

**EMPLOYMENT APPEALS TRIBUNAL**

CLAIMS OF:  
Employee

CASE NO.  
UD503/2005  
MN374/2005  
WT139/2005

against

Employer

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2001  
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001  
ORGANISATION OF WORKING TIME ACT, 1997**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr J Flanagan BL

Members: Mr F Cunneen  
Ms M Maher

heard these claims in Dublin on 20<sup>th</sup> September 2005  
and 8<sup>th</sup> February 2006  
and 31<sup>st</sup> May 2006

Representation:

Claimant: Mr Justin McQuade BL instructed by FH O'Reilly  
& Co., Solicitors, The Red Church, North Circular Road, Dublin 7

Respondent: Mr John Cheatle BL instructed by Michael J Kennedy  
& Co., Solicitors, The Parochial House, Baldoyle, Dublin 13

The determination of the Tribunal was as follows:

At the commencement of the hearing the claimant withdrew her claims under the Minimum Notice and Terms of Employment Acts, 1973 to 2001, and the Organisation of Working Time Act, 1997.

**Claimant's case:**

At the date of the hearing the claimant was in her fifties and married with three children. At the age of sixteen, and after obtaining her Intermediate Certificate, the claimant left school to take up a clerical position. The claimant had married at twenty years of age whereupon she gave up paid employment to work in the home.

On 21<sup>st</sup> August 1990 the claimant went back to paid work for the first time since the birth of her children. Her duties were clerical in nature. The claimant returned to work on a back-to-work scheme. At first the claimant worked for two days per week and then later for three days a week until her employment ended on 5<sup>th</sup> November 2004 after over fourteen years of service.

On 28<sup>th</sup> October 2004 the claimant experienced an intolerable smell at the offices of the respondent. The claimant and her colleagues had to go out for fresh air. The stench became so intolerable that it was almost impossible to work there. The smell came from the office of the manager of the respondent. The claimant believed that the smell was being caused by a dead rat. The claimant's office was adjacent to that of the manager. Despite complaints being made nothing was done.

On 5<sup>th</sup> November 2004 there was an outburst from the manager. As a result of this outburst the claimant felt that she could not return to the workplace. The claimant went home and has not worked since.

Subsequently, the manager sent the claimant a letter dated 9<sup>th</sup> November 2004, which was not on headed paper, but which contained the following:

*"I wish to express my sincere apology for my behaviour last Friday. I have no explanation for what came over me at that time but I know it was completely over the top. I hope you will accept this apology in the manner it is sent and I can assure you it will never happen again."*

Copies of the above apology were furnished to the Tribunal.

In her testimony to the Tribunal, the claimant said that on Thursday, 28<sup>th</sup> October 2004, she had commented on the smell to her female colleague. Her female colleague also thought the smell unpleasant. They told the son of the manager, who was also their co-worker, about the smell. The son asked if there was any air freshener available. As there was none the son went to a shop to get some. The son knew that there really was a smell. He returned with furniture polish instead and sprayed it around in an attempt to disguise the smell. The smell was terrible and remained so on Friday, 29<sup>th</sup> October 2004. It was horrible and very unpleasant. People were coughing because of the spray. On that Friday the claimant brought in with her to work some air freshener from her own home. The smell was nauseating. The ventilation in the room was very bad. The window could only be opened about one inch. There was no window in the office of the manager, it had been blocked up. There were only double doors, which opened out onto the claimant's area. When the claimant mentioned the smell to the manager he replied that he could not smell anything. After lunch the smell seemed even stronger. The claimant told the respondent's warehouse operative about the odour. They thought the smell was coming from behind a cabinet. When she told the manager he said that it must be only chip papers because they had just eaten chips. There was no fresh air in the room. It was a very nauseating and a very unpleasant environment in which to work.

