

## **EMPLOYMENT APPEALS TRIBUNAL**

**CLAIM(S) OF:**

EMPLOYEE - claimant

MN1086/2009

against

EMPLOYER – respondent

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007  
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007  
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005  
ORGANISATION OF WORKING TIME ACT, 1997**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr M Gilvarry

Members: Mr D Morrison  
Ms R Kerrigan

heard this claim at Donegal on 10th February 2010 and 11th May 2010

Representation:

Claimant: Mr Sean Magee BL instructed by:  
Mr Michael Ward,  
Gallagher & Brennan, Solicitors  
House B, Carnamuggagh Upper, Kilmacrennan Road, Letterkenny, Co Donegal

Respondent: Mr Padraig O'Grady  
IBEC 3<sup>rd</sup> Floor, Pier 1,  
Quay Street, Donegal Town, Co. Donegal

The determination of the Tribunal was as follows:-

**Claimant's Case:**

The claimant gave evidence that he commenced employment with the respondent in March 2002 as a part-time chef. After 18 months to two years he obtained a full-time position as second chef with the respondent. The head chef left two years later in 2007 and he took up this position. He was now fully in charge and responsible for staff, standards, stock and hygiene. He received no terms and conditions of employment when he commenced with the respondent, nor when he took up the role of head chef.

Up to April 2008 he had always had a good working relationship with the owners of the respondent company, but around this time it started to change. The atmosphere changed, there were snappy comments and talk of pay cuts, but this was not discussed directly with the employees.

In November 2008 his starting time was changed from 13.00 hours to 12.00, this meant a longer day for him but he did not receive an increase in pay. In February 2009 the managing director (MD) asked him to take a pay cut, but he refused to do this as his working hours had increased. MD responded by telling him he would have to take pay cut. The claimant continued to work and the atmosphere was thick for the next few days. The claimant had no idea what MD had in mind, but MD had made no attempt to negotiate with him or call a meeting about a pay cut. The atmosphere improved a bit, however MD was still making sly comments. The claimant got the impression that MD wanted him to walk out.

MD did not speak to him at all over the four days he worked over Easter. On Easter Monday, 13<sup>th</sup> April 2009, he was rostered 12.00 to 21.00 and at 20.30 MD came in to the kitchen and informed him that he wanted to see him before he went home. He was finishing up that evening to go on a two-week holiday.

When he went to the office MD and his wife were there. MD's wife told him that they were laying him off as if they didn't they would go "belly up". The claimant was surprised as he was the longest serving chef in their kitchen. They gave him a letter, which he read at the time; from this he understood that they did not want him back after his holidays. MD confirmed this and also informed him that they did not want him back unless he took a substantial pay cut. MD's wife informed him that there would be another letter issued two weeks later, they shook hands and he left.

On the 14<sup>th</sup> May 2009 at 15.20 MD's wife rang him and asked him to go to social welfare to get a form and to send it to them. He asked her if they were making him redundant and she replied yes as we can't afford you.

On the lead up to when he was let go there were six other chefs employed by the respondent, none of these were let go. Also another chef was employed while he was on holidays. He also produced two advertisements (web and news paper) for positions within the respondents in September 2009. He had received a written contract in January 2009, he did not sign this contract as his salary or hours of work were not noted in same.

He gave evidence of loss and produce applications for positions he has applied for.

During cross-examination the claimant contended that there was an uncomfortable atmosphere in the workplace. People didn't speak to each other, especially the MD. He was sometimes afraid to speak to him. MD made nasty comments about the carvery and swore at him. The claimant claimed that he never used the 'f' word himself.

He felt his suggestions were ignored. He believed that they wanted him to walk off the job. He agreed that he ran the kitchen and that it was his responsibility.

He agreed that he received two pay increases since being appointed head chef and his salary was €1,390.00 per week. When asked to take a pay cut he requested to talk to his wife about it, but he decided not to accept a pay cut as they had increased his hours. His difficulty was that no one sat

him down at a table and discussed it with him. He accepted some staff were put on short time.

He attended a meeting with the owners and their accountant. The accountant told him to make sure to keep everything tight in the kitchen. He disputed that MD discussed meal numbers compared to the previous year. He might have mentioned it in passing but he did not sit down at a table and discuss it with him. He disputed that he was told that the business was suffering.

He was upset at how he was told he was being put on lay-off. He thought someone would sit down and discuss it with him at a meeting. He was upset. He agreed that he shook hands with MD and that MD's wife hugged him. When he said he would take a redundancy payment but MD said he didn't want to do that to him. He asked them to make him redundant as he could then apply for his mortgage protection insurance. He was told he wouldn't be returning after the holidays unless he took a substantial pay cut, but the amount was not specified.

He was aware of the company's grievance procedure. He did not invoke the procedure, as he didn't believe he would be listened to.

When MD's wife phoned him on May 14<sup>th</sup> 2009 he asked if he was being made redundant and she said yes. She didn't know what form was required and told him to check with the Social Welfare office. He went to his solicitor that day, as he didn't think the situation was being handled properly. He did not believe that they intended to bring him back when the situation improved.

