THE INDUSTRIAL TRIBUNALS

CASE REF: 26690/20

CLAIMANT: **Andrea O'Donnell**

RESPONDENT: **Craigantlet Farms Ltd**

JUDGMENT

The unanimous judgment of the tribunal is that the claimant was unfairly selected for redundancy and therefore unfairly dismissed. In the absence of a resolution between the parties, a separate hearing will be convened to consider the question of remedy for unfair dismissal.

CONSTITUTION OF TRIBUNAL

Employment Judge: **Employment Judge Sturgeon**

Members: **Mr T Carlin**
Mr A Kerr

APPEARANCES:

The claimant appeared in person and represented herself.

The respondent was represented by Mr R Cushley, Barrister-at-Law, instructed by Mr S McGranaghan, Solicitor, of O'Reilly Stewart Solicitors.

THE CLAIM

1. The claimant claimed that she was unfairly dismissed by the respondent company by being made redundant. The claimant alleged that her role was not redundant and that she was unfairly selected. The respondent denied that the claimant was unfairly dismissed. The respondent asserted that the claimant was fairly selected for redundancy and therefore fairly dismissed.

THE ISSUES

2. The legal issues for determination by this tribunal, in respect of this claim, were as follows:-

   (i) Was the claimant unfairly dismissed from her employment as per Article 126 of the Employment Rights (Northern Ireland) Order 1996?

   (ii) Was the claimant fairly dismissed as a result of redundancy as per Article 130(2)(c) of the Employment Rights (Northern Ireland) Order 1996?

PROCEDURE

3. This case had been case managed and detailed directions had been given in relation to the interlocutory procedure and the witness statement procedure.

4. Each witness swore or affirmed and then adopted their previously exchanged witness statement as their entire evidence in chief, before moving on to cross examination and brief re-examination.

5. For the respondent, the tribunal heard evidence from Mr Geoffrey Weir, the Managing Director, Ms Megan Russell, the Sales and Events Director, and Ms Julie Moore, the HR and Accounts Office Manager.

6. The claimant gave evidence on her own behalf. Witness statements were submitted by two other witnesses, on behalf of the claimant, but the claimant confirmed at hearing that she would not be calling these witnesses. Accordingly, the tribunal panel therefore did not consider these statements.

7. The tribunal heard evidence on Wednesday 15 September and Thursday 16 September 2021. The tribunal also considered a number of documents submitted by the parties and included in the tribunal bundle. Oral submissions were heard on the afternoon of Thursday 16 September 2021 and the panel met immediately thereafter, and also on 7 October 2021, to reach a decision. This document is the decision.

THE LAW

Unfair Dismissal/Unfair Selection for Redundancy

8. The right not to be unfairly dismissed is enshrined in the Employment Rights (Northern Ireland) Order 1996 as amended (referred to below as the ERO). One of the potentially fair reasons for dismissal listed in the ERO is redundancy. It is for the employer to show the reason for dismissal and it is for the tribunal to determine whether the dismissal was fair in all the circumstances.

9. Article 130(1) of the 1996 Order provides:-

> *"In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*
>
> *(a) the reason (or if more than one, the principal reason) for the dismissal; and*
>
> *(b) that it is either a reason falling within Paragraph (2); or*
> *... ."*

Article 130(2) of the 1996 Order provides:-

> *"A reason falls within this paragraph if it –*
>
> *...*

(c) is that the employee was redundant;

... ."

Article 130(4) of the 1996 Order further provides:-

> *(4) where the employer has fulfilled the requirements of paragraph (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case."*

10. In ***Polkey v AD Dayton Services Ltd [1988] ICR 142***, Lord Bridge stated:-

> *"In a 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."*

11. In ***Langston v Cranfield University [1988] IRLR 172,*** the EAT stated:-

> *"Where an applicant complains of unfair dismissal by reason of redundancy we think that it is implicit in that claim, absent agreement to the contrary between the parties, that the unfairness incorporates unfair selection, lack of consultation and failure to seek alternative employment on the part of the employer."*

