

**EMPLOYMENT APPEALS TRIBUNAL**

CLAIM(S) OF:  
EMPLOYEE – *claimant*

CASE NO.  
UD2574/2009

against  
EMPLOYER – *respondent*

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr T Ryan

Members: Mr N Ormond  
Mr A Butler

heard this claim at Dublin on 1st March 2011 and 26th May 2011

Representation:

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Claimant(s): Ms Suzanne Boylan BL instructed by:  
Mr Derek Stewart  
Stewart & Co, Solicitors  
12 Parliament Street, Temple Bar, Dublin 2

Respondent(s): Mr Niall McGrath  
MacCarthy & Associates, Solicitors  
10 Upper Mount Street, Dublin 2

The determination of the Tribunal was as follows:-

**Background:**

The claimant was employed by the respondent as a chef from 1995 until May 2009. He contended that he was unfairly selected for redundancy.

**Respondent's Case:**

The Financial Controller (FC) of the respondent company gave evidence that the company runs a number of hostels. The claimant was employed as a chef in the restaurant (IV's) of one of the hostels. He was promoted to head chef in 1997. The company operated another restaurant (DV's) at a nearby hostel. The hostel was run by a different company. The restaurant was leased to a third party who gave up the lease in 2008. The claimant asked to take over the running of DV's and he agreed. He commenced as chef/manager of DV's in March 2008.

The function of the restaurant was to provide free continental breakfasts to hostel guests, pre-booked meals for groups and lunch to company staff. The restaurant was also open to the public. It was assigned €3.50 per staff lunch provided and €1.50 per continental breakfast. The company calculated that only half of guests took breakfast so they allocated €1.50 for half the number of guests. The claimant disputed this allocation. Guests could also purchase a cooked breakfast for €6.50.

The claimant employed one fulltime chef, one part-time chef, one fulltime floor-person, one fulltime kitchen porter and one part-time kitchen porter. The claimant operated the restaurant rent-free for the first three months and for €250 per month after that. He did not actually pay rent, but this charge was allocated to the accounts of the restaurant. He was charged €250 for light and heat and €150 for insurance per month. The idea of the restaurant was to provide a service and breakeven. It was not intended to make a profit. The FC sent the accounts to all managers on a monthly basis.

When the claimant took over DV's the manager of IV's, who was also a trained chef, took over in the kitchen and continued to manage the restaurant. His employment had commenced in 2004. The claimant was not replaced. In March 2009 the company decided to close DV's as it was not increasing trade from outside customers, which was what they wanted. The wages were costing more than they were making. The continental breakfast service was continued. The chefs and part-time kitchen porter were made redundant. The full-time kitchen porter moved to IV's as there was a vacancy. The floor-person got a role in housekeeping and continued to set-up for the free continental breakfast.

The claimant was shocked when he was told that his role was redundant. He asked if there was any other role available or if he could return to his old role, but it wasn't an option. The FC did not consider a more junior role for him as she felt it would be downgrading him and there was no position available.

During cross-examination FC disputed that a head chef position had been advertised on an employment website. She was not aware of the advertisement produced by the claimant. She did not consider making the IV's chef/manager redundant instead of the claimant even though he had less service. He was a better manager in terms of managing staff and negotiating on prices for stock than the claimant. There was a disagreement over tips between IV and the claimant when IV commenced in 2004, but the company did not get involved with tips. The manager was senior to the claimant when he commenced. There was no formal selection process for redundancy.

They had a full complement of chefs, all with less service, and she felt that a junior chef position would be beneath the claimant. She did not ask the claimant for his view.

The Group General Manager for Property and Human Resources (GM) gave evidence that the company did not place a advertisement for a head chef as contended by the claimant. She produced a list of jobs advertised from March 1<sup>st</sup> 2009 to November 28<sup>th</sup> 2009. A sous chef position was advertised on June 29<sup>th</sup> 2009, as a month after the claimant's dismissal a sous chef left.

On the second day of hearing the GM gave evidence that the company had no record of advertising the position of head chef in June 2009. A sous chef position was advertised when a sous chef gave verbal notice to quit on June 29<sup>th</sup> 2009 and then gave written notice on July 2<sup>nd</sup> 2009. He left the

employment on July 17<sup>th</sup> 2009. The then chef de partie got the position and consequently his job was advertised. The witness accepted that the claimant was qualified to perform in the role of sous chef.

FC denied that she gave any assurance to the claimant that his job in IV's would remain open for him when he went to DV's. He found it intolerable working in IV's and he asked about moving to DV's. She offered the position to him. She didn't consider the claimant for the sous chef role as he would see it as a demotion.

### **Claimant's Case:**

The claimant gave evidence that he was employed as a chef by the respondent for 14 years. He agreed with the FC that he would run DV's. He was to serve breakfasts, feed the staff of the company group and cater for groups. Previously the breakfast was just tea and toast. He served 350 to 400 breakfasts at the weekend when it was busy and less than 100 on weekdays. He wanted to build up the passing trade but the signage was removed, there was no credit card facility and there was no drinks licence. He disputed the amount allocated for the free breakfasts as they cost him more to make.

He was told he was being dismissed because the restaurant was not making a profit and therefore his position was being made redundant. He asked about his role in IV's but he was told it was gone. He had more service than any of the chefs in IV's. When he was looking for work afterwards he came across the advertisement for head chef and printed it off. He gave evidence of his loss.

