

Appeal No. UKEAT/0470/13/JOJ

EMPLOYMENT APPEAL TRIBUNAL
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 17 March 2014
Judgment handed down on 28 August 2014

Before

HIS HONOUR JUDGE BIRTLES

(SITTING ALONE)

MAYMASK (148) LLP

APPELLANT

MR S JOBSON

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MR JAMIE ANDERSON
(of Counsel)
Instructed by:
Ms Lisa Branker
DAV House
7 Groat Market
Newcastle upon Tyne
NE1 1UQ

For the Respondent

MR STEVEN JOBSON
(The Respondent in Person)

HIS HONOUR JUDGE BIRTLES

UNFAIR DISMISSAL – Reasonableness of dismissal

The Employment Judge was entitled to find on the available test the reason the dismissal was neither redundancy nor some other substantive reason as the dismissal was unfair. **Polkey** correctly applied. Appeal dismissed.

HIS HONOUR JUDGE BIRTLES

Introduction

1. This is an appeal by Maymask (148) LLP, who was the Respondent before the Employment Tribunal. The Appellant appeals from the Reserved Judgment of Employment Judge Singleton (sitting alone), sent to the parties on 4 March 2013 following a hearing on 5-6 February 2013.

2. The Employment Judge found that the Claimant's claims for unfair dismissal succeeded. At the subsequent Remedy Hearing he awarded compensation of £35,187.17.

3. The Appellant is represented by Mr Jamie Anderson of Counsel. Mr Jobson represents himself.

4. At the conclusion of the hearing on 17 March 2014 I reserved Judgment.

The factual background

5. The Claimant commenced his employment as Head Chef on 3 June 2002. He was employed to work at the Three Mile Inn in Gosforth. His salary was £31,000. In May 2004 he was transferred to work at the Louis Restaurant, which was a new restaurant and was part of the New Northumbria Hotel Ltd. At that time the Claimant received a pay rise, bringing his salary up to £45,000 per annum.

6. On 30 April 2010 the company was subject to a takeover. The Claimant's employment transferred under TUPE to a company called Maymask (160) LLP, a business in which Mr Atul Malhotra (Mr Malhotra Junior) had an interest and which subsequently became the

Respondent Company. The Respondent wrote to the Claimant shortly after the transfer informing him that his employment had transferred “on your current terms of employment except for those terms relating to your occupational pension scheme”. That letter also stated that “The Company does not envisage taking any measures in relation to your current employment”. The Respondent did not provide the Claimant with a new contract of employment.

7. When the Claimant commenced his employment in 2002, he had been given a contract of employment which stated that his job title was Head Chef. It also stated that:

“You may also be required as a condition of employment to undertake duties of any type, level or authority as part of your normal duties.”

8. The factual background is complicated, and it seems to me therefore to be sensible to set out part of the findings of fact by the Employment Judge. He said this:

“2.5 Prior to the Louis Restaurant opening in 2004 the claimant had been asked for some input into the kitchen set up and his new employers were aware of this. The claimant was subsequently asked for his input on refurbishing the kitchen at the Osborne Restaurant, another restaurant within the respondent group. Discussions also took place between the respondent and the claimant in late 2012 regarding a proposed new venture in Ponteland (‘the Ponteland venture’) which the respondent was hoping to open in 2013. The proposal involved the claimant training up and handing over the day to day running at the Louis Restaurant to Lee Bell and Lee Hedley, two of the more junior chefs at the Louis Restaurant and that following a handover period of six months the claimant’s role within the company would become that of an executive chef responsible for training all of the kitchen staff, employing kitchen staff, being responsible for menu development, inspection supervision of units and also responsible for future development of new venues within the business. The claimant was asked to provide a proposed job description and I was referred to a document at page 37 of the bundle headed ‘Job Description’. I noted that this document...was more of a costing proposal setting out the timetable for handing over the running of the kitchen at the Louis Restaurant, the costs involved and in very general terms what the claimant’s role would be over the forthcoming year or so. I shall refer to this document as ‘job description 1’. Job description 1 was produced and sent by the claimant to Mr Malhotra Junior on 14 January 2012. Correspondence continued about the Ponteland venture between the claimant and Mr Malhotra Junior during February through to April 2012. In March 2012 the claimant produced four new job descriptions to apply to four different roles, being executive chef, head chef, sous chef/pastry chef and commi chef/chef de partie. The job description for the executive chef role I shall refer to as ‘job description 2’ and the one for head chef I shall refer to as job description 3. I found that the difference between job description 2 and job description 3 was minimal, the only differences being that job description 2 stated that the executive chef would manage the hazard analysis and critical control systems, that he would check suppliers and prices and that he would ensure that menu costings were checked regularly. A fact not in dispute was that the Ponteland venture did not proceed, it being put on hold by the respondent for an indefinite period of time.