12. In ***Williams and Others v Compair Maxam Limited 1982 ICR 156, EAT,*** a seminal case on redundancy procedure, and approved by the Northern Ireland Court of Appeal in ***Robinson v Carrickfergus Borough Council*** **[1983] IRLR 122,** the EAT laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals. It stressed, however, that in determining the question of reasonableness, it was not for the employment tribunal to impose its standards and decide whether the employer should have behaved differently. Instead, it had to ask whether, *"the dismissal lay within the range of conduct which a reasonable employer could have adopted."*

13. The factors suggested by the EAT, in the ***Compair Maxam*** case, that a reasonable employer might be expected to consider were:

(i) Whether the selection criteria were objectively chosen and fairly applied;

(ii) Whether employees were warned and consulted about the redundancy;

(iii) Whether, if there was a union, the union's view was sought; and

(iv) Whether any alternative work was available.

14. However, the EAT issued a note of caution in relation to the ***Compair Maxam*** guidelines stating that they were not *"principles of law"* but rather *"standards of behaviour that can inform the reasonableness test."* The overriding test is whether the employer's actions, at each step of the redundancy process, fell within the range of reasonable responses.

Selection pool

15. In ***Capita Hartshead Limited v Byard (2012) IRLR 814,*** the EAT considered a case where the allegation of unfair dismissal, in relation to redundancy, centred on whether or not the employer had chosen the correct pool for redundancy selection. This case contains a very useful summary of the law on assessing the fairness of a redundancy dismissal by reference to the pool of employees chosen by the employer. ***Silver J***, at paragraph 31, gave this summary of the position:

> *"Pulling the threads together, the application principles where the issue in an unfair dismissal claim is whether an employer has selected a correct pool of candidates who are candidates for redundancy are that:*
>
> (a) *"It is not the function of the [Employment] Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted (per* ***Browne-Wilkinson J*** *in* ***Williams and Others v Compair Maxam Limited (1982) IRLR 83***)";
>
> (b) *"… the Courts were recognising that the reasonable response test was applicable to the selection of the pool from which the redundancies were to be drawn"* (per ***Judge Reid QC in Hendy Banks City Print Limited v Fairbrother and Others (UKEAT/0691/04/TM***)";
>
> (c) "*There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind to the problem"* (per ***Mummery J*** in ***Taymech Limited v Ryan EAT 663/94***);
>
> (d) *"The Employment Tribunal is entitled, if not obliged, to consider with care and scrutinise carefully the reasoning of the employer to determine if he has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy"*; and that
>
> (e) *"Even if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it*."

16. The key element, in a redundancy process, relevant to this case is whether, in carrying out the redundancy exercise, the respondent correctly identified the group of employees from which those who were to be made redundant was drawn. This

is commonly known as the *"pool for selection"* and it is to these employees that an employer will apply chosen criteria to determine who will be made redundant. In assessing the fairness of dismissals, tribunals will first look to the pool from which the selection was made. However, if an employer simply dismisses an employee without first considering the question of a pool, the dismissal is likely to be unfair *(**Taymech Limited v Ryan EAT 663/94**).*

Statutory disciplinary and dismissal procedures

17. The statutory Disciplinary and Dismissal Procedures (SDP) are set out in the Employment (NI) Order 2003 (Dispute Resolution) Regulations 2004 and in the Employment (NI) Order 2003. Essentially there are three steps in the minimum disciplinary and dismissal procedure. Step one involves the employer writing to the employee setting out the grounds for any proposed action and inviting the employee to a step one meeting to discuss the matter. Step two involves holding a meeting and notifying the employee of the decision and the right of appeal. Step three involves inviting the employee to an appeal meeting if the employee avails of the appeal process and notifying the employee of the appeal decision. Regulation 17(2) of the Employment (NI) Order 2003 requires a tribunal to reduce any award to an employee by 10% and up to 50% if they fail to exercise their right of appeal under the SDP. Regulation 17(3) of the Employment (NI) Order 2003 requires a tribunal to increase any award to an employee by 10% and up to 50% if an employer fails to comply with any of the above 3 steps.

RELEVANT FINDINGS OF FACT

18. Having considered all the evidence in the case, the tribunal found the following relevant facts to be proven on the balance of probabilities:

    (1) The claimant was employed by the respondent company (which currently trades as Le Mon Hotel and Country Club) as a Pastry Chef from 20 April 2016. During this time, the claimant was responsible for the running of the Pastry Kitchen. The role of Pastry Chef was considered part of the Senior Management Team.