During cross-examination the claimant denied having had prior knowledge of DV's being vacated. He asked the FC if there was anything else and she told him about DV's. He had complained to her about being bullied by the new manager. When the manager was hired the claimant was not told that he was going to take over managing the kitchen as well. He found it unbearable and went to the FC to find a solution. He contended that the FC wanted him to go to DV's and that she said he didn't have to make a profit. He contended that the FC assured him that his job would be there to return to.

He contended that he would have accepted a different position if it had been offered. He did not apply for the head chef position when he saw it advertised.

### **Determination:**

The claimant gave evidence that he commenced employment, in 1995, as a chef in a Restaurant called IVs. He was promoted to head chef in 1997. The company operated another restaurant (DV's) at a nearby hostel. DV's was leased to a third party who gave up the lease in 2008. The claimant was asked to take over the running of DV's and he agreed. He commenced as chef/manager of DV's in March 2008.

When the claimant took over DV's the manager of IV's, who was also a trained chef, took over in the kitchen (IV's) and continued to manage the restaurant. The Tribunal notes that this manager commenced employment with the Respondent in 2004. In March 2009 the company decided to close DV's as it was not making a profit and make the claimant's position redundant.

FC gave evidence that the claimant was shocked when he was told that his role was redundant. He

asked if there was any other role available or if he could return to his old role, but it wasn't an option. FC did not consider a more junior role for him as she felt it would be downgrading him and there was no position available.

The claimant introduced in evidence to the Tribunal an advertisement on an employment website in which the Respondent was looking for head chef. Notwithstanding this the respondent strenuously denied placing this advertisement. The Group General Manager for Property and Human Resources (GM) gave evidence that the company did not place an advertisement for a head chef as contended by the claimant. She produced a list of jobs advertised from March 1<sup>st</sup> 2009 to November 28<sup>th</sup> 2009. A sous chef position was advertised on June 29<sup>th</sup> 2009 because, a month after the claimant's dismissal, a sous chef left.

Irrespective of whether the head chef position was advertised or not and having considered the totality of the evidence the tribunal is not satisfied that the respondent acted fairly and reasonably when addressing the need to reduce the number of employees. Where an employer is making an employee(s) redundant, while retaining other employees, the selection criteria being used should be objectively applied in a fair manner. While there are no hard and fast rules as to what constitutes the criteria to be adopted nevertheless the criteria adopted will come under close scrutiny if an employee claims that he/she was unfairly selected for redundancy. The employer must follow the agreed procedure when making the selection. Where there is no agreed procedure in relation to selection for redundancy, as in this case, then the employer must act fairly and reasonably.

The Tribunal does not accept that the Respondent acted fairly and reasonably in this case for the following reasons:

1. there was consultation with the claimant prior to making him redundant;
2. there was no formal selection process for redundancy as is clear from the evidence of FC;
3. there was no prior indication given to the claimant of the financial difficulty in which the respondent found itself due to the fact that the restaurant was not making a profit; (The Tribunal acknowledges of course that an employer can make a position redundant even if the said employer is making a profit so long as the employer acts fairly);
4. no discussion in relation to the criteria used for selecting the claimant;
5. no discussion with him about the claimant's suitability for an alternative position. FC said that she did not consider the claimant for the sous chef position as she took the view that it would be a demotion for him.

The Tribunal finds that the claimant was unfairly selected for redundancy and is satisfied that the respondent has contravened Section 6 (3) of the Unfair Dismissals Act 1977 which states:

‘Without prejudice to the generality of subsection (1) of this section, if an employee was dismissed due to redundancy but the circumstances constituting the redundancy applied equally to one or more other employees in similar employment with the same employer who have not been dismissed, and either—

- (a) the selection of that employee for dismissal resulted wholly or mainly from one or more of the matters specified in subsection (2) of this section or another matter that would not be a ground justifying dismissal, or
- (b) he was selected for dismissal in contravention of a procedure (being a procedure that has been agreed upon by or on behalf of the employer and by the employee or a trade union, or

an excepted body under the Trade Union Acts, 1941 and 1971, representing him or has been established by the custom and practice of the employment concerned) relating to redundancy and there were no special reasons justifying a departure from that procedure,

then the dismissal shall be deemed, for the purposes of this Act, to be an unfair dismissal.’

An employers must act reasonably in taking a decision to dismiss an employee on the grounds of redundancy. Indeed Section 5 of the Unfair Dismissals (Amendment) Act 1993 provides that the reasonableness of the employer’s conduct is now an essential factor to be considered in the context of all dismissals. Section 5 , inter alia, stipulates that:

*“.....in determining if a dismissal is an unfair dismissal, regard may be had.....to the reasonableness or otherwise of the conduct (whether by act or omission) of the employer in relation to the dismissal”*

The selection criteria, which should be impersonal and objective, were not discussed with the claimant and neither was there any discussion on alternative positions in the company.

Accordingly the Tribunal determines the claimant was unfairly selected for redundancy under the Unfair Dismissals Acts, 1977 to 2007. The Tribunal further determines that compensation is the most appropriate remedy and awards the claimant €23,000.00 (twenty-three thousand euro). For the avoidance of doubt this is in addition to monies already received by him under the Redundancy Payments Acts.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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