of pilots whose names are added upon joining the airline or qualifying, whichever date is latest. As passenger commands become available, they are offered to those most senior, whose names have risen to the top of the list. This practice was agreed as the policy for appointments to passenger command between the AOAE and the respondent. In resigning from FCS and accepting new employment with the respondent, Mr Girdwood understood that his name would be added to the bottom of the list and that his service with FCS would not be counted for those purposes. However, as the letter made clear, his service with FCS would be retained for the purposes of assessing entitlements under any staff travel, HKG medical, and expatriation benefits.

10. Mr Girdwood's terms and conditions of employment were contained within the CPA-UK CoS 2008. Both the PBPA and FABP were agreed between the respondent and the AOAE and were incorporated into Mr Girdwood's contractual terms.

11. The FABP 2000 applies to all 'Company Officers'; i.e. *'Pilots listed on the Cathay Pacific Airways Limited Aircrew Seniority List'*; such as Mr Girdwood.

12. The PBPA 2006 applies to *'all officers on the Cathy Pacific Aircrew Seniority List who operate or are eligible to operate Passenger aircraft.'* Eligibility requirements are provided at (13) FABP 2000 as '*Officers holding Freighter Aircraft base appointments* [such as Mr Girdwood]' *who have served at least 3 years, solely*

operating Freighter Aircraft will be eligible to transfer to operate Passenger Aircraft'. The respondent did not challenge the applicability of the PBPA 2006 to Mr Girdwood.

13. The freighter captains such as Mr Girdwood who had joined the respondent from FCS retained an incremental pay scale specific to them, in accordance with the assurance provided in the offer letter, whilst the respondent's other pilots were placed on the 'Unified First Officer' pay scale from 2009.

14. Mr Girdwood's permanent home base was Manchester, as stated in his offer of employment and defined in the FABP 2000 as;
'Freighter Home Base (FHB): the place nominated by the Company to the Officer or as otherwise contractually agreed between them from where the Officer normally starts and ends a scheduled duty and at which place, under normal conditions, the Company is not responsible for the accommodation of the Officer concerned.'

15. This definition is echoed in the PBPA 2006 (4.8) as;
'The port mutually agreed by both the Company and the Officer from where the Officer normally starts and ends a duty cycle'.

16. The home base falls within a freighter base area (FBA) which is defined in the FABP 2000 as;
'A defined area within which the Freighter Home Base and/or Freighter Preferred Port is situated. Current Freighter Base Areas are Australia, Europe and North America.' Mr Girdwood's home base fell within the Europe FBA.

17. The freighter preferred port is;
'The port mutually agreed by both the Company and the Officer which does not qualify to be nominated as a FHB but from which the Officer may start and end a duty cycle should services permit.'

Provisions relating to redundancy/closure

18. At (11.1) of FABP 2000; *'closure of freighter home base'* it provided that;
'In the event of closure of a FHB, affected Company Officers will be given the opportunity either of relocating to another FHB within the FBA, subject to a position being available regardless of aircraft type, or of relocating to Hong Kong. Relocation will be at the company's expense to the levels provided for in the Officer's Conditions of Service.'

19. The PBPA 2006 echoes this provision at (13) *'Reduction in Crew Levels or Closure of Home Base'*; with the qualification that opportunity to relocate will be given in seniority order;
'In the event of a reduction in overall crew levels in, or closure of, a Home Base, suitable Officers who are already based or have been awarded a vacancy in that Home Base will be given the opportunity, in seniority order, to relocate to another Home Base within the Base Area subject to a position being available regardless of aircraft type or to another base or to Hong Kong. Relocation will be at the company's expense to the levels provided for in the officer's Conditions of Service.'

20. The CoS 2008 incorporates these provisions at (42.1), *'closure of home base'*, providing that, in the event of a closure; '*affected Officers will be given the*

opportunity of either relocating to another HB within the BA, subject to a position being available regardless of aircraft type, or of relocating to Hong Kong. Relocation will be at the company's expense to the levels provided for in this section.'

21. The CoS deals with redundancy at (30) and provides at (30.4);
'If redundancy should occur and officers are required to operate in a lesser capacity than that for which they are qualified they will retain their original rank i.e. there will be no demotions'.

22. The CoS (43.1) provides;
'permanent Hong Kong base: officers who take a permanent Hong Kong base will be entitled to the relevant benefits provided in the VETA Conditions of Service. Expatriate benefits will apply to eligible officers.'
The VETA conditions of service are those which apply to the respondent's Hong Kong air crew.