The October bank holiday weekend followed. As the claimant had worked a three-day week her next working day was Wednesday, 3<sup>rd</sup> November 2004. The claimant and her female colleague were in the office. The doors to the manager's office were closed. Her female colleague said that the doors of the manager's office had been closed on Tuesday, 2<sup>nd</sup> November 2004 because of

the smell and that the manager had not been able to work in his office. The manager was now working from another office at the back of the warehouse. The claimant and her female colleague were working from an office that was attached to the manager's office. To no avail they pleaded that something be done. The manager and his son more or less 'blanked' them. The manager's son had an office at the back of the warehouse. When asked if the son had been the second-in-command at the business premises, the claimant replied that the son "...often wrote a cheque."

On Wednesday, 3<sup>rd</sup> November 2004, the claimant and her female colleague had to leave several times to get fresh air. The claimant had not eaten before work so that she would not get sick. The air smelled stale and filthy. The warehouse operative came in to the office and ran out because of the smell. The claimant and her female colleague were constantly having headaches and feelings of nausea. The claimant told the manager that she thought the smell was disgusting.

On the morning of Thursday, 4<sup>th</sup> November 2004, the smell was just as bad. The claimant sprayed some air freshener. That only made things worse. The manager came from the back office to get something from his office. When the claimant mentioned the smell to him he said that it was not that bad. The claimant felt that she would be sick. She and her female colleague ran to the door. The manager returned to the office at the back of the warehouse.

The manager's son came up to use the photocopier in the office. He said to make sure that he did something about the smell. Later on that day, the manager's son said that his father would do something. The claimant knew it was a dead rat. The respondent had had that problem before, but this time it was worse. The manager's son said that he thought that there was a dead rat behind the radiator. The manager went out to a shop and bought a white elastic facemask which he wore. However nothing was found behind the radiator. He said that he would return to the shop. Some wooden slats had been missing from the manager's office. He said he would buy slats to block it up. The claimant and her female colleague said that would not solve the problem and would not take away the smell. Then the manager made reference to throwing a butt of an apple in a bin and that when it rotted the smell would go away. He did not buy the slats but instead returned to the back of the warehouse. He did nothing else to solve the problem.

On Friday, 5<sup>th</sup> November 2004, the place was stinking and totally nauseating. Early on that Friday, the manager went into his office and the door was opened. The claimant told him that the smell was disgusting. She ran out to get some air. She stood at the door. The manager said that surely the smell could not have been that bad. The claimant gave evidence that it was impractical to ventilate her work area by leaving the door open as there had been a security problem and as the traffic noise would prevent people hearing what was being said on the telephones.

Later on that day the manager's son came into the office. Upon being asked if he could do anything about the odour, he said that he was sick of asking his father but that he would ask his father again anyway. The claimant and her female colleague said to him that if nothing was done they would have to go home as they could not work in such conditions. The manager's son said that he would not put up with those conditions either.

A few minutes later, while the claimant was at her desk doing invoices, the door flew open and the manager burst in. The manager came and stood at the end of the claimant's desk. He was hanging over the desk and waving his hands. He said, "*What are you threatening me for? Go home if you can't work with the smell. Go f\*\*\*\*\* home!*" The manager further said that he and his son could manage without them.

The claimant replied to the manager and said, *“What are you talking about threatening? I haven’t been speaking to you.”*

Her female colleague then added that it was not just the claimant alone complaining about the smell but that it was both herself and the claimant. The manager then said: *“What do you want me to f\*\*\*\*\* do?”* He was shouting and waving his hands and asked, *“What would you do?”*

The claimant then said, *“There’s something you can do. You are the boss. You should be able to do something.”* She added that she resented the way the manager was speaking to her. In a very sarcastic tone he replied, *“I resent the way I’m speaking to you but what would you do? What would you f\*\*\*\*\* do?”* The claimant replied that she would contact the landlord of the premises in which the respondent was a tenant or a pest control firm.

Prior to this, the manager pointed his finger at her female colleague and said that he was waiting for a day that she, the claimant’s female colleague, would not be there so that he could use a spray or get sprayers in. He was very aggressive and intimidating and used a lot of bad language.

The manager said that the pest control firm would have to take the panelling off the wall in order to solve the problem. He said to the claimant that *“You come out with some sh\*\*\* sometimes.”* He then went out, slamming the door, and went back to the warehouse. The claimant was shaking. She and her female colleague were crying. The manager’s son then came into the office and asked what his father had said. He said that his father had no business speaking to them in that way. The son said that he had told his father all that week to get the problem solved. The manager’s son told the claimant and her female colleague to go home and that if they stayed the manager would never fix the problem.