2.6 The claimant continued with his role working at the Louis Restaurant and in addition he carried out additional tasks as and when required. The evidence of Mr Malhotra Junior was that in addition to his role at the Louis Restaurant the claimant was ultimately responsible for

overseeing all of the kitchens at the respondent's three establishments to include maintaining hygiene standards; health and safety; managing the hazard analysis and critical control point systems; employee training; creation of menus and menu costings. He told me that whilst the head chefs at each venue reported to their respective restaurant managers the claimant dealt with any issues concerning the operation of their kitchens. He also told me that the claimant visited each establishment to meet with its head chef at least once a week when they would sit down and discuss any problems they had with supplies, training needs, rotas, new menus etc. Mr Malhotra Junior's evidence was that job description 2 reflected the claimant's role and that this role was as executive chef. The claimant's evidence was that he was not responsible for all of these tasks and that whilst he visited the other restaurants to help out or fulfil specific tasks required of him he did this in addition to his normal role as head chef at the Louis Restaurant, that he only did this as and when specifically required of him by the respondent and that in any event these additional tasks took up no more than 5% of his time. The claimant accepted that had the Ponteland venture gone ahead with him taking on the role of executive chef he would have been responsible for these additional tasks as part of his contract of employment. However, this change of role never occurred and the job description more applicable to his role was job description 3 being that of head chef. Mr Malhotra Junior told me that he regarded the role of executive chef being above the head chef in the hierarchy and he told me that there was no head chef at the Louis Restaurant, that restaurant only having an executive chef. He told me that the claimant fulfilled the same role as the head chefs at the other restaurants, the claimant doing this at the Louis Restaurant but in the capacity as an executive chef. He also disputed the claimant's evidence that he spent on average no more than 5% of his time at the other restaurants or in the other tasks suggesting that he spent a reasonable amount of his time on these additional tasks which the other chefs could not and did not do and hence the claimant's proper role was that of an executive chef. He told me that this was the reason the claimant was paid £45,000 whereas the other chefs who were head chefs were only paid in the region of £24,000 to £27,000, a fact which was disputed by the claimant.

2.7 I heard evidence from...Karrell Nicholson who was the general manager of the New Northumbria Hotel which incorporated the Louis Restaurant, from Lauren Day who was employed at the Scalini's Restaurant, from Sonia Carnegie who was employed at the New Three Mile Inn and from Richard Cronin who was the head chef at the Three Mile Inn. The evidence from all of these witnesses was consistent with that of the claimant in that they all confirmed that the time spent by the claimant at the various other restaurants was infrequent, that the claimant was not ultimately responsible for and did not carry out on a regular basis all of the additional tasks suggested by Mr Malhotra Junior and that the average time spent by the claimant at the other restaurants or on the additional tasks amounted to no more than 5% of his time. I preferred the evidence of the claimant and his witnesses and found that as a matter of fact on average the claimant spent no more than 5% of his time on tasks over and above his role at the Louis Restaurant and that he carried out these other roles at the request of the respondent and believing that he was under an obligation to do having regard to the terms of his contract of employment which required him to undertake duties of any type, level or authority as part of his normal duties.

2.8 On Tuesday, 3 April Mr Malhotra Junior spoke to the claimant and asked him to take a pay cut informing him that the head chef at Scalini's (Mr Terry Botto) and the front of house manager at Scalini's (Giani Contini) had agreed to take a pay cut. The claimant did not decline to do so but said that he would have to think about it. Later that same day the front of house manager in the Louis Restaurant (Lauren Day) took the claimant to one side and asked him if he would be prepared to consider a pay cut. She told me that Mr Malhotra Junior had suggested that she ask him. The claimant responded in the same way as he had responded to Mr Malhotra Junior stating that he would think about it.

