

## EMPLOYMENT APPEALS TRIBUNAL

APPEALS OF:  
EMPLOYEE

*-appellant*

CASE NO.  
UD129/2012  
TE17/2012

against the recommendation of the Rights Commissioner in the case of:

EMPLOYER *-respondent*

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2007 TERMS OF EMPLOYMENT (INFORMATION) ACT, 1994 AND 2001

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr. D. Mac Carthy S. C.

Members: Mr R. Murphy  
Mr. P. Woods

heard this appeal at Dublin on 17th May 2013

#### **Representation:**

\_\_\_\_\_

Appellant:

Respondent: No appearance or representation on behalf of the respondent

This case came before the Tribunal by way of an employee appeal of the Rights Commissioner Recommendations **ref: r-111808-ud-11/RG** under the Unfair Dismissals Acts 1977 to 2007 and **ref: r111809-te-11/RG** under the Terms of Employment (Information) Act, 1994 and 2001.

#### **Appellant's Case**

The appellant was employed by the respondent for a significant number of years until he was made redundant in April 2009. He received all his statutory entitlements at that time. The appellant was re-employed on the 16<sup>th</sup> of June 2009 until he was placed on lay-off on the 26<sup>th</sup> of April 2010. He remained on lay-off until August 2010 where he was recalled to work for one week. The respondent instructed him that they would contact him when more work became available. The appellant was not contacted again by the respondent and he did not attempt to contact the respondent. The appellant was aware that other staff members in the same situation were contacted to return to work.

The appellant's representative maintains that the onus is on the respondent to have a fair system of re-calling staff from lay-off. The appellant's representative further maintains that 'if you are overlooked for re-employment when others are recalled, without knowing the reason, then it's

effectively an unfair dismissal.’ The appellant is claiming that he was constructively dismissed by being overlooked for re-employment. The appellant has not resigned from his employment and as such does not have a date of dismissal.

The appellant did not receive any Terms and Conditions of Employment when he was re-employed in June 2009. His appeal of the Rights Commission Recommendation is on quantum only.

### **Determination**

The Tribunal is satisfied that the respondent is properly on notice of this hearing.

A Constructive Dismissal as defined by Sec 1(b) of the Act is,

*‘the termination by the employee of his contract of employment with his employer, whether prior notice of the termination was or was not given to the employer, in circumstances in which, because of the conduct of the employer, the employee was or would have been entitled, or it was or would have been reasonable for the employee, to terminate the contract of employment without giving prior notice of the termination to the employer, or’.*

In this case the employer’s ‘conduct’ in question is failure to re-employ the appellant. The appellant’s representative argued that ‘if you are overlooked for re-employment when others are recalled, without knowing the reason, then it’s effectively an unfair dismissal.’ The Tribunal does not accept this argument and follows the dictum of the first chairman of the Tribunal, Mr John Gleeson who said, “a Contract of Employment cannot be terminated by a mere mental process in the minds of one of the parties.” There must be communication of some kind from one party to another to bring the contract to an end. The appellant waited, he made no contact with the respondent. There was therefore no resignation as would fall within the definition of Constructive Dismissal as above.

The Tribunal finds that the claim under the Unfair Dismissals Acts, 1977 to 2007 fails and accordingly upholds the recommendation of the Rights Commissioner **ref: r-111808-ud-11/RG.**

Having regard to all the circumstances the Tribunal find that the award made by the Rights Commissioner under the Terms of Employment (Information) Act, 1994 and 2001 is just and equitable. The Tribunal affirms that recommendation **ref: r111809-te-11/RG** to award the appellant €500.00 as compensation.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)