The claimant's place of employment

23. KA operated freight flights from Manchester and after acquiring KA in 2006, the respondent continued to use Manchester as a port for freight. In 2014 it considered ceasing to use Manchester for freight. As Mr McEwan explained in evidence, it is inconsistent with the respondent's business approach to operate small bases due to operational inefficiency and the respondent's practice is generally to only operate freighter aircraft from points where market demand cannot be satisfied by carrying cargo in the holds of passenger aircraft. The respondent was increasing its passenger operations significantly from London Heathrow, had launched a four-weekly passenger service from Manchester to Hong Kong and its passenger planes had large cargo capacity. This meant that the freight demands of the UK market could be met without a dedicated freighter service from Manchester. A proposal to close the Manchester base was made, a potential redundancy situation was identified affecting the 44 Manchester based pilots and a consultation process commenced. Following collective consultation, the respondent decided to cease operating freighter aircraft into and out of Manchester and the airport was taken 'off-line' as a freighter port. However, the redundancy proposals were withdrawn and it was decided to keep Manchester as the home base for the affected pilots. The arrangement was subject to review in 2015, at which point Mr Girdwood and his colleagues were informed that the Manchester freighter base would be maintained subject to the normal base reviews.

24. The effect of this was that from 2014, Mr Girdwood and his fellow Manchester based freight pilots would travel to other airports; London Heathrow, Paris (CDG), Frankfurt or Hongkong, to operate a flight. The practise of transferring pilots from a home base to the port from which they are to fly is known as 'positioning' and is defined in the respondent's 'Flight Time Limitations Scheme' as *'the practice of transferring crew members from place to place as passengers in surface or air transport at the behest of the company.'* A scheme for the regulation of flight times, approved by the relevant Civil Aviation Authority, (Hong Kong in this instance), is required under international civil aviation rules. The Flight Time Limitations Scheme was contained within the 'Operations Manual' which was expressly incorporated into Mr Girdwood's CoS 2008.

25. Positioning forms part of a pilot's duties; in addition to flight duty, ground training, ground duties and reserve duty; all of which count in the calculation of duty periods regulated under the Scheme. Positioning counts towards the calculation of minimum periods of rest, attracts basic pay and the costs of positioning are borne by the respondent (except in limited circumstances when a pilot elects to position for his own convenience). 'Home base' is defined in the Flight Time Limitations Scheme in the same terms as in the FABP 2000; '*the place, nominated by the Company to the crew member or otherwise contractually agreed between them, from where the crew member normally starts and ends a Duty Cycle and at which place, under normal conditions, the Company is not responsible for the accommodation of the crew member concerned.'* The respondent is required to calculate duty periods from the pilot's home base to comply with the regulatory scheme to which it is subject. As Mr McEwan explained, this means that time spent positioning from a home base has inevitable implications for the overall rostering arrangements for a pilot as it can impact upon his or her productivity and flexibility. It was not disputed that save for a handful of occasions when Mr Girdwood elected to change positioning, from 2014 onwards, he was positioned and rostered from his home base of Manchester.

26. In his evidence, Mr Girdwood characterised the connection with his home base as an administrative convenience rather than an actual place of work, explaining that he had long ceased to operate from the Manchester base. Mr Brogden suggested that, as the respondent requires its pilots to fly any route instructed, the place of work of a pilot is the port from which he operates the flight. That analysis fails to take account of the range of contractual duties beyond flight operation. In my view, Mr Girdwood's connection to his home base has real practical significance and is substantial; his contractual duties commenced from and ended in Manchester. As Mr Cooper summarised the position in his closing submission, Mr Girdwood's contract, the regulatory flight time limitations scheme and the operation of those provisions, as a matter of fact, all tied his employment to Manchester.

<u>The 2017 proposal</u>

27. By 2017, 36 pilots (26 Captains and 10 First Officers) retained a Manchester home base and the respondent decided that this was an inefficient and unproductive arrangement by comparison with the productivity of pilots based in Hong Kong or Heathrow. Mr McEwan described the factors which contributed to this as changes in technology; the demand for freight being driven from Hong Kong and Asia and not Europe with cargo transiting Hong Kong producing a significantly higher yield than cargo leaving Europe; increased competition from other airlines and the European trucking network; the increasing need to be more flexible and reactive to meet freight demand in the UK market which could be met more efficiently from London and the additional costs and loss of flexibility in positioning pilots from a location which did not operate freighter flights; Manchester.