    (2) There was no dispute between the parties that a redundancy situation pertained in June 2020 as a result of the worldwide Covid-19 pandemic. The respondent company was forced to close the hotel in March 2020 and, with the uncertainty of no reopening date in the near future, the respondent had no alternative but to carry out a business reorganisation. This reorganisation was undertaken by the Managing Director, Geoffrey Weir. Part of Mr Weir's business reorganisation emphasised the need for potential redundancies.

    (3) Mr Weir, the Sales and Events Director, Megan Russell, and the HR Manager, Julie Moore, met on 1 June 2020 to discuss the business reorganisation and potential redundancies.

    (4) As a result of that meeting, it was confirmed by the Directors that part of the business reorganisation would result in a number of posts being made redundant. Four posts were identified at risk of redundancy – General Manager, Banqueting Manager, Country Club Manager and Pastry Chef (the claimant's position). The respondent identified these positions as being at

risk of redundancy due to the closure of accommodation, conferencing, weddings, events and the health club.

(5) All of the positions identified as being at risk of redundancy were also management positions. An organisation chart, applicable in March 2020, was presented to the tribunal. From the organisation chart provided by the respondent, the role of Operations Manager, Banqueting Manager and Bar Manager were all at a comparable level and sat alongside that of the Executive Chef, a role which was not placed at risk of redundancy. The role of Pastry Chef (the claimant's position) and Head Chef sat just under the position of Executive Chef. From the organisation chart provided by the respondent, both the role of Pastry Chef and Head Chef were also at a comparable level.

(6) Specifically, in relation to the claimant's role of Pastry Chef, Mr Weir had identified that, as a costs savings exercise, the hotel could cease production of the vast majority of pastries and desserts and instead outsource these. The reason for this was because there were no weddings, conferences or other events due to take place, at the hotel, for the foreseeable future and these were the type of functions which would typically require pastries and desserts. It was the view of Mr Weir that this was an area which would therefore result in a significant saving thereby placing the role of Pastry Chef at risk of redundancy as this was a function that could be undertaken by the Executive Chef instead.

(7) The role of the Head Chef was at a level comparable to the claimant's as demonstrated in the organisation chart of March 2020 provided by the respondent. The role of Head Chef was to look after functions and banquets within the Hotel, which naturally would also include weddings, conferences and other events.

(8) Despite the Head Chef being involved in similar events as the claimant, no consideration was given to placing the claimant in a pool with the Head Chef.

(9) No minutes were kept of the meeting, on 1 June 2020, by either Mr Weir, Ms Russell or Ms Moore. No document or memo was drawn up by either Mr Weir, Ms Russell or Ms Moore setting out the rationale for the reason why the Operations Manager, Banqueting Manager, Bar Manager and Pastry Chef were selected.

(10) By letter of 24 June 2020, the claimant was advised that her post of Pastry Chef was at risk of redundancy and she was notified that a consultation meeting would take place on 1 July 2020. The claimant was informed that the aim of the meeting was to give her a chance to discuss the proposed redundancy in more detail. The claimant was informed that she would be given the opportunity to discuss her proposed redundancy and the possibilities for alternative employment.

(11) The claimant's criticism of the consultation meeting, which took place on 1 July 2020, was that the respondent did not put forward any alternatives to redundancy but waited for the claimant to put forward options. The tribunal does not regard it as a flaw of the procedures that the respondent did not

volunteer alternative work suggestions. Within its letter, of 24 June 2020, the respondent set out the aim of the meeting, as stated at above at paragraph 18(10). However, the claimant brought no alternatives to the meeting on 1 July 2020. She presented no evidence of having made suggestion of any alternatives that could be explored.

(12) The claimant was dismissed, by reason of redundancy, by letter of 8 July 2020. The claimant was informed that her last day of employment would be 4 August 2020. The claimant was also advised of her right to appeal in that letter. If appealing, the claimant was informed that such a request should be in writing, it should state whether the claimant was appealing against the finding and/or the process and that it should be lodged within five working days of receipt of the written confirmation of her redundancy. Finally, the letter also stated that the appeal would be heard by a senior representative of the company who had not been involved in the case to date. While the outcome letter did not confirm who that person was, the tribunal was informed that it would have been Mr Geoffrey Weir.