The claimant was turning back to the typewriter. The manager had come back and slammed the door and gone back to the warehouse. The claimant could hear shouting.

The manager came back to the office. The claimant and her female colleague were sobbing at this stage. He said that they should see his son if they wanted anything and that he, that is the manager, was *“... out of here.”* The manager then slammed the door and went back to the warehouse.

The claimant accepted that she was going back on her story and adding elements. She stated that she was doing so as she recalled the various details of what had happened and that her evidence to the Tribunal was not being given entirely in chronological sequence.

The manager’s son came back into the office and said to them *“Listen girls! Just go home!”* He said that, if the manager were not his father, he *“... would have boxed the head off him.”* The manager’s son said that he had told his father all week to get the problem solved and that his father was not solving problems but causing them. The claimant was in tears, shaking and shocked and gave evidence that she *“... was totally demoralised by this man.”* The claimant told the Tribunal that she felt verbally abused. In her view the manager had *“... directed all his anger”* at her. The claimant gave in evidence that she *“... never had to endure anything like that before”* and that her husband was *“... a gentleman.”*

At this point in the hearing, the claimant stated that back in 1996 she had been out of work for a period of six weeks for medical reasons. The claimant had furnished her employer with medical certificates in respect of her absence. Upon her return to work the manager said that she had nearly

caused his son a nervous breakdown from coping with all the work. The manager had not spoken to her for weeks after her return. He had accused her of taking wages for a week that she had not worked. Subsequently, his son apologised to her but the claimant replied that it was his father who should have apologised. His son said that *"You know what that man is like. He apologises to nobody."*

On 5<sup>th</sup> November 2004 the manager's son came back to the office and told the claimant and her female colleague to go home. The claimant told the manager's son that he could take her notice because she could not work with *"... that man ..."* any more. Her female colleague said to the claimant that she did not mean it. The claimant said that she did. The manager's son said, *"Okay."* The manager was not in that afternoon. No contract of employment in writing had been furnished to the employee. No grievance procedure had been put in place. The respondent himself only came to Ireland a couple of times per year. The claimant said that the respondent was *"... very nice."*

On 9<sup>th</sup> November 2004 the claimant presented herself to a medical practitioner. The medical report was accepted into evidence. The claimant told her medical practitioner that the smell at work and her ensuing interaction with the manager had culminated in the claimant giving her notice. The report said that, on the day of the initial consultation, the claimant *"...was understandably very upset over the entire incident. She appeared very uptight and weepy. Her blood pressure was elevated..."* The doctor had prescribed an anxiolytic to be taken three times daily as required.

The claimant re-attended the doctor on 24<sup>th</sup> November 2004 for a follow-up examination. The doctor reported that: *"On that occasion she complained of panic attacks since the above incident. She was not sleeping well. She continued to be feeling very upset. Her appetite was poor at times. She had no interest in going out. She was feeling depressed. There was no motivation."* The doctor had referred the claimant to a psychoanalyst for counselling and that, in the doctor's opinion, the claimant appeared to be *"...suffering with symptoms consistent with post-traumatic stress disorder. She should respond in the long-term to intensive counseling (sic)."*

Resuming her evidence to the Tribunal, the claimant said that her doctor told her to take the medication sparingly as he did not want her to get addicted. She had had no history of panic attacks. She went for five sessions of the abovementioned counselling at €50.00 per session. As recently as September 2005 her doctor had given her a further prescription. She kept *"...reliving the horror of that day."* She had no respect for the manager *"...after what he did."* She had to take medication if she got a panic attack.

Regarding correspondence sent to her by the manager, the claimant said that when she saw his handwriting, she *"...just shook..."* and *"...broke down..."* and that no-one asked her to go back to the respondent.

On 23<sup>rd</sup> November 2004 the claimant received a message on her home telephone from the manager's son. In his message he said that he was sorry that he had missed her and that he would call her the next day. However he did not do so.