28. The respondent predicted that relocating Manchester based crew to Hong Kong would produce a total saving of around £1 million, or £3 million if Captains moved to Hong Kong and First Officers to Heathrow. The respondent initially analysed its Captains' relative productivity by 'productive credit hours' (a measure of the number of hours that pilots fly, factored by the type of flying that is done), and found a clear difference in productivity between Manchester and Hong Kong crew. This was partly due to 33% of all duties operated by Manchester captains being 'downranked' to first officer (as compared to 1% for Hong Kong Captains) and the additional positioning time. At the first consultation meeting on 10th January 2017, Mr Brogden challenged this methodology and proposed that an analysis of actual hours flown would be a more accurate measure of productivity. Mr Brogden told me that this straightforward approach was the normal and accepted industry standard. The respondent did not adopt this approach but undertook a further analysis, presented at the second consultation meeting on 13th February 2017, this time based on 'Productive Duty Days', (i.e. total duty days minus positioning days); which were significantly higher for Hong Kong crew and, taking downranking into account, showed that Manchester Captains only added 36% as much to total Captain PDDs as Hong Kong Captains did. David Ryan, Manager of Flight Operations and Strategic Planning, conducting the consultation meeting, explained that the respondent had alighted upon PDD as the best way to assess productivity having consulted external consultants. Mr Brogden, throughout the consultation process and in evidence, challenged the PDD analysis as bizarre and arbitrary and introduced simply to support the respondent's pre-determined outcome of base closure.

29. Mr Brogden and Mr Girdwood described alternative analysis that could be adopted to demonstrate that Manchester based pilots were, in fact, no less productive than Hong Kong based crew and consequently, that maintaining Manchester as a home base was a viable option. Although, during cross examination on the point, both Mr Brogden and Mr Girdwood conceded that having a group of freighter pilots based in Manchester, where there were no freighter flights was inherently inefficient. Mr Brogden criticised the respondent for not sharing some detailed aspects of its calculations of positioning costs during the consultation process. However, he acknowledged that these costs were based on the respondent's revenue system data containing proprietary and commercially sensitive data which it was reasonable not to share. Whilst Mr Brogden has identified other possible approaches to the assessment of productivity, that does not presuppose that the one used by the respondent is unreasonable or arbitrary. I was satisfied on the evidence before me, that the respondent adopted a reasonable method of analysis of data and information to produce an assessment of productivity of Manchester based pilots which supported a genuine and legitimate business rationale for the proposal to close the Manchester base.

<u>The consultation process</u>

30. Mr Perret wrote to the AOAO chairman, Captain Fryett on 10th January 2017; *'as you are aware, the cessation of freighters into Manchester in June 2014 left the UK with limited scheduled freighter services into London Heathrow each week. At that time, the Company and the elected representatives met and discussed the possible closure of the MAN Base. The decision was ultimately made to continue having Officers based at MAN. Since that time the Company has maintained the*

MAN base, while like all bases, monitoring its long-term viability. We recently studied the MAN base from cost, operational and productivity perspectives. This review revealed closing the MAN base would create savings, efficiencies and productivity gains for the Company each year.
Due to the Company's current structural financial issues it is difficult for the Company to justify continuing to maintain the MAN base. As a result, this creates a potential redundancy situation as there may no longer be a need for pilots to be based out of MAN airport…'

31. Mr Girdwood was informed of the proposal to close the Manchester base and that he was at risk of redundancy, by letter that day, in similar terms and informed that individual and collective consultation would take place on ways to avoid or reduce the need for redundancies and that suitable alternative employment and other internal vacancies would be explored.

32. The respondent held consultation meetings with AOAE representatives on 7 occasions from 10 January 2017 to 5 May 2017. The minutes of all these meetings were contained within the bundle and Mr McEwan and Mr Brogden gave detailed evidence on the nature and content of the discussions. What was apparent was that the respondent engaged with the AOAE on its rationale for the proposed closure and the restriction of the pool for selection to Manchester pilots, debating the various analytical approaches and providing data and information. Considerable time was spent considering a range of alternatives to redundancy and the benefits that would be properly payable upon relocation to Hong Kong and, whether the pilots would be eligible for 'expatriate benefit'. The respondent implemented the AOAE suggestions of seeking voluntary redundancies at Heathrow and a 'condensed roster' trial for up to 8 Captains, who would be located from Heathrow but on 21-day duty cycles.

