EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:	CASE NO.
EMPLOYEE	UD2329/2010, RP3131/2010 MN2269/2010,WT1033/2010

against

EMPLOYER

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
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 E. Kearney

Members: Mr D. Hegarty
Mr J. Flavin

heard this claim at Tralee on 27th June, 1st and 2nd October 2012

Representation:

Claimant : Mr Paddy Whelehan, Philip O'Sullivan & Company, Solicitors,
14 Denny Street, Tralee, Co Kerry

Respondent : Mr Pat Enright, Lees, Solicitors, 45 Church Street, Listowel, Co Kerry

The determination of the Tribunal was as follows:

Claimant's Case

At the outset the claimant withdrew his appeal under the Redundancy Payments Acts, 1967 to 2007.

The claimant commenced employment with the respondent as a general operative on 9th April 2008 and his employment terminated on 11th September 2010. His job included cutting. Bagging and loading turf in the respondent's bog. For the first two years the claimant was paid €250 per week but thereafter he was paid €300 per week.

Having been involved in an accident at work on 20th August 2010, the claimant applied for Disability Benefit but was told by the Department of Social Protection that he was not registered for PRSI and therefore was not entitled to any payment. The claimant never received pay slips or P60s or a P45 from the respondent and was always paid in cash. The respondent's representative told the

ribunal that the respondent operated in the "black economy" and did not pay tax or PRSI for the claimant.

The claimant was never given paid holidays during his employment with the respondent. After the accident on 20th August 2010 the respondent wanted the claimant to return to work almost immediately and told him that if he did not return to work his job would be gone. However, the claimant was unable to return to work due to his injury. When he discovered that he was not registered for PRSI the claimant had a nervous breakdown and was not prepared to return to work and at the time of the first hearing he was still medical certified as unfit to return to work.

A witness, who was a friend of the claimant and whom had worked for the respondent for two days told the Tribunal that he often gave the clamant a lift to work and stated that he knew the claimant worked for the respondent for a long time.

A former worker with the respondent told the Tribunal that the claimant worked all year for the respondent. This witness regularly drove the claimant to work both in the summer and winter.

Respondent's case

In accepting he employed the claimant the respondent acknowledged that the claimant's employment with him was never registered for taxation or social welfare purposes. He employed the claimant on "a take it or leave it" basis and paid him in cash for his labour. At times he just wished the claimant would go away as his heart was broken dealing with him. The respondent did not know when the claimant commenced work with him and added that he hired him both for winter and summer work. There were no work records and the respondent did not have an insurance cover for work purposes.

The respondent was involved in the operation of turf. Together with some hired labour, including the claimant, he cut and prepared turf for sale. Throughout his life he had never worked for anyone except himself. In 1992 he was declared bankrupt and remains in that state.

Around the 17 August 2010 the respondent met the claimant who was accompanied by a representative who could converse clearly in English. That representative sought a commitment from the respondent that the claimant's employment status be regularised. In response the respondent stated his only interest in engaging the claimant was "off the books". Subsequent to that meeting there was no further direct contact between the parties. No mention or reference was made by the claimant of an alleged injury he sustained through an accident he had while working for the respondent. He described the claimant's account of such an accident as false and suggested that his back pain was the result of an assault earlier in the year.

Determination

The Tribunal having carefully listened to the evidence that was adduced by both parties, we unanimously find as follows;

There was substantial conflict on dates and factual evidence given as to what actually transpired regarding the alleged accident at work, and dates of meetings of the parties to discuss the work situation, work done, and hours of work.
The claim proffered was one of constructive dismissal in circumstances where the Claimant put forward the case that, when he realised that he was not an insured employee for the purpose of obtaining social welfare in the nature of sick pay, he was left with no option but to leave his employment.

The Respondent accepts the Claimant was not insured accordingly. He alleges that, at a meeting on the 17th of August 2010 at the back of a hotel, the Respondent paid monies owned to the Applicant, and this was the sole purpose of the meeting. He claims thereafter he did not come back to work. He further claims he rang the Claimant to come back to work. The date of this meeting was not contested by the Claimant.

The Tribunal finds that the Claimant did not tender sufficient evidence to satisfy the Tribunal that he was left with no option but to leave his employment due to the fact that he was not appropriately insured subsequent to an alleged accident which the Claimant says occurred on the 20th of August 2010.

Therefore the claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

Since this was a case of alleged constructive dismissal the appeal under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 must fall.

The appeal under the Organisation of Working Time Act, 1997 falls for want of prosecution.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)