2.9 Three weeks later on Tuesday, 24 April 2012 the claimant attended a meeting with other heads of department which meeting had been called by the health and safety maintenance manager and was being chaired by Kevin Pattinson, the operations director. The health and safety maintenance manager complained about the standard of the two Scalini kitchens, the implication being put by the respondent's witnesses was that the claimant was responsible for this in his capacity as executive chef. The claimant's response was to say that he was not responsible for this but that he had, for some time, been asking Mr Malhotra Junior to organise a deep clean at the kitchens as this had been left too long but that no action had been taken. I noted that if this was the responsibility of the claimant, as alleged by the respondent, no action was taken by the respondent against the claimant to discipline the claimant for failing to meet his obligations if, as they suggested, he was responsible for health and safety in these kitchens.

2.10 On Monday, 30 April 2012 the claimant was asked to attend a meeting the following day with Mr Malhotra Senior. He was not told what the meeting was about. The claimant's

evidence was that when he attended this meeting Mr Malhotra Junior was present at the meeting together with Nicole Vanzie, the respondent's new operations manager. The evidence of both Mr Malhotra Senior and Mr Malhotra Junior was that Mr Malhotra Junior was not present at that meeting. I preferred the evidence of the claimant in this respect and found that Mr Malhotra Junior was present at the meeting although he played little or no part in the discussion. In that meeting the claimant was told that the respondent had decided to reorganise its business and to place the claimant formally at risk of redundancy. The claimant was told that it was proposed to remove his current role as executive chef from the management structure, that the respondent wanted to move forward with head chefs at each venue and that there needed to be a full time head chef at the Louis Restaurant. The claimant was told that a newly created role as head chef at the Louis Restaurant was an alternative to redundancy and the claimant was given a few days to consider whether or not he wanted to accept this new role. I was referred to some minutes of that meeting produced by the respondent, the claimant's evidence being that those minutes did not accurately record what was said at that meeting and that he was not provided with a copy of those minutes at the time only being provided with minutes of this meeting at the appeal stage of his dismissal. Following that meeting the claimant was sent a letter informing him that he was formally at risk of redundancy and inviting him to a 'initial consultation on Friday, 4th May ... to discuss the potential redundancy in more detail and, in particular, how this decision will affect you.' The letter went on to state 'No more decisions would be made until all relevant matters have been discussed and considered'.

2.11 The claimant attended this meeting which was postponed until 11 May due to the claimant taking a period of sickness absence. This meeting was referred to by the respondent as the 'first consultation meeting'. Ms Vanzie was also present at this meeting. During the meeting the claimant was told that if he accepted what the respondent referred to as the new role of head chef his salary would be reduced down to £30,000 per annum as the role 'would only require the claimant to assume responsibilities in respect of one unit'. Prior to attending this meeting the claimant had asked Mr Malhotra Junior to put into writing the amount of redundancy pay he would receive if he chose not to take the role that was being offered to him with the reduction in salary. Mr Malhotra Senior responded to that enquiry by way of a telephone call to the claimant in which he stated that he could not give the claimant the figures that he was asking for as he had not seen his contract of employment and required information as to how many years he had worked for the company. He also told the claimant in that telephone call that he wanted the company doctor to attend at the claimant's house to examine him. As the claimant's days off were Wednesday and Thursday that week, being 2 and 3 May, and as he had only seen his doctor on 3 May I found the respondent's request to not only be made in undue haste but also to be an attempt to pressurise the claimant into returning to work and continuing with the respondent's consultation process the claimant having only been absent from work ill for one day. The following day, being Friday, 4 May, the claimant received an e-mail from Mr Malhotra Senior again requesting information about his doctor and stating that the company doctor wished to examine the claimant as soon as possible. The claimant had previously had open heart surgery and was having pains in his chest but was told that these pains were caused by anxiety and stress and was advised not to attend the meeting. Despite this the claimant attended the meeting on Friday, 11 May 2012.