33. Once the collective consultation process had finished, Mr Perret wrote to Mr Girdwood on 11th May 2017, informing him that, following consultation with the AOAE, no viable alternatives had been found to closing the base which would take effect on 30th September 2017; that he remained at risk of redundancy and that *'collective discussion and proposals presented by the representatives have resulted in changes to the effective date of closure, the potential number of roles remaining in the UK, elements of the package for those Officers wishing to transfer to Hong Kong as well as the creation of a condensed roster trial'*. Mr Girdwood was informed that an individual consultation meeting would take place on 12 June 2017 and that several options were available to him;

'1. Take up a position on the B747 in Hong Kong; more information on this option can be found in Appendix 1;
2. Apply for a First Officer position on the B747 based in London; more information on this option can be found in Appendix 2;
3. Accept redundancy; more information on this option can be found in Appendix 3;
4. Take up a position on the 'condensed roster' trial; more information on this option can be found in Appendix 4.
In addition, we will be offering Captains currently based in London on the B747 the opportunity to volunteer for redundancy. Should any such Captain wish to do so then this slot would be exclusively available for a MAN Captain to take up.'

34. Mr McEwan met with Mr Girdwood; Mr Girdwood questioned the genuineness of the consultation process, expressed his view that the pool for redundancy should include all European pilots and confirmed that he did not wish to pursue any option other than redundancy and he requested a settlement package. Further issues such as payment of transitional support to gain a flight Instructor Certificate, extension of BUPA coverage and Mr Girdwood's request to bring his termination date forward were dealt with in email correspondence.

35. The second consultation meeting with Mr Girdwood was conducted by Worth Barthel on 21st June 2017. Mr Girdwood confirmed that he did not wish to consider any of the proposed alternatives to redundancy and made it clear that he did not accept the respondent's position on expatriate benefits. Following that meeting, Mr Girdwood was informed by letter of 30th June 2017 that his employment was being terminated because of redundancy, with notice effective from 1st July to expire on 30th September 2017. Subsequently, at Mr Girdwood's request, his notice was reduced so he ceased employment on 31st July 2017 to enable him to take up a position with JET2. Of the 36 pilots informed that their role was at risk of redundancy only Mr Girdwood was made redundant, the others accepting alternative positions.

36. Mr Girdwood submitted an appeal against his dismissal by letter of 6th July and detailed grounds by letter of 13th July 2017. Mr Girdwood did not accept that Manchester was his place of work and that a genuine redundancy situation existed; as there was *'no evidence of a cessation or diminution of Cathay's need for employees to carry out flying duties crewing Freighter services where I am carrying them out, namely between airports from and to where Cathay operates its Freighter Service and in particular, from and to London Heathrow, Paris, Frankfurt and Hong Kong'* and he pointed out that the respondent was leasing aircraft to maintain its existing Freighter service. He argued that the respondent still required pilots to fly the same routes, but wished to position them from Hong Kong instead of Manchester and that this was an attempt to force Freighter pilots onto less favourable terms. As he was carrying out the same work, rostered interchangeably, as colleagues based in London Heathrow and Frankfurt he believed that the pool for selection should extend to them and not limited to Manchester based pilots. Mr Girdwood sought clarification on why the policy of 'last in first out', at section 30.1 of his CoS had not been applied. He identified alternatives which he believed the respondent should have considered; retaining him as a Freighter Captain; offering him Passenger command from Manchester or a First Officer position at London Heathrow flying the Boeing 777 with type rating training. Finally, he asserted that the alternative employment offered was unreasonable as it failed to honour entitlement to expatriate benefit upon transfer to Hong Kong.

37. The appeal hearing was held on 27th July 2017 by Mr Perret. Mr Perret had had some limited involvement in the redundancy process; he had advised the AOAE of the closure proposal and had attended the first collective consultation meeting and the letter notifying Mr Girdwood that he was at risk had been sent by him but he had not been responsible for the decision to close the Manchester base or to terminate Mr Girdwood's employment. The grounds of appeal were discussed between Mr Perret, Mr Brogden and Mr Girdwood in some detail and Mr Girdwood raised further concerns; that the respondent should apply clause 30.4 of his CoS and offer FO role

at Heathrow at his existing rank and he challenged the appropriateness of Mr Perret to hear the appeal given his prior involvement in the process.

38. By letter of 9th August 2017, Mr Perret gave his decision to uphold the decision to dismiss because of redundancy and his grounds. He recorded Mr Girdwood's acknowledgement that he did not have passenger seniority to fly passenger aircraft as a Captain and confirmed that no slots existed, even if Mr Girdwood were to be retrained, to fly the 777 as a First Officer. Mr Perret reiterated the respondent's position that Manchester was Mr Girdwood's place of work and that whilst it was correct that there was no reduction in the work of flying aircraft, the requirement for Manchester based pilots had ceased and that therefore, restricting the pool to Manchester pilots was appropriate. He pointed out that even had the pool been extended to the 45 Freighter Captains in Manchester, London and Frankfurt, as Mr Girdwood's seniority placed him 10th from bottom, he would still have been selected.