He did not apply for his redundancy payment after four weeks on lay-off, as he would not have been eligible for his mortgage protection insurance. If they had made him redundant he would have accepted. He accepted that there were now five part-time chefs and that others were put on lay-off in the weeks after he was put on lay-off.

### **Respondent's Case:**

MD gave evidence that the hotel was a family run business. They had built the new premises and it opened in December 2001. The claimant began in 2002. They had a good relationship and there were no problems with the employment. The claimant never raised any difficulties with him.

They recorded how many meals were served each day, but it was not hard to count when it was quiet. MD, his wife and his father met with the company accountant to discuss problems with the business. They were losing a lot of money and discussed cutting down on staff. When they started discussing the kitchen MD decided to get the claimant to join them in order to discuss stock control. The claimant suggested that he be made redundant, but MD said that the last person he wanted to make redundant was the claimant.

The financial situation did not improve. A few weeks later he was standing behind the carvery with the claimant. It was quiet and he asked the claimant if he would consider taking a pay cut. He told him to discuss it with his wife. He asked him about it later in the week and he said 'no way' and went back to the kitchen. He denied making rude comments to him. He didn't deny cursing in general, but it was normal to curse in the kitchen, everyone did it.

MD took a 33% pay cut and froze his pension contribution. Four or five staff were laid off and others were put on short time. Everyone took a 10-15% pay cut. They couldn't afford the claimant's salary anymore. He was paid two or three times more than the next employee. On

April 13<sup>th</sup> MD requested that the claimant come to the office after work. They all sat down and MD gave the claimant a letter. After reading it he asked if he was being made redundant. MD explained that he wasn't and that he was being laid off until things improved. He asked why he wasn't being made redundant as it had something to do with his mortgage insurance. MD told him that he only intended it to be short term. He could not recall saying that the claimant wouldn't be returning unless he took a substantial pay cut.

He was surprised when he received the Tribunal claim forms as he considered that the claimant was still an employee at that time. If he had wanted to be made redundant he could have sent an RP9 form to them.

During cross-examination MD stated that he didn't think there was any point sitting down to discuss a pay cut with the claimant as he had said no to a pay cut and walked away.

The company accountant gave evidence that he met the owners of the hotel and the claimant at a meeting at the end of January 2009. There was a financial crisis in the company. Costs and wages were unsustainable. He explained to the claimant how tight things were and asked him about cutting back on stock and menus. The claimant suggested that he be made redundant.

MD's wife gave evidence that she managed the restaurant part of the business. She had no difficulties with the claimant. They got on well over the years. She contended that everyone cursed in the kitchen, including the claimant.

She and MD made the decision to lay-off the claimant, as they could not afford to pay him. The claimant suggested being made redundant but she told him that would be the last resort. She was surprised how shocked the claimant was when he read the letter putting him on lay-off. She didn't understand the process of laying-off staff. She said she'd be in touch and that he would be paid whatever he was owed.

She phoned the claimant to find out how he was doing when she knew he was back from his holidays. She told him things were still quiet. She said if he wanted to claim redundancy he could get a form and they would pay it.

They had to hire a chef temporarily after the claimant was put on lay-off as one of the other chefs broke his arm and was on sick leave. She re-activated an old advertisement she had with Fás by phone, which was the advertisement that the claimant saw. Four chefs including the claimant were put on lay-off.

During cross-examination the witness stated that it was a coincidence that four weeks had elapsed before she phoned the claimant. The meeting of 13<sup>th</sup> April 2009 was not the end of the line, she expected the claimant to return to work.

### **Determination:**

The Tribunal carefully considered the evidence given and submissions made.

In this case it was clear that the respondent had suffered a large fall in turnover and steps were needed to reduce costs so as to keep the business open. MD had requested the claimant to take a

pay-cut, and the claimant, as was his right, refused. It was common case that the claimant volunteered to be made redundant but the respondent declined. Instead the respondent purported to lay the claimant off for a period of time. The Tribunal determines that the respondent in fact dismissed the claimant by reason of redundancy on the 13<sup>th</sup> of April 2009.

The Tribunal finds that the redundancy was justified and that there was no unfair selection for redundancy and therefore dismisses the claimants claim under the Unfair Dismissals Acts, 1977 to 2007.

The Tribunal finds that that the claimant is entitled to a redundancy lump sum payment under the Redundancy Payments Acts, 1967 to 2007, based on the following information:

Date of Birth:	16 <sup>th</sup> May 1951
Date of Commencement:	12 <sup>th</sup> March 2002
Date of Termination:	13 <sup>th</sup> April 2009
Gross Weekly Pay:	€1,390.00

This award is made subject to the claimant having been in insurable employment under the Social Welfare Acts during the relevant period. It should be noted that a statutory weekly ceiling of €600.00 applies to payments from the Social Insurance Fund.

As the claimant volunteered for redundancy the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, fails and is hereby dismissed. The claimants claim under the Organisation of Working Time Act, 1997 was not proven and is hereby dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)