Then on *"Thursday 2<sup>nd</sup> December (sic)"* at 11.50am another message was left on the claimant's telephone. The manager's son left his mobile number and asked the claimant to ring him. She could not ring him until that evening. She left a fifteen-second message for the manager's son saying that she was sorry that she had missed him and asking if he could call her back.

The manager's son drove the warehouse operative to the claimant's house. The warehouse operative hand delivered a letter dated 2<sup>nd</sup> December 2004 from the manager's son to the claimant. The claimant was at home at the time but they did not knock. The claimant's son saw them drive off. In the letter the manager's son wrote that "... I have contacted your house twice with no success. I need to speak to you as soon as you can in order to bring closure to this situation. Its (sic) now four weeks since the incident here so you can understand my situation here...."

The claimant told the Tribunal that she had great respect for the manager's son. On 8<sup>th</sup> December 2004 the manager's son phoned her back and left a message that he would ring that afternoon. He did so. He asked how she was and what the situation was. She replied that she had handed in her notice on 5<sup>th</sup> November 2004 because she could not work with the manager any more. The manager's son said that he fully understood and asked the claimant if she was all right. She replied that she was too upset to talk about it. The manager's son asked if she needed her P60. She asked for her P45 and said that she would appreciate a reference. The manager's son said that it was the least that he could do. She got her P45 on 5<sup>th</sup> January 2005 but she never received a reference.

Asked if she had made attempts to get back to work, the claimant said that she had written applications but had not posted them because she had not felt ready. She was still having panic attacks. In early August 2005 she had answered an advertisement for a clerical post. When it came to going she could not do so. She just had a panic attack. She did not feel she was ready to go back to the workforce. Her doctor told her to keep taking tablets and see how she got on.

During cross-examination of the claimant the witness appeared to be referring to notes which she said she had taken at one point. When asked by the Tribunal to clarify she said the notes to which she was referring had been prepared by her in relation to her request for a pay rise. The Tribunal directed that she submit these notes to the Tribunal at the next hearing date. These notes were never presented to the Tribunal.

A medical consultant gave evidence for the claimant and was then cross-examined. The claimant had been referred to the medical consultant in 2005. He was a member of the Royal College of Psychiatry and a consultant since 1998. The consultant diagnosed the claimant as being moderately depressed. He said that she had explained that she was fearful that she was going to be struck by the manager. Her illness was caused by feeling powerless. He was of the view that it was impossible for her to return to her former employer and that there had been no likelihood of the claimant being able to function in a working environment over the previous twelve months. The medical consultant was asked why the claimant did not accept the manager's apology. The medical consultant explained that the claimant had given two reasons, first that she would panic at the thought of meeting the manager and second that she did not believe the apology to be genuine. The Tribunal asked if it was reasonable for the claimant to disregard the apology. The medical practitioner replied, "*It is not for me to say.*" The medical consultant was of the view that the lack of formality in the apology was unhelpful.

### **Respondent's case**

The Tribunal heard evidence from the manager. He told the Tribunal that he had been manager with the company since 1988. The claimant joined the company in 1990. A mutual friend of theirs had recommended her to him and he had hired her on the basis of that recommendation. The claimant knew his family well and he thought that they had a "...family-like relationship..." and that she was like a "...younger sister..." They had exchanged gifts at birthdays and at Christmas. He had visited her house for tea on two or three occasions.

The witness told the Tribunal that he did not remember ignoring the claimant but that he may have had spats with her. Regarding the claimant's request for a pay rise, he said that he could not give her a rise, as the decision was a matter for the owner. It was totally wrong that he did not speak to her over a period of months. He was possibly cool towards the claimant for a day or two but that *"...life went on."*