39. In respect of the redundancy provisions in the CoS, Mr Perret informed Mr Girdwood that 30.1 applied to global redundancies and not base closures and stated *'I have reviewed clause 30.4 which is the clause of the CoS which I believe is the clause you maintain has been breached. This clause does not apply in these circumstances as the Company is not requiring that an officer must operate as an FO as a result of a redundancy situation. The choice is the Officer's to make in whether to accept a LON B747 FO or not on the terms and conditions offered for that role.* In evidence, Mr Perret confirmed that this clause was directed at circumstances where the company's need for Captains had diminished and they were required to fly as First Officers instead; in that situation the Captain's pay and status would be preserved. This was consistent with the approach taken by the respondent when their Captains flew as First Officers in the normal course of events. Further, as Mr Perret stated, Mr Girdwood had several options open to him and was not compelled to take a First Officer role. Mr Perret's letter continued;
'You stated that there are work requirements in Europe demonstrated by the B747 FO vacancies at London. That is correct. There are requirements for FO's on the B747 and that has never been disputed. As I explained during the appeal hearing there has been an increase in FO positions as a result of the consultation in order to minimise disruption to affected Officers.
Likewise, it is correct that HKG Officers are sometimes positioned to Europe to man freighter operations. Those HKG Officers are of course based at the location identified in their contracts of employment, Hong Kong. There is no suggestion that for those Officers their base becomes the location from which they begin their flying duties which is what you are suggesting should be the case here for you. They are positioned to Europe in the same way that you have been positioned from Manchester.' Mr Perret disputed that the consultation process had been a charade and the appeal hearing a sham. He reiterated that *'this is a genuine redundancy situation involving the closure of the Manchester base. The offer of B747 FO roles to those affected was an offer made to comply with the obligations on Cathay to offer alternative employment. This offer was made to avoid redundancy dismissals not to force employees on to less favourable terms and conditions.'*
In response to the alternative suggestions presented by Mr Girdwood, Mr Perret explained that the agreement with AOAE did not permit the respondent to simply move people into passenger Captain roles and there was no passenger base in

Manchester in any event. He confirmed that no B777 vacancies in London existed and pointed out that the respondent had offered 10 B747 FO vacancies to all Manchester Officers but that Mr Girdwood did not apply for that or the B747 condensed roster trial and had made it clear during both consultation meetings that he simply sought redundancy. In respect of the expatriate benefit, Mr Perret repeated the respondent's position that Mr Girdwood was not eligible for that benefit. On the issue of his independence, Mr Perret stated *'To be clear, I was not the ultimate decision maker and it was the Director of Flight Operations who made the final decision to close the Manchester base. This was confirmed to the AOAE during the collective consultation process when the union asked who was to make the final decision. In addition, I note that at no stage prior to the appeal hearing did you raise this concern.'*

The pool

40. The identification of the appropriate pool for selection was discussed in several of the collective consultation meetings. Mr McEwan explained that the place of work was what determined the selection pool; as Manchester was to be closed, the pool would be those whose place of work was Manchester. The decision was to close the Manchester base but not to reduce the number of Freighter pilots overall, only Manchester based pilots were affected and it would be counter-productive to include pilots in the pool whose place of work were at bases that the respondent wished to retain.

The alternatives offered

41. The alternatives offered to Mr Girdwood to redundancy were; to transfer to Hong Kong as a Captain flying freight on 'VETA' terms (i.e. local Hong Kong terms) with a 6-month trial period. The respondent's uncontested evidence was that the total remuneration package of this option would be an increase of approximately £20,000.00 per year, although Mr Girdwood explained that this increase would be swallowed up by the increased accommodation and living costs of Hong Kong; to transfer to London as a First Officer, which would result in a reduction in status and income as it would be on the unified First Officer pay scales or to transfer to London on the 'condensed roster' trial as a Captain on existing terms and conditions. During consultation, the respondent increased the number of First Officer positions to 10, agreed to seek voluntary redundancies in Heathrow and accepted the AOAE's proposal of the 'condensed roster' trial. As Mr Perret explained during the appeal; the alternatives suggested by Mr Girdwood were not viable as there were no passenger flights based in Manchester, no B777 vacancies in London and in any event, as Mr Girdwood acknowledged, he had not acquired sufficiently seniority to be offered a passenger command.

Expatriate Benefits

42. Mr Girdwood does not accept that the respondent made reasonable efforts to identify suitable opportunities for alternative employment. He believes that it was not reasonable to offer a transfer to Hong Kong without payment of expatriate benefits (as provided in the Accommodation and Rental Assistance Policy Agreement) to which he believes he would have been contractually entitled. The issue was discussed in detail during collective consultation and at the appeal, the respondent's

position was that this benefit was only available to Captains transferring to Hong Kong to assume passenger command. As Mr Girdwood had not acquired sufficient seniority, he was not eligible for that benefit.