(13) The claimant did not appeal within the set timescale. However, the claimant did send a letter to Julie Moore on 4 August 2020, her last day of employment. This letter was not classified as an appeal by the claimant. Rather, the claimant raised two concerns within the letter:

(i) Desserts were not being brought in and despite her (the claimant's) redundancy, desserts were still being made in-house;

(ii) The head chef had offered another employee (a Mr A Pedro) the role of Pastry Chef for a reduced salary.

(14) Despite the claimant not classifying the letter as an appeal, this letter clearly raised concerns about the claimant's redundancy. The letter was less than a month outside the appeal timeframe. Given the concerns raised within the letter, the tribunal is of the opinion that any reasonable employer would have treated this letter as an appeal.

(15) In the event, Ms Moore did not treat the letter as an appeal but chose to reply to the letter without meeting the claimant a further time. Ms Moore replied to the claimant, by email of 6th August 2020, refuting the allegations raised by the claimant.

(16) With regard to the claimant's first concern, Ms Moore confirmed that the claimant's redundancy was genuine. Ms Moore also provided clarity in relation to the outsourcing of desserts and pastries. Specifically, Ms Moore advised that it was not possible to outsource everything and that some desserts would be made internally.

(17) With regard to the claimant's second concern, Ms Moore confirmed that this was a reduced post and that the remuneration attached to it would not be a management role.

(18) The tribunal did not hear evidence from the witness whom the claimant alleged was offered her role nor did the respondent hear evidence from the Executive Chef whom, the claimant alleged, made the offer.

(19) The tribunal accepts, however, the respondent's explanation for the concerns raised, by the claimant, for the following reasons:

(i) The tribunal was presented with no evidence to demonstrate that Mr Pedro would be returning to the claimant's management role.

(ii) It was clear, from the WhatsApp messages provided by the claimant in her evidence, that if Mr Pedro had returned, it would be on a substantially lower wage.

(20) The claimant made no response to Ms Moore's letter.

DECISION

19. The tribunal has reached the following conclusions having applied the relevant legal principles to the facts found.

Unfair Dismissal/Unfair Selection for Redundancy

20. The unanimous decision of this tribunal is that the respondent was facing a genuine redundancy situation, as a result of the Covid-19 pandemic, in June 2020 which required a significant reduction in its workforce. The claimant did not dispute this point at any stage in her evidence. While the respondent did not produce, in evidence, its business reorganisation plan, the respondent did present figures clearly demonstrating the drastic downturn in business thus demonstrating that there was a need for redundancies within the business. The tribunal therefore concludes that the reason for the claimant's dismissal had been redundancy, a potentially fair reason for dismissal for the purposes of the ERO Order.

21. However, having established that there was a fair reason for the dismissal, as per Article 130(4) of the ERO, the next question for this tribunal to consider was whether the dismissal was fair or unfair *"in accordance with equity and the substantial merits of the case."* As per the ***Capita Hartshead Ltd*** case, this tribunal was "obliged" to consider *"with care and scrutinise carefully the reasoning of the employer to determine if he has genuinely applied its mind to the issue of who should be in the pool for consideration for redundancy*." Moreover, the ***Capita Hartshead Ltd*** case also stressed that "*there is no legal requirement that a pool should be limited to employees doing the same or similar work." (Tribunal emphasis).*

22. The relevant factors which the tribunal took into account in determining whether the respondent had genuinely applied its mind to the issue of who should be in the pool for consideration for redundancy were as follows:

(1) As demonstrated in the organisation chart of March 2020 provided by the respondent, the role of the Head Chef was at a level comparable to that of Head Pastry Chef (i.e. the claimant's role). Both roles were

directly under the Executive Chef. The respondent contended that both roles were considered part of the Senior Management Team.

(2) The role of Pastry Chef was to prepare all desserts and pastries for events within the hotel to include weddings, conferences and other events. The role of Head Chef was to look after functions and banquets within the Hotel, which would also naturally include weddings, conference and other events.