In November 2004 there was a large petrol spillage in the building next door to the respondent's building. This spillage seeped through to their building. On the Monday of the week in question he noticed a slight smell. As the week progressed the smell worsened and it was very bad by Friday. The claimant mentioned it to him on Wednesday and he could not close down the business, as it would take a day or two to take down the wall panelling. They did try to locate the mouse and took down some of the panels. He explained *"I told the lads that we would tackle it on Saturday."* He told the claimant this generally and not specifically. On Thursday he moved out of his office and closed the door. He received a complaint on Friday morning from the claimant *"She probably said could you do something about the smell, I said there's nothing I can do about right now."* At the time a truck was to be unloaded that had ninety cartons and another truck had thirty-four cartons. They complained a second time through the manager's son and he told his son to tell them to go home. His son came back to him and said that they were not going and were still complaining. He *"unfortunately blew it"* and *"I used the f word, once, I blew the head, I used words this is a load of s\*\*\*\*."* The claimant then ran for her coat. He then left and did not know whether the claimant was there after he left. He instructed the *"young lad"* and he returned five minutes later. The manager told his son that he was going home so as to defuse the situation.

The manager was asked if he had ever threatened the claimant physically and he explained that *"I would never threaten a man, ever, I would never threaten a woman."* He added *"I was no physical threat; I also did not say anything about her..."* He said, *"The outburst was for about ten or fifteen seconds and I went back to the warehouse to instruct the lad"* apparently referring to his son. The manager told his son that if they, the claimant and her female colleague, were not going to go home then he himself would go home in order to defuse the situation.

When the manager was asked if he apologised to people he said that generally he did not fall out with people, that he felt terrible, and that he was annoyed with himself letting himself down and for insulting the claimant and her female colleague.

The manager and his other son took the panels from the wall on Saturday. The manager's son was also working until 11pm that night. He saw his son the following Monday or Tuesday. He wrote to her female colleague and the claimant. He never heard back from the claimant. Her female colleague phoned him and said that she would be back in one week as she was on holidays. They sat down when she returned. The manager's son made efforts to phone the claimant. He asked his son to contact the claimant to see if they could talk and resolve matters *"...but it was not to be."* He paid her wages for five weeks and he was hoping that she would return. He himself decided to retire because of his age and ill health. He accepted that he had not given the claimant a contract of employment in writing nor had he provided her with a grievance procedure.

During cross-examination he explained that he apologised to the claimant verbally five minutes after the incident and he wrote an apology a couple of days later. He went back once to the building after the incident to apologise, he said he was sorry for what had happened and apologised and said,

*“If you are not going to leave then I will leave to defuse the situation.”*

The claimant's female colleague then gave evidence for the respondent. The witness worked in the administration area with the claimant. She has worked for the respondent for eleven years and knew the claimant since the commencement of her employment with the respondent. The claimant was already working with the respondent when the witness started there. The witness enjoyed her work and there was a family atmosphere. If one needed time off there was no problem and no deduction was made from wages. The witness felt that the claimant got on well at work also. In every job someone gives out. It is a part of the day-to-day running of a business. It appeared that the claimant got on well with the manager and she remembers a few Christmas presents generally.

There was a lingering odour, not a dead mouse smell and it was possible that it was spilled petrol from the motorbike store beside them. The witness worked Monday to Friday and while the smell was bad on the Wednesday it was worse on Thursday. It came to a head on Friday. She complained about the unpleasant smell and the claimant said it to the manager's son. She was not sure of the exact words but the manager had said we could go home if we wanted to. Friday was an extremely busy day and the staff helped each other out. They would never have asked to take a Friday off as they knew how busy it was. The manager did come in shouting and ranting and asking what he could do about the smell. The witness and the claimant sat there for a while and she felt anxious, as she had never seen the manager like this before. It was out of character. The manager told the two staff to go home and while he was still annoyed he was no longer ranting. This all happened before lunch break. The witness did not go home as a task had to be done but she went home around lunchtime. The task was not completed and she thought that the manager's son finished off the work. The witness had asked the claimant if she was okay.

In cross-examination the witness said that the manager had retired since then but that he came in once or twice a week to help out. The witness did not receive a payslip, her salary was paid into the bank and she received a list of the deductions. There were no formal grievance procedures, it was a small business. While there was a smell the previous week it was worse the second week. While the manager got agitated and annoyed she felt it was not directed at the claimant. There was also an outburst between the manager's son and his father. The witness received an apology in writing and she felt it was heartfelt; however she had told him that he did not need to send her one. Personally she did not think that the claimant had to give up. While the manager blew his top he would never raise his hand to any of the staff and she did not feel that he was about to hit the claimant.