43. Clause 43.1 of Mr Girdwood's CoS, provided that *'permanent Hong Kong base: Officers who take a permanent Hong Kong base will be entitled to the relevant benefits provided in the VETA Conditions of Service. Expatriate benefits will apply to eligible Officers.'* As Mr McEwan explained in evidence, it was the respondent's policy to provide those benefits to Captains who had reached passenger command seniority on return to Hong Kong. Those who had not reached that level would not be eligible to the benefit. Mr McEwan, relied upon Clause 13 of FABP 2000 *'transfer to operate passenger aircraft'* which provides that; 13.1 *'officers holding freighter aircraft based appointments who've served at least three years solely operating freighter aircraft will be eligible to transfer to operate passenger aircraft.'* 13.2 '*Company officers who are successful in bidding to transfer to operate passenger aircraft and as a result also transfer to Hong Kong will become entitled to expatriate benefits…'* 13.3 '*Expatriate Officers who are successful in bidding to transfer to operate passenger aircraft and, as a result, also transfer to Hong Kong, will become entitled to Accommodation and Rental Assistance..'* Mr McEwan and Mr Perret both interpreted those provisions as having the effect that Mr Girdwood would only have been entitled to expatriate benefits had he taken Hong Kong as his permanent Home Base and reached passenger Command seniority.

44. Mr Girdwood argued that his letter of appointment made it clear that he was entitled to expatriate benefit as it stated; *Your FCS DOJ (date of joining) will be retained for staff travel, HKG* [Hong Kong] *medical and expatriation benefits'.* Mr McEwan and Mr Perret both understood that provision as not conferring an automatic entitlement to benefit but as providing the date which would be used in determining eligibility in accordance with the terms of the relevant scheme. I agree with that interpretation; as I have found at paragraph 9 above, that is clearly the meaning and intent of that provision.

45. Mr Girdwood argues that because, on transfer, he would be an *'expatriate officer'* in the sense that he was not a Hong Kong citizen, the Accommodation and Rental Assistance Policy Agreement, incorporated into VETA terms and conditions applied. Clause 3.1, states *'This agreement applies to expatriate officers based in Hong Kong.* The policy agreement does not provide a definition of expatriate officers and the respondent accepts that there is no definition of *'expatriate'* in any of its policies. He points out that there is no restriction in this policy to Captains with passenger command.

46. In evidence, Mr McEwan explained that because of Hong Kong's Race Discrimination Ordinance, it would not be lawful to confer benefits on grounds of citizenship or country of origin and Mr Girdwood's argument was neither a reasonable or lawful interpretation of the policy. In any event, eligibility was conferred by passenger command, which Mr Girdwood did not have.

47. I was asked to exercise caution in providing my own contractual interpretation of these provisions, not least because the respondent employs 3,000 crew on VETA terms in Hong Kong. For the purposes of a claim of unfair dismissal, my task is to

consider the reasonableness of the process adopted and the alternatives considered. That does not require me to provide a definitive contractual analysis of these policies and provisions. During the consultation process and appeal, Mr McEwan and Mr Perret engaged with Mr Brogden and Mr Girdwood on the issue of expatriate benefits, reached a reasonable and considered view of its applicability to Mr Girdwood and explained that view and the basis for it to them. The respondent's conclusion, that Mr Girdwood was not eligible for that benefit, was reasonably open to it and it fell within the reasonable range of responses in these circumstances for the respondent to reach that conclusion and offer a transfer to Hong Kong without that benefit.

The Law

48. Both parties submitted written submissions and I have included the legal authorities to which they referred in the following outline of the relevant law:

49. Redundancy constitutes a potentially fair reason for dismissal at S98(2)(c) Employment Rights Act 1996 and 'some other substantial reason' at S98(1)(b). Both are subject to the requirement of fairness at S98(4) ERA 1996; *'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 sufficient reason for dismissing the employee… determined in accordance with equity and the substantial merits of the case.'*

50. For an employer to successfully rely on *'some other substantial reason'* of a kind such as to justify dismissal as a fair reason, it must establish a *'sound good business reason'*, in the sense of one which is *'not whimsical or capricious'*, for making the change(s) that resulted in the dismissal (Hollister v National Farmers' Union [1979] ICR 542, 551 *per* Lord Denning; Willow Oak Developments Ltd (trading as Windsor Recruitment v Silverwood & others [2006] ICR 55, EAT, paras 21 & 23 *per* Burton J).