2.12 At that meeting Mr Malhotra Senior and Ms Vanzie was present and the claimant was told what redundancy pay and notice pay he would receive. He was told that if he was prepared to take the head chef's job he would start with immediate effect with no notice being given in respect of what the respondent said was his executive chef role. In other words the respondent was proposing that his salary would reduce by £15,000 per annum with immediate effect. The claimant was also told that he would have to sign a new contract of employment together with an agreement stating that he would give three months if he were to leave the company and he would also have to enter into restrictive covenants preventing him post termination from working in any capacity within any business concern which was or intended to be in competition with the respondent and which covenants were not contained in his existing contract of employment.

2.13 A further meeting took place on Monday, 14 May at which the claimant stated that the meeting would be a short meeting as he had nothing else to say other than the fact that he was going to take legal advice. No further consultation took place at this meeting save for the respondent reiterating its position that the claimant was an executive chef, that they could not sustain an executive chef's role any further and that they wished him to continue with them as a head chef at the Louis Restaurant. Following that meeting the claimant was sent a copy of the proposed new contract of employment together with a copy of the job description for the proposed new position. The new contract was dated 15 May 2012 and contained a three month notice period with the first month being a probationary period. The claimant's job title was to be head chef and his normal place of work was to be the Louis Restaurant or such

other place within a reasonable area which the company may reasonably require. The contract also included a provision requiring the claimant to travel on company business (both within the United Kingdom or abroad) as may be required for periods of up to one month. These provisions were in addition to the post-termination restrictions. The job description which accompanied the new contract of employment was signed by Mr Malhotra Junior and dated 19 April 2012 prior to any consultation with the claimant. That job description made it clear that the list of duties set out therein was not to be regarded as exclusive or exhaustive and that the claimant may be required to undertake such duties as may be reasonably required of him.

2.14 The claimant attended a further meeting on Friday, 18 May in which meeting the claimant said that he would take the termination package because he did not believe that this was a true redundancy situation. The respondent then informed the claimant that he was required to serve his nine weeks notice. A further meeting took place on 22 May at which the claimant was simply asked whether he had changed his mind. The claimant said that he was not willing to accept a £15,000 reduction in salary and he was again told that he would be required to work his notice. The claimant was not informed of his right to appeal and this meeting lasted less than five minutes. The claimant then received a letter informing him of his right to appeal to which he responded stating that he did wish to appeal the decision to terminate his employment. That appeal was heard by Kevin Pattison on Monday, 11 June. Mr Pattison was accompanied by Adam Langman to take minutes. The claimant attended this meeting without representation. He pointed out his belief that this was not a real redundancy situation, that his existing role was one as head chef at the Louis Restaurant, that he had never been an executive chef and that he believed he was being taken down a redundancy route because he had declined to take a pay cut when asked to do so on 3 May. The claimant pointed out that the executive chef and the head chef job descriptions were almost identical, pointing out that some of the additional tasks that he had carried out had been taken off him some time ago, that he was not allowed to talk to suppliers and therefore he could not manage costs which was a task that the respondent said the executive chef undertook. A discussion took place about the new contract and, in particular, the covenants contained therein and the claimant concluded by stating this was not a real redundancy situation but that it was in reality simply a wage reduction. Following this meeting Mr Pattison wrote to the claimant informing him that he was upholding the decision to terminate the claimant's employment on the ground of redundancy suggesting that the claimant's role 'developed organically over time such that there is unfortunately no up to date contract of employment that exists clearly setting out your executive role and responsibilities.'

2.15 I had the benefit of hearing evidence from Mr Pattison who told me that when he commenced his employment with the respondent in October 2011 he commenced that employment as senior executive but that his role evolved into that of chief executive officer. He also told me that when he joined the company he had a job description reflecting his role as a senior executive but that as his role evolved he was provided with a new job description reflecting his new role. He was unable to say why, if the claimant's role had evolved in a similar way, the claimant had not been given an updated contract of employment or job description to reflect the new role which he suggested had developed organically. Mr Pattison also told me that he accepted that the claimant had fulfilled the role of head chef at the Louis Restaurant accepting that this was his role but also stating that he had additional responsibilities as well. When referred to the various job descriptions he acknowledged that the only differences between the role of a head chef and an executive chef were three specific tasks, one of which the claimant said he was not permitted to do and which not contested by the respondent, and the other two tasks were those only carried out by the claimant on an infrequent basis and involving no more than 5% of the claimant's time.