In answer to questions from the Tribunal the witness said that the ranting and raving lasted about fifteen seconds and was totally out of character for the manager. The son did use foul language in his conversations and the claimant would have heard the use of foul language but the witness would not be taken aback by such usage.

The son of the manager in his evidence said that he used colourful language. The incident got out of control and the claimant and the last witness were upset at the language. He was as annoyed with his father as the girls were. The girls were good workers. He told the staff to go home and tried to source the smell. He spoke to his father and asked if there was anything he could do. He could not take off the wall panels as they were working in that area and he would have to strip the floor. His father said if the smell was unbearable to tell the staff to go home. His father was very agitated and said he was going home. When witness went to see the staff he could see they were upset. His father and his brother took the panels off the walls. When he saw his father on the Tuesday night he was very depressed and annoyed and said that he would apologise to the girls. The following week the previous witness accepted his apology and was back at work.



The claimant said she was not coming back. Both ladies were very upset. It is a small business and they all knew each other very well. His father and the claimant seemed to get on well. His father had also sent a written apology to the claimant but it was not accepted.

In cross-examination the son said that his father had been ill some years ago and was now retired. The father became depressed. In re-examination the son said that his father was hurt that the claimant did not accept his apology.

In answer to questions from the Tribunal the son said that he had a habit of using bad language but this was not the case with his father.

### **Determination**

The claim under the under the Minimum Notice and Terms of Employment Acts, 1973 to 2001 was withdrawn.

The claim under the Organisation of Working Time Act, 1997 was withdrawn.

The claim made before the Tribunal under the Unfair Dismissals Acts, 1977 to 2001 is one of constructive dismissal. The claimant alleged that an extremely unpleasant odour emanated from an office adjacent to her workstation and that her employer failed to provide the claimant with a tolerable working environment. The claimant repeatedly requested that something be done about the odour. The claimant alleged that the ultimate response of her manager to her requests was so inappropriate as to constitute circumstances which entitled or made it reasonable for the employee to terminate her contract of employment.

It was common case that a very unpleasant odour was present in the environment in which the claimant was required to work. The claimant made it quite clear in her evidence that she was convinced that the cause of the malodour was a dead rat, for the respondent it was suggested that the more probable cause was a spillage of fuel from an adjacent premises, although steps were taken to search for what the respondent preferred to describe as a mouse. It is common case that the two employees most affected brought the matter to the attention of the management and requested that steps be taken to ameliorate their working environment. It is also common case that such steps as were taken were unsuccessful and that other steps which could have been taken were either not taken or not taken immediately. For the respondent a variety of reasons were put forward to justify the failure to take certain steps at all and the postponement of others. The Tribunal is satisfied that it is wholly unnecessary for it to decide as to what caused the odour or whether the respondent was justified in failing to remove the odour immediately. An employee is entitled to be provided with a tolerable working environment. Where it is brought to the notice of an employer that its employees are being required to work in an environment which those employees reasonably regard as intolerable then the employer has a number of options whereby the issue may be resolved without precipitating a constructive dismissal situation. The employer may ameliorate the environment, or obtain the employees consents to tolerate that environment or dispense with the requirement that the employees affected work in that environment. The Tribunal is satisfied that by reason of the odour, howsoever caused, the claimant was required to work in an environment which the claimant reasonably regarded as intolerable. The Tribunal is also satisfied that the matter was adequately brought to the notice of the respondent. The Tribunal is satisfied that, notwithstanding the attempts made, the respondent failed to ameliorate the working environment. The Tribunal is also satisfied that, notwithstanding the respondent's attempts to persuade the claimant to tolerate that environment for a further period, the claimant's consent was not forthcoming. Ultimately the

respondent resolved the situation by dispensing with the requirement that the claimant work in an intolerable environment by sending her home. Therefore the Tribunal finds that the respondent did not constructively dismiss the claimant by reason of a requirement that the claimant continue to work in such conditions.