51. S139(1) Employment Rights Act 1996, provides that; *'an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –*
…..
(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'.

52. The 'place where the employee was employed' has the same meaning in both subsections (Bass Leisure Ltd v Thomas [1994] IRLR 104, EAT, para 11(i) *per* HHJ Hicks QC). It is to be determined by
'… a factual inquiry, taking into account the employee's fixed or changing place or places of work and any contractual terms which go to evidence or define the place of employment and its extent, but not those (if any) which make provision for the employee to be transferred to another.' (Bass Leisure, para 44 *per* HHJ Hicks QC; High Table Ltd v Horst & others [1998] ICR 409, CA, 419E-H *per* Peter Gibson LJ)

53. Mr Cooper emphasised two points from the above:
(1) The statute requires identification of *'the'* place where the employee is employed, even if his work in fact involves travelling so that, in one sense, he may 'work' at multiple locations (Bass Leisure, para 11(ii) *per* HHJ Hicks QC).
(2) Thus, although the test is not purely contractual, in the case of mobile or peripatetic workers of this kind, the definition of the place where the employment is based in the contract may be particularly important (provided of course it is not wholly fictional or nominal) (Bass Leisure, paras 14 & 17 *per* HHJ Hicks QC; Exol Lubricants Ltd v Birch & another, UKEAT/0219/14/KN, 13 November 2014 (unreported), para 24 *per* HHJ Serota QC).

54. Mr Brogden relied upon the court of Appeal's Judgment in High Table Ltd v Horst and ors 1998 ICR 409, CA that; *'the 'place' where an employee is employed should be determined primarily by a consideration of the factual circumstances pertaining prior to the dismissal.'* He referred me to Exol Lubricants Ltd v Birch 2014 UKEAT/0219/14/KN where the EAT made clear that there needed to be a physical or practical connection between a particular place and the work performed in order for it to be considered as the 'place' where the employee was employed.

55. it is well-established that it is not for the Tribunal to decide whether the employer's underlying business decision was good or bad as a matter of commercial judgment, and its role is limited to a review of whether management of the consequential dismissal of the Claimant was within the range of reasonable responses. (James W Cook & Co (Wivenhoe) Ltd v Tipper & others [1990] ICR 716, CA, 729G *per* Neill LJ). Provided the Tribunal is satisfied that the decision was a genuine one taken for legitimate business reasons, then it is not for the Tribunal to second-guess whether that decision was good or bad, right or wrong, as a matter of commercial or business judgment: employers are entitled to make their own commercial judgments about the best way of organising their operations and the Tribunal's function in an unfair dismissal case is limited to reviewing whether, in implementing those business decisions, the consequences for employees were managed reasonably.

56. Williams & others v Compare Maxim Ltd [1982] ICR 156, EAT provides the general principles of fairness in making redundancy dismissals. The range of reasonable responses test applies to all aspects of the collective and individual consultation process and, whilst the general elements of a fair process are set out in Williams, *'not all of these factors are present in every case'* and the fair conduct of a particular process will depend on the specific circumstances of that case. The factors that a reasonable employer might be expected to consider are; 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.

57. Polkey v AE Dayton Services Ltd 1988 ICR 142 HL, established the central importance of consultation and proper procedures in redundancy situations; *'In the case of redundancy… the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on*

which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation'.

58. As for identification of the pool for redundancy, the range of reasonable responses test applies. It is primarily a matter for the employer to determine and provided the employer has genuinely applied its mind to the question, then it will be difficult for the employee to challenge it (Capita Hartshead Ltd v Byard [2012] ICR 1256, EAT, para 31 *per* Silber J).

59. The Court of Appeal in Thomas and Betts Manufacturing Co v Harding 1980 IRLR 255 CA, considered the extent of the obligation to consider alternative employment for employees selected for redundancy and ruled that an employer should do what it can so far as is reasonable to seek alternative work.

60. On the issue of the fairness of an appeal, Mr Cooper pointed out that the ACAS Code of Practice 1 (2015) only applies to capability/conduct dismissals and expressly does not apply to redundancy dismissals (para 1) and it has long been held that an appeal is not a requisite for a fair redundancy procedure (Robinson v Ulster Carpet Mills Ltd [1991] IRLR 348, NICA, paras 22-30 *per* Hutton LCJ). In Taskforce (Finishing & Handling) Ltd v Love, EATS/0001/05, 20 May 2005 (unreported), the EAT emphasised that
'… even in redundancy cases, the absence of appeal or review procedure does not of itself make a dismissal unfair; it is just one of many factors to be considered in determining fairness, as was determined in the case of Shannon… it would be wrong to find that a dismissal on grounds of redundancy was unfair because of the failure to have an appeal hearing conducted by someone other than the person who took the original decision.' (para 31 per Lady Smith)