2.16 One matter that was not in dispute between the parties was that the Louis Restaurant was a fine dining restaurant with the claimant being the only chef that the respondent employed that was experienced and skilled enough to deliver fine dining. The other restaurants [that] are owned by the respondent in this group were bistro or pizzeria type restaurants where it was not necessary for the head chefs to have the same level of skills and experience that the claimant had. In the course of his evidence the claimant took issue with the respondent's evidence that the head chefs at the other venues were paid between £24,000 to £27,000 per annum. His evidence was that one of the other chefs was paid £35,000 per annum but that he had been asked to and accepted a reduction in pay. After being requested to do so the respondent produced payslips for the other chefs which confirmed that Mr Terrence Botto, a chef at the Scalini Restaurant, had been paid £35,000 per annum prior to agreeing to take a reduction in salary down to £32,100 per annum. Other matters that were not in dispute were the fact that the claimant was the only chef put at risk of redundancy, there being no selection pool. The respondent's case in this respect was that the claimant was the only executive chef and therefore there was no requirement for a selection pool."

The Employment Judge's conclusions

9. The Employment Judge said this:

“4.2 Approaching first of all the issue of the real reason for the dismissal, two reasons were advanced by the respondent being redundancy and ‘some other substantial reason’. Redundancy is a potentially fair reason for dismissal. For redundancy to be the real reason for the dismissal in the circumstances of this case the requirement of the business for employees to carry out work of a particular kind or for employees to carry out work of a particular kind in the place where the employee was employed had to be have ceased or diminished or were expected to cease or diminish. The respondent’s evidence was that the claimant was employed as an executive chef and the requirements of their business were such that the need for an executive chef had ceased. Their position was that they were creating a new role of head chef at the Louis Restaurant which role they offered to the claimant. The claimant’s position was that he had never been employed as an executive chef and that his role was that of head chef at the Louis Restaurant, a fact accepted by Mr Pattison in his evidence although Mr Pattison said the claimant undertook additional duties over and above that of head chef. I found as a matter of fact that whilst the claimant did undertake some minimal additional duties he did so in his capacity and under his contract of employment as head chef at the Louis Restaurant and not in any capacity as executive chef. The respondent’s evidence was that the requirement of the business for a head chef at the Louis Restaurant had not ceased and diminished or was not expected to cease or diminish, therefore the real reason for the claimant’s termination of employment could not be redundancy.

4.3 I then went on to consider whether the reason for the termination of the claimant’s employment was for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held, the dismissal not falling within any of the categories set out in section 98(2). Mr Malhotra Senior was, on the respondent’s evidence, the person who made the decision to terminate the claimant’s employment and his evidence was that the claimant was employed as an executive chef, the business no longer required an executive chef but did require a head chef and therefore the claimant’s employment must come to an end if he was not prepared to accept what the respondent said was a new role. As was clearly stated in the case of *Abernethy, Mott, Hay & Anderson*, ‘a reason for the dismissal of the employee is a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee’. The case goes on to state that an incorrect label given by the employer at the time of dismissal does not preclude him from relying on another reason for dismissal or, in other words, there is no requirement on the employer to correctly label or, in other words, there is no requirement on the employer to correctly label the reason for the dismissal at the time of dismissal. The *Abernethy* case went on to state that ‘if at the time of the dismissal the employer gives a reason for it, that is no doubt evidence, at any rate against him, as to the real reason, but it does not necessarily constitute real reason. He may knowingly give a reason different from the real reason out of kindness or because he might have difficulty in proving the fact that actually led him to dismiss or he may describe his reasons wrongly through some mistake of language or of law’. What is clear from that case is that the reason for the dismissal of an employee must be based on either a set of facts known at the time or beliefs held by the respondent at the time. It was put to me by Mr Anderson that the respondent’s belief was that the claimant undertook the role of executive chef and that the claimant’s belief, whether that be that he undertook the role of executive chef or head chef, was irrelevant. He submitted that the claimant’s case was that he identified fulfilling additional tasks amounting to 5% of his time and as it is clear that those tasks were to cease or diminish section 139 is satisfied and the real reason for dismissal was redundancy. I have dealt with that claim above and found against the respondent. In the alternative, Mr Anderson submits that the reason under some other substantial reason is an unidentified reason (see his written submissions) and he goes on to suggest that it must be a business reason that need not be grave in order to fall within that category. Mr Anderson accepts that the reason could not be a reorganisation as only one employee was affected and that it was a matter of the employer seeking to run its business as it sees fit. The claimant’s evidence was that the reason for his dismissal was that the respondent wanted him to continue in the same role that he was already fulfilling but with a pay reduction of £15,000 per annum. Had the respondent advanced this as a reason for dismissal I may have come to a different conclusion, however, as the respondent’s evidence was that the reason was nothing to do with a pay cut such a necessity to reduce the claimant’s pay for business reasons cannot have been a set of facts known to or a belief held by the respondent which caused it to dismiss the claimant.

4.4 I then went on to consider the issue of reasonableness being the range of reasonable responses test. I have considered this in respect of both the case of redundancy and some

other substantial reason. I reminded myself that I must not substitute my own decision for that of the employer. In determining this I had regard to the size and administrative resources of the employer's undertaking and noted that the respondent is a relatively large organisation, having the benefit of a chief executive officer who had worked in a senior corporate banking role for some 30 years and who had responsibility for all personnel and employment issues within his assigned region. I was satisfied in this particular case that the decision to dismiss the claimant fell outside of the band of reasonable responses open to an employer. I noted that at neither the dismissal stage nor the appeal stage and investigation was carried out or steps taken to ascertain the claimant true role. The claimant was stating that he was already the head chef at the Louis Restaurant, that this was not a redundancy situation and that this was just a means of making him take a pay cut. He stated that two members of Scallini's staff had agreed to a pay cut but this was not investigated by either Malhotra Senior or by Mr Pattison. The claimant had pointed out that the executive chef job description required him to deal with suppliers and costings but that he had had a specific e-mail stating that under no circumstances was he allowed to talk to any suppliers and therefore he could not be respondent for costings. This matter was not investigated. No steps were taken to ascertain how much time he spent on tasks outside of the Louis Restaurant. Furthermore, the reason given by the respondent for the potential redundancy in its letter to the claimant of 2 May 2012 stated that the respondent had 'decided that overall responsibility for the operation of each kitchen should be devolved solely to the head chefs at each venue'. Mr Pattison in his evidence accepted that the claimant already had overall responsibility for the operation of the kitchen at the Louis Restaurant. This statement was made the day after the statement was made to the claimant in the first meeting when he was told that the 'Louis is struggling unlike any of our other businesses and I want to ask you to look at the situation with me so that we can find a solution otherwise I'm worried that we may not have our fine dining restaurant going forward' and 'Louis is in great need of extra care and attention to drive it forward and keep hold of its standing within the community'. It appeared to me that on the one hand the respondent was suggesting that they needed the claimant, his skills and expertise to keep this fine dining restaurant functioning to the required standard but on the other hand they wanted to demote him with the consequence of a substantial reduction in salary. I found that no employer acting reasonably would have ignored these issues or the comments made by the claimant without investigating these further to ascertain the true facts upon which to base a fair decision.

4.5 With regard to procedural issues, I found that the respondent had failed to follow a fair procedure in that the decision to terminate the claimant's employment was clearly made prior to the first meeting on 1 May 2012 as it evidenced in part by the production and signing of the proposed new job description on 19 April 2012 and was also evidenced by the discussions about the amount of redundancy pay the claimant would receive and by the respondent's undue haste and attempts to pressurise the claimant into returning to work and continuing with the planned consultation process when the claimant had only been off work ill for one day. Added to this was the fact that matters raised by the claimant in the various meetings were not investigated by the respondent to ascertain the true position and I concluded that had a fair procedure been followed and that the claimant's correct role had been properly identified the chance of his employment still coming to an end was nil.

4.6 For the above reasons the claimant's claim for unfair dismissal succeeds. This matter will now be set down for a Hearing on Remedy with a time estimate of one day."