It is the claimant's case that it was in response to the outburst of the manager that the claimant gave what she described as her notice on Friday, 5<sup>th</sup> November 2004. The claimant had worked a three-day week, from Wednesday to Friday. The claimant never returned to work after the day on which she stated that she was giving in her notice. It was common case that the claimant was sent home on the Friday in question. Evidence was given by the claimant that nobody asked her to return to work. The Tribunal has heard evidence that the claimant was paid for a further period of some five weeks thereafter. It was common case that efforts were made by the respondent to make contact with the claimant. The claimant gave evidence that she had told her employer that the respondent could take her notice on 5<sup>th</sup> November 2004 because she could not work with the manager any longer. The Tribunal finds that the termination of employment was otherwise than on notice, as the claimant had clearly expressed what was in effect an intention not to work out her notice, nor is it reasonable to infer that the respondent had released the claimant from an obligation to attend at the respondent's premises for the entire notice period.

In industrial terms harassment and bullying are used as synonyms and it is well established that in order to support a finding of bullying or harassment the behaviour must be constituted by more than one incident. The Tribunal finds that the misconduct of the respondent amounted to a single incident.

It was common case that no formal grievance procedure had been made implemented. However the respondent's manager was well aware of the incident since he was the perpetrator of it and from his subsequent behaviour it is clear that the manager sought to address the obvious grievance that arose from his misbehaviour such that the absence of a formal grievance procedure is not determinative of this case.

The Tribunal finds that the manager engaged in a verbal outburst on 5<sup>th</sup> November 2004 and that his outburst constituted a single incident of misconduct. In their evidence to the Tribunal the parties presented different versions of the events as they occurred on 5<sup>th</sup> November 2004. It is unnecessary for the Tribunal to resolve every detail. The Tribunal finds that the misconduct was verbal in nature and consisted of the use of coarse language over a short period of time.

The Tribunal is satisfied that the manager apologised verbally very soon thereafter and apologised in writing dated Tuesday 9<sup>th</sup> November 2004. The claimant chose not to accept the apology. The claimant stated that she did not regard the apology as being sincere because it was not typed and because it was not on written headed paper. The medical consultant was of the view that the lack of formality in the apology was unhelpful. The Tribunal is aware that traditionally it is considered better etiquette to correspond in manuscript in respect of personal matters. The Tribunal is satisfied that there is nothing untoward in the form of the written apology and that the specifications of the claimant as to the appropriate form are, in this day and age, eccentric even if they were not, as they are, wrongheaded. The respondent was never advised by the claimant as to her requirements for the acceptable form which the written apology ought to take. The Tribunal is of the view that the requirements of the claimant are more in the nature of a pretext to justify the non-acceptance of the manager's apology. It was common case that no incident of this nature had occurred between the claimant and her manager in eleven years of employment, and this fact appears to have been unreasonably disregarded by the claimant in assessing the sincerity of

the manager's assurance that the incident would not recur. The claimant failed to have proper regard to the payment of her wages for a period of approximately five weeks while she remained at home in assessing both the sincerity of the manager's apology and the willingness of the respondent to atone for the wrong done to her.

The Tribunal finds that the subsequent response of her manager to the incident was such that in the totality of events circumstances did not pertain which entitled or made it reasonable for the employee to terminate her contract of employment.

For the claimant it was submitted that since the only medical evidence before the Tribunal was presented on behalf of the claimant, and since the evidence was to the effect that an incident with the manager had caused a psychic injury to the claimant such that she could no longer work, then the Tribunal was obliged to find that the respondent had caused the incapacity and that a finding of constructive dismissal must follow, and the case of *Allen –v- Independent Newspapers (Ireland) Ltd.* UD641/2000 was opened to the Tribunal. The Tribunal explicitly rejects this argument. It is well settled that expert evidence may not be advanced that purports to determine the final issue. The Tribunal has a statutory duty to determine certain matters and to take the approach urged upon it would involve the abrogation of its statutory duty. Alternatively, were the Tribunal to allow the question as to whether any injury was caused to the claimant by the respondent to be decided by the medical experts then the Tribunal would have delegated its statutory function without statutory authorisation contrary to the principle *delegatus non potest delegare*.

