EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF: CASE NO.

UD394/2006

EMPLOYEE–**claimant**

against

EMPLOYER

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. P. Hurley

Members: Mr. B. O'Carroll
Ms. S. Kelly

heard this claim at Ennis on 3 June 2010

Representation:

Claimant: Mr. Derek Sheahan B.L. instructed by
Mr. Gerard O'Neill, O'Neill & Co. Solicitors,
25 Glentworth Street, Limerick

Respondent: Mr. Niall Beirne B.L. instructed by
Mr. John Dunne, Matheson Ormsby Prentice Solicitors,
30 Herbert Street, Dublin 2

The determination of the Tribunal was as follows:

The claimant was employed in the respondent's aircraft engine repair facility from June 1993 and at the relevant time was a welder/processor involved in the tack welding and brazing of low- pressure turbine vanes. This is part of a cellular manufacturing process whereby the claimant assembled a full set of twelve vanes in a tray whilst seated at a bench. In 2004 the claimant was absent from work for several months with a non-work related neck injury. On his recovery from this injury he was permitted to return to work without the need to produce any documentation attesting to his fitness to return and was not required to see any doctor on behalf of the respondent.

On or around 26 July 2005, when leaving work, the claimant asserts that he sustained a neck injury as a result of his having walked into a window which was opened beyond its normal range because of a faulty catch mechanism. No report of this incident was made at the time but the claimant reported the incident the following day and continued to work until 10 August 2005 at which stage

he visited his GP and began to submit medical certificates to the respondent. The respondent operates a sick pay scheme of which the claimant was availing at this time. As a result of a change of policy brought about by the requirements of their insurers the respondent was now seeking a statement of fitness to return before permitting employees to return to work after injuries such as that sustained by the claimant.

The claimant was examined by a doctor on behalf of the respondent on 19 August 2005 and the diagnosis was of a muscular soft tissue injury akin to a whiplash type injury.

The respondent had concerns about both the circumstances and the extent of the injury suffered by the claimant and to that end appointed private investigators (the investigators) on or around 12 September 2005 to ascertain if the claimant was in gainful employment elsewhere. The investigators mounted a surveillance operation at the claimant's residence on 19, 20 and 21 September 2005. As a result of this surveillance there was no evidence that the claimant was in gainful employment elsewhere. In the event the within proceedings remained in abeyance until the personal injury claim in regard to the incident of 26 July 2005 was disposed of.

Coincidentally, on Wednesday 21 September 2005, following the expiry of his most recent medical certificate, the claimant reported for work at his normal start time of 7-30am. It is accepted that the claimant began work that day but some time later perhaps around 9-30am his supervisor (HS) had a conversation with the claimant to enquire about his health. It is common case that the claimant told HS that his neck was still sore, he was still receiving physiotherapy and that he might last a day or he might last a month. HS sought a certificate of fitness to return to work from the claimant's GP and the claimant replied that he wanted to return. The claimant had then asked for his expenses involved in getting such certificate. The claimant's position is that HS asked if he was 100% fit and the claimant then made the comment about a day or a month. HS told the Tribunal it was neither probable nor likely that he had referred to any need for the claimant to be 100% fit in order to return to work.

As a result of the expenses request HS sent an email to his manager and to the human resource office at 9-55am asking if the claimant should be sent to the company doctor. As a result of this the claimant was sent home and thereafter continued to submit medical certificates. He was examined by the respondent's medical officer (MO) on 5 October 2005. In this report MO notes that the claimant stated he wanted to return to work even though he was not 100% fit. On 5 October 2005 the claimant wrote to the human resource specialist (HRS) enclosing medical and social welfare certificates, confirmed his attendance at the appointment with MO and sought copies of the reports from both MO and that of his examination on 19 August 2005.

Further surveillance was carried out on the claimant on 11 and 12 October 2005 this time with a view to ascertaining the claimant's level of activity when at his residence. As a result of the video evidence gathered on these days being shown to MO on 20 October 2005 MO concluded that the claimant was clearly able to do heavy physical work without any restriction of neck movement and clearly at odds with what the claimant told MO on examining him some two weeks earlier.

On 12 October 2005 the claimant wrote to HRS enclosing a further medical certificate. He asserted he had been asked to leave the premises on 21 September 2005 in circumstances where he did not have a final certificate from his GP stating that he was in 100% full health. He asked what the respondent required in order for him to return to work and again sought copies of the two afore-mentioned medical reports.

On 26 October 2005 the claimant wrote to HRS noting his disappointment at not having received a response as to what the company required in order for him to return to work. He again requested copies of the medical reports. The claimant again wrote to HRS on 9 November 2005 in similar vein. He reminded the respondent of their responsibilities under the Data Protection Act in regard to the medical reports. He again wrote on 24 November 2005 noting this was his fourth reminder regarding return to work information and the fifth reminder regarding the medical reports.

HRS wrote to the claimant on 1 December 2005 setting out the respondent's position that they had doubts about the injuries sustained by the claimant on 26 July 2005. They supplied the claimant with a copy of the surveillance report including the video evidence as well as copies of medical reports of MO and the claimant's GP of 2 October 2005 and MO's comments on the video evidence. The claimant was called to a meeting in accordance with the respondent's disciplinary procedures on 6 December 2005 to discuss the respondent's view that by reason of the video evidence the claimant was guilty of dishonesty amounting to gross misconduct warranting summary dismissal in relation to his ability to work when maintaining that he was unfit for work and benefiting from the sick pay scheme.

In the event the meeting took place on 8 December 2005 and the claimant was accompanied by his solicitor, the respondent was represented by HRS the human resource manager (HM) and the respondent's solicitor. The claimant explained that his injury had got progressively better before his return on 21 September but HS, who left the respondent's employ in November 2005, had then told him on that he needed to be 100% fit in order to return to work. In regard to the video evidence the claimant said this only showed him doing small amounts of work after which he rested. There was an objection to the respondent's suggestion that the claimant's GP be shown the video evidence.

HRS wrote to the claimant on 22 December 2005 to notify him that it was the respondent's decision to dismiss him for dishonestly claiming monies under the sick pay scheme when well enough to work and being absent from work when not really sick in breach of his contract of employment. This decision took into account the uncontested opinion of MO per his report having seen the video evidence. The claimant was notified of his right of appeal which he duly exercised and the appeal was heard by the marketing manager, the production manager and the quality manager on 25 January 2006. The claimant was accompanied by his solicitor and the respondent's solicitor was again in attendance. The decision of the appeal board was delayed pending extra time granted to the claimant to produce further material from his GP to support his position. In the absence of such information on 17 February 2006. the decision to dismiss the claimant was confirmed

Determination

There is a clear conflict of evidence over what was said to the claimant on 21 September 2005 when he returned to work. HS told the Tribunal it was neither probable nor likely that he told the claimant he needed to be 100% fit in order to return to work. The claimant was clear in his evidence that this was the position put to him. Moreover both MO's report of his 5 October examination of the claimant and the claimant's letters starting with the one on 12 October refer to the 100% fit question. The Tribunal is satisfied, on the balance of probability, that HS did tell the claimant on 21 September that he needed to be 100% fit in order to return to work.

The claimant repeatedly put the question of what was required for him to return to work to HRS in a series of letters starting on 12 October and received no reply until he was summoned to a disciplinary hearing in the letter of 1 December 2005 from HRS. Section 6(2)(C) of the Unfair

Dismissals Acts provides

Without prejudice to the generality of subsection (1) of this section, the dismissal of an employee shall be deemed, for the purposes of this Act, to be an unfair dismissal if it results wholly or mainly from one or more of the following:

> *(c) civil proceedings whether actual, threatened or proposed against the employer to which the employee is or will be a party or in which the employee was or is likely to be a witness,*

Whilst the Tribunal is satisfied that the surveillance of the claimant was carried out in order for the respondent to defend its position in regard to the personal injury claim the Tribunal is satisfied that the respondent took advantage of its investigation of the personal injury claim to effect his dismissal in circumstances where pertinent and searching enquiries from the claimant were not answered. Accordingly, the Tribunal finds that the dismissal was unfair.

The claimant's statement of loss shows that he was on invalidity benefit from the time of his dismissal until early June 2006. He then found work at higher pay than with the respondent in late July 2006. His loss is limited to that period between early June and late July. Accordingly, the Tribunal measures the award under the Unfair Dismissals Acts, 1977 to 2007 at €4,000-00

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)