The Grounds of Appeal

10. There are four grounds of appeal, and I take each in turn.

Ground 1: The definition of redundancy

11. Mr Anderson submits that the Employment Judge was wrong in paragraph 4.2 of his conclusions in finding that this was not a redundancy situation. The Employment Judge found

that the Claimant was not employed as an Executive Chef but rather as the Head Chef at Louis Restaurant. Because the Claimant's evidence was that 5% of his duties was outside that restaurant and he did not wish to continue that work outside the restaurant, the Employment Judge should have found that there was a diminution in work (inaudible). Mr Anderson further submits that it is settled law that, in considering the potentially fair reason for dismissal, the issue is what is in the mind of the employer when taking the decision to dismiss: **Abernethy v Mott Hay and Anderson** [1974] IRLR 213 per Cairns LJ at paragraph 13.

12. In my judgement this submission is defeated by the finding of fact made by the Employment Tribunal in paragraph 4.2 of his Reasons. He said this:

"I found as a matter of fact that whilst the claimant did undertake some minimal additional duties he did so in his capacity and under his contract of employment as head chef at the Louis Restaurant and not in any capacity as executive chef."

The Respondent's evidence was that the requirement of the business for a head chef at the Louis Restaurant had not ceased and diminished or was not expected to cease or diminish, therefore the real reason for the Claimant's termination was his refusal to accept a pay cut.

Ground 2: Some other substantial reason

13. This is a criticism of paragraph 4.3 of the Employment Judge's Reasons. I reject Mr Anderson's first submission under this ground of appeal that the Employment Judge erroneously recorded the nature of his submission or (even if that is not the case) that this amounts to an error of law. There is no perversity. The Employment Judge dealt with the issue in the second part of paragraph 4.3 of his Reasons. He records Mr Anderson's submission that the some other substantial reason in this case is a business reason. It was for the employer to run his business as he sees fit. The Employment Judge accepts the Claimant's evidence that the reason for his dismissal was that the Respondent wanted him to continue in the same role that

he was already fulfilling, but with a pay reduction of £15,000 per annum. That was not the evidence of Mr Malhotra Senior, the person who made the decision to terminate the Claimant's employment. His evidence was that the reason for terminating the Claimant's employment was nothing to do with a pay cut. It was open to the Employment Judge, on the evidence, to find that a necessity to reduce the Claimant's pay for business reasons cannot have been a set of facts known to, or a belief held by, the Respondent, which caused him to dismiss the Claimant.

14. Neither do I find any substance in what Mr Anderson calls additional errors regarding some other substantial reason. The Employment Judge rejected the two grounds put forward for dismissal by the Respondent, ie redundancy and some other substantial reason. He is not required to make a finding as to what was the reason for dismissal. He was entitled to go on to find that, having rejected the Respondent's arguments, the dismissal was therefore unfair.

Ground 3: Substitution

15. MrAnderson submits that, in considering section 98(4) of the Employment Rights Act 1996, the Employment Judge substituted his view for that of the employer in that:

- (i) The employer was aware of the role being undertaken by the Claimant. It employed him.
- (ii) The Employment Judge placed reliance on the evidence of Mr Pattison (a witness for the employer) that the Claimant had overall responsibility for the Louis Restaurant kitchen.
- (iii) He criticises a view that, in paragraph 4.4 of his Reasons, the Employment Judge explicitly stated that the employer was not entitled to reduce the Claimant's salary.

I have carefully considered Mr Anderson's submissions, which go to paragraph 4.4 of the Employment Judge's Reasons. I find no substitution. The Employment Judge carefully considered the evidence. He points out the clear contradictions in the employer's evidence.

Ground 4: Polkey

16. Mr Anderson submits, paragraph 1.3.4 of the Reasons, the Employment Judge identified **Polkey** as an issue. He dealt with that at paragraph 4.5 of the Reasons. He made four findings of fact and from them concluded that, had a fair procedure been followed and the Claimant's correct role had been properly identified, the chance of his employment still coming to an end was nil.

17. Mr Anderson submits that the Employment Judge misdirected himself in law in regards to his written submissions to the Employment Judge. I am not persuaded that there was any misdirection by the Employment Judge. He was clearly aware that he had to apply **Polkey**: paragraph 1.3.4. The case and its principles are well known. It is not necessary for him to refer to it in detail. He applied in paragraph 4.5 of his Reasons. With respect to Mr Anderson, his submissions on ground 4 amount to a repetition of his unsuccessful submissions to the Employment Judge. They do not raise a point of law. Neither there is any perversity.

Conclusion

18. For these reasons the appeal is dismissed.