The medical evidence presented to the Tribunal on behalf of the claimant comes from two sources, a general medical practitioner and a consultant medical practitioner. The consultant diagnosed the claimant as being moderately depressed. The consultant said that she had explained that she had been fearful that she was going to be struck by the manager. He was of the opinion that the ensuing feelings of powerlessness caused her illness, which was of moderate depression. However in her first encounter with the medical profession there was no report of fearing that she was about to be struck by the manager, the claimant reported to her general practitioner an incident with the manager involving shouting, roaring and abusive language and no mention of any kind of threat of violence. The manager denies in his evidence that he manifested any physical threat to the claimant and the Tribunal prefers the evidence of the manager.

Having carefully considered all relevant factors, the Tribunal finds that the claimant is a less than fully credible witness. The Tribunal has carefully noted the manner in which the evidence was given and the demeanour of the witness. It further appears to the Tribunal that the claimant was adding in new details as they might seem to enhance her claim. For example, it was initially represented to the Tribunal that the manager used bad language only in the one brief and shocking outburst, but as the claimant proceeded to describe the day the f-word appears more frequently in the discourse of the manager as described by the claimant. The Tribunal has already noted *supra* that a claim of physical menace was made for the first time long after the first medical attendance. The claimant appeared to be relying on notes when answering questions under cross-examination. When asked about the notes, the witness claimed that the notes were a diary of her attempts to obtain a pay increase. Despite being directed by the Tribunal to do so, copies of these notes were never furnished to the Tribunal or the respondent, such that the actual contents of these could not be verified. The claimant made much of the shocking effect upon her of hearing what she described as obscenities the like of which she had never heard in her life. The Tribunal finds it incredible that a woman of her maturity and life experience and who had spent the previous eleven years working in a warehouse could have avoided encountering the two words used by her

manager. The manager's son admitted that he habitually engaged in the casual use of bad language and this admission was corroborated by the female colleague of the claimant and the Tribunal is satisfied that the claimant would already have heard these two words from at least that particular source.

The Tribunal finds that the manager uttered the sentences "*This is a load of s\*\*\*\*. There is nothing I can f\*\*\*\*\* do.*" The claimant said in her evidence to the Tribunal that "*I keep reliving the horror of that day.*" She also said of the incident with the manager that "*He totally degraded me and destroyed my confidence.*" The Tribunal considers the reaction of claimant to be exaggerated and disproportionate to the offence.

In the course of the case it emerged that the claimant harboured a strong sense of grievance against her manager, and one wholly unrelated to the incident complained of in this case, but caused by his failure to obtain for her any pay increase as sought by her over a prolonged period of time. The Tribunal is satisfied that the unwillingness of the claimant to return to work was motivated, to a significant degree, by the underlying sense of grievance over her pay claim.

The Tribunal notes the opinion of the consultant medical practitioner, as set forth in the ultimate paragraph of his medical report, which states that assuming a "*...satisfactory outcome to the current Employment Appeals Tribunal proceedings, coupled with an adequate acknowledgement of the distress and trauma that she suffered...*" the claimant "*...should make an eventual good recovery from her current illness.*" The Tribunal is concerned that symptoms which can be cured by an adequate acknowledgement of the distress and trauma can, at least in part, be caused by the prospect of an adequate acknowledgement of the distress and trauma.

The Tribunal finds that the manager treated the claimant in an inappropriate manner and one that falls far short of the standards to which an employee is entitled. The respondent has, through the near immediate issuing of a verbal apology by the manager to the claimant, and by the further issuing of a written apology some days later, recognised the distress and trauma caused to the claimant. The respondent has paid the claimant for a period of approximately five weeks after she quit work and this action can be regarded as a sincere and tangible acknowledgement by the respondent of her distress and of her value to the business. Furthermore, the manager has apologised on oath to the claimant.

The Tribunal finds that the respondent addressed the legitimate grievance of the claimant in such a manner that circumstances did not exist at the material time to support a finding of constructive dismissal.

The claim under the Unfair Dismissals Acts, 1977 to 2001 therefore fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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