(3) Despite being involved in similar events (i.e. weddings, conferences and other events), the tribunal was provided with no evidence or explanation to demonstrate that consideration was given to either placing both these roles in the same pool or indeed putting the Head Chef in a single pool like the claimant.

(4) The meeting between Mr Weir, Megan Russell and Julie Moore, on 1st June 2020, was a very important meeting, its purpose being to consider the business' reorganisation, to discuss the long term survival of the business, what roles were at risk of potential redundancy and why and the drastic steps which the business would need to take for the business to survive. Despite the importance of this meeting, no document or memo was drawn up by either Mr Weir, Ms Russell or Ms Moore setting out the rationale for the reason why the Operations Manager, Banqueting Manager, Bar Manager and Pastry Chef were selected. Given its importance, the tribunal is shocked that no minute was recorded of this meeting, on 1 June 2020, by either Mr Weir, Ms Russell or Ms Moore.

(5) Given that the respondent's explanation for the redundancies was to remove a layer of management, no consideration appears to have been given as to why the Head Chef, despite also being a member of the Senior Management Team, and on the same level as the Pastry chef, was not identified as being at risk of redundancy or included in the same pool as the claimant.

23. After analysing and considering each of the points above in turn, this tribunal finds that the respondent did not genuinely apply its mind to the issue of who should be in the pool for consideration for redundancy. This tribunal therefore finds that it was not a reasonable response of the respondent to automatically select the claimant for redundancy.

24. For the reasons set out at 18(14) above, this tribunal also finds that the respondent failed to carry out a proper procedure when dismissing the claimant in that it did not invite the claimant to an appeal meeting despite the claimant raising concerns about the redundancy exercise after her dismissal.

Remedy

25. The tribunal has considered whether it would be appropriate to deal with the question of remedy in this decision. It has determined that it would not be appropriate for the following reasons:

(i) **The provisions of Article 146 of the Employment Rights (NI) Order 1996**

Article 146 provides

146.—*(1) This Article applies where, on a complaint under Article 145, an industrial tribunal finds that the grounds of the complaint are well-founded.*

(2) The tribunal shall—

(a) explain to the complainant what orders may be made under Article 147 and in what circumstances they may be made, and

(b) ask him whether he wishes the tribunal to make such an order.

(3) If the complainant expresses such a wish, the tribunal may make an order under Article 147.

*(4) If no order is made under Article 147, the tribunal shall make an award of compensation for unfair dismissal (calculated in accordance with Articles 152 to 161**)**. . . to be paid by the employer to the employee.*

Whilst the claimant had indicated at paragraph 6.11 of her claim form that she is seeking the remedy of "compensation only", the provisions of Article 146 require the tribunal, on a finding of unfair dismissal, to explain to the claimant what orders may be made, and to ask the claimant whether she seeks an order of re-instatement or re-engagement.

(ii) **The provisions of Articles 156 and 157 of the Employment Rights (NI) Order 1996**

In the event that the claimant confirms her election to receive compensation only, the tribunal must award what it considers just and equitable in the circumstances having regard to the loss sustained by the claimant in consequence of the dismissal in so far as that loss is attributable to action taken by the respondent. A schedule of loss was presented by the claimant and a counter schedule of loss was presented by the respondent. Email correspondence was submitted by both parties, after the final hearing, in relation to the schedule of loss which raised further questions for the tribunal. Accordingly, the tribunal has been unable to determine the precise level of the claimant's losses, the claimant's pension loss, if any, and the claimant's income, if any, after her redundancy.

26. Accordingly, a separate Remedies Hearing will now be convened to consider the question of remedy for Unfair Dismissal. A Case Management Discussion will be convened to give directions and orders in respect of that hearing. This does not preclude the parties resolving the issue of remedy, for the claim of unfair dismissal, between them in advance of such a reconvened hearing.

Concluding remarks

27. The tribunal had serious concerns at the lack paperwork produced by the respondent in relation to its redundancy exercise. The respondent is a well established hotel in Northern Ireland and had the benefit of external HR advice throughout its redundancy exercise. Going forward, the tribunal would encourage the respondent to better document its policy and procedures in relation to any redundancy exercise.

Employment Judge: **EJ Sturgeon**

Date and place of hearing: **15 and 16 September 2021, Belfast.**

This judgment was entered in the register and issued to the parties on: