**EMPLOYMENT APPEALS TRIBUNAL**

| APPEAL OF: | | CASE NO. |
|---|---|---|
| EMPLOYEE | ***-appellant*** | RP1932/2010<br>MN1370/2010<br>WT590/2010 |
| Against | | |
| EMPLOYER | ***-respondent*** | |

Under

**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: Ms. K. T. O'Mahony B.L.

Members: Mr. P. Casey
Mr. D. McEvoy

heard this appeal at Cork on 04 February 2011

**Representation:**

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Appellant: Mr David Kenny, David Kenny & Co, Solicitors, Dillons Cross, Cork

Respondent: Mr. Conor O'Connell, Construction Industry Federation, Construction House, 4 Eastgate Avenue, Little Island, Cork.

The respondent denied dismissing the appellant.

**Appellant's Case**

The appellant was employed as a crane driver from 3rd January 1990. He sustained a foot injury, which resulted in his being on sick leave from 14th August 2005. During 2007 and 2008 he was unfit to work but made social calls to the respondent's premises.

The appellant's position was that .he was fit to return to work in 2009 and made a number of visits to the respondent's premises in relation to his return to work:

In March 2009 the appellant visited the respondent's premises, met with the Operations Manager (OM), informed him he was fit to return to work and asked him to have the respondent contact him about his return. The respondent did not contact him.

The appellant returned to the premises in June 2009 but the respondent was not in the office so he asked OM to record his visit in the logbook. The respondent did not contact him.

The appellant visited the premises on a Saturday in September but the only one on the premises was the cleaning lady, who told him that they no longer worked on Saturdays.

In late November 2009 the appellant again visited the respondent's premises seeking to speak to the respondent but he was at a meeting. Another director called into the office on that occasion and when he told the appellant that there was no work available the appellant asked to be made redundant.

In early February 2010 the appellant was invited to meet the respondent's Financial Director (FW). FM arranged for him to see doctor on 8 February. The appellant's position was that the owner's son then came into the office and terminated his employment; he told him that there was no work available, that he could not afford to 'pay him off' but that if he sold a crane tomorrow he could pay him redundancy. Two office staff might have heard this conversation. The appellant did not visit the doctor on 8 February because he had been told there was no work available. The appellant was surprised to be treated in this manner given his length of service with the respondent. He consulted a solicitor who, in a letter dated 11 May 2010 sought redress for the claimant's dismissal/redundancy. The appellant was very annoyed by the contents of the letter of reply dated 21 May to his solicitor's letter and told the owner's son that it was "all lies".

**Respondent's Case**

According to the respondent the appellant was a very good employee, a skilled crane operator and very good with clients. The respondent would not make someone with such wide ranging crane operating skills redundant.

FW agreed that the appellant had called to the premises on a number of occasions and he as well as OM, had usually spoken with him. While the appellant had indicated that he would like to return to work he had never presented himself for work or indicated that he was fit to return to work. Apart from the injury sustained in an accident the appellant had a serious health problem. As the appellant had not organised a medical appointment, he arranged one for him for 8 February 2010. On 7 February the appellant informed him that he would not be keeping the medical appointment and that he would be taking advice. The owner's son denied dismissing the appellant or having any conversation with him about redundancy.

In reply to the above-mentioned letter of 11 May 2010 the respondent's solicitors in its letter dated 21 May 2010 stated *inter alia:*

*"For the record, your client continues to be employed by our client. He was neither dismissed nor made redundant as alleged by your client. No Form RP50, redundancy pay, notice pay, or P45 has been issued to your client as he remains employed by our client.*

...

*It is accepted that your client contacted our client, but the contact was made by telephone to our client's s managing director wherein your client asked to be made redundant. Our client refused this request as there was work available for [him] should he wish to return to work."*

The appellant called to the office again a week or so later. The owner's son invited him to return to work and FW advised him that a return on a part-time basis would not be a problem for the respondent. The owner's son advised the appellant to have the medical examination and that the respondent had work for him. The claimant had not been dismissed and continued to be an employee. The respondent's redundancy policy is LIFO and a number of employees had less service than the appellant.

**Determination**

There was a conflict of evidence as to whether the respondent dismissed the appellant in early February 2010. The claimant had been absent from work due to injury and illness from August 2005, apart, it seems, from one week in November 2005. The appellant's assertion that he had presented himself as fit for work throughout 2009 is vehemently denied by the respondent. The claimant had not presented a fit-for-work medical certificate to the respondent. It was common case that the respondent's Financial Director (FW) organised a medical examination for the appellant in February 2010 but the appellant did not keep that appointment. According to the claimant's version of what transpired in early February 2010 he got mixed messages from FW, who asked him to undergo a medical examination while within a matter of minutes the owner's son told him his employment with the respondent was terminated. The appellant took no steps to clarify the situation. The Tribunal finds that making an appointment for the appellant to see a doctor is not consistent with the appellant's allegation that he was dismissed on the same day. No documentation relevant to a dismissal was issued to the appellant. Finally, although it is subsequent to the alleged dismissal, in his letter of 21 May 2010 the respondent's solicitor indicated that the appellant continues to be employed by the respondent but the appellant did not act on this. Having considered this and all the evidence adduced the Tribunal on the balance of probability finds that the appellant was not dismissed. Accordingly, the appeal under the Redundancy Payments Acts 1967 to 2007 fails.

As there was no dismissal the claim under the Minimum Notice and Terms of Employment Acts 1973 to 2005 fails.

As no evidence was adduced in relation to a claim under the Organisation of Working Time Act, 1997 that claim is dismissed for want of prosecution.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)