The Tribunal's Conclusions

61. Addressing the issues as identified above:

The reason for dismissal

62. I accepted Mr McEwan's and Mr Perret's evidence, supported by the correspondence between the respondent, the AOAE and Mr Girdwood and the minutes of the consultation meetings, that Mr Girdwood's dismissal arose from the business decision to close the Manchester base to achieve operational efficiencies. I found that the respondent's rationale as described by their witnesses, was genuine and not, as alleged by Mr Girdwood, a ruse to force existing pilots onto less favourable terms and conditions of employment. Mr Girdwood strongly believes that to be the case but could not substantiate that belief in evidence.

63. Did that reason constitute redundancy? For the reasons given at paragraphs 23-26 above, I found that Mr Girdwood's place of employment for the purposes of S139(1) was Manchester. His dismissal was wholly attributable to the closure of his place of employment; the Manchester base; the requirement for employees to carry out the role of freighter pilot in Manchester had ceased. Accordingly, the respondent has established a potentially fair reason for dismissal; redundancy.

64. Alternatively, the respondent has established sound good business reasons for the closure of the Manchester base; operational efficiencies; amounting to 'Some Other Substantial Reason' within the meaning of S98(1)(b) ERA 1996.

Was the decision to dismiss reasonable applying S98(4) ERA?

65. As I have found at paragraph 29 and 62 above, the decision to close the Manchester base and to cease to employ freighter pilots with Manchester as their home base was genuine and taken for legitimate business reasons.

66. The pool for selection adopted by the respondent; Manchester based pilots; was plainly reasonable in these circumstances. It was an issue that Mr McEwan considered and consulted upon, and the rationale for restricting the pool, explained in evidence, that widening the pool to European pilots as Mr Girdwood proposed, would have been illogical and counter-productive was reasonable and logical. As Mr Cooper put it, restricting the pool to Manchester based pilots addressed the need for all Manchester based pilots to leave their existing Manchester-based roles and either transfer elsewhere or be dismissed and was thus an appropriate pool for selection. Given that all Manchester based pilots were affected, identification of specific selection criteria was not an issue in this case.

67. The respondent entered detailed and extensive collective consultation with AOAE representatives; information and data was shared; differing analyses discussed, and alternative employment options explored. The respondent adapted and expanded those options in response to AOAE suggestions. The collective consultation process was genuine and reasonable. Likewise, the individual consultation with Mr Girdwood was genuine and reasonable. Mr Girdwood was given the opportunity at both meetings and in email correspondence to raise and discuss his concerns, was provided with explanations and further information, agreement was given to various requests such as extension of BUPA cover and bringing forward his termination date so he could take up a role at JET2.

68. The conduct of the appeal was reasonable; whilst Mr Perret had had prior involvement, he had not made the decision to close the base or dismiss Mr Girdwood and he was well placed to carry out a thorough review of the process and rationale in his capacity of General Manager of Aircrew. He conducted the appeal in a reasonable manner, giving Mr Girdwood proper opportunity to explain his grounds and providing a detailed and thorough response.

69. The respondent took active and reasonable steps to identify suitable opportunities for alternative employment for Mr Girdwood, resulting in three possible roles all of which were within the reasonable range of suitable alternative employment in the circumstances. The alternative roles suggested by Mr Girdwood were not feasible or viable as the vacancies or roles were not available or he did not qualify for them. As I found at paragraph 47, the offer of a transfer to Hong Kong on terms which did not include expatriate benefit was reasonable; the respondent did not unreasonably contravene or threaten to contravene a contractual entitlement to expatriate allowance and the role was a suitable one to offer Mr Girdwood, in the circumstances, on those terms.

70. In respect of the offer of First Officer role based at London Heathrow; the respondent's position that this did not attract pay protection, as explained by Mr Perret in the appeal outcome recorded at paragraph 39 above, was based on a reasonable interpretation of the relevant provision. The respondent did not unreasonably fail to honour a contractual entitlement to pay protection and the role was a suitable one to offer Mr Girdwood, in the circumstances, on those terms.

71. Accordingly, for the reasons explained above, I am satisfied that the process adopted by the respondent, including the steps taken to identify suitable alternative employment, fell within the reasonable range of responses open to the employer in these circumstances. As the requirements of S98(4) ERA 1996 have been met, it follows that Mr Girdwood's claim fails and is dismissed.

Employment Judge Howard

Date: 10th July 2018

JUDGMENT SENT TO THE PARTIES ON

18 July 2018

FOR THE TRIBUNAL OFFICE

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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