

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
Employee

CASE NO.
UD469/2007

against
Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. P. Quinn BL

Members: Mr. J. Redmond
Mr. T. Kennelly

heard this claim at Galway on 7th July 2008
and 4th February 2009
and 5th February 2009

Representation:

Claimant(s) : Mr. Greg Nolan, Solicitor, Patrick Hogan & Co., Dunlo Street,
Ballinasloe, Co. Galway

Respondent(s) : Mr. David Farrell, IR/HR Executive, IBEC, Confederation
House, 84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:-

In this case, the fact of a dismissal of the Claimant from his employment with the Respondent was an issue. At the outset of the hearing on the 7th July 2008, Mr. Farrell, the Respondent's representative, raised a preliminary issue as to the jurisdiction of the Tribunal to hear and determine the claim on the basis that, as at the date of submission of the Form T1A to the Tribunal on the 11th May 2007, the Claimant remained an employee of the Respondent and ultimately ceased his employment with it in July 2007, there having been no dismissal of the Claimant on the 28th March 2007, either constructively as alleged, or otherwise.

Having heard the submission of Mr. Nolan in reply, it was apparent to the Tribunal, that apart from agreement as to the date of submission of the Form T1A to the Tribunal being the 11th May 2007, there was no consensus in relation to the other matters which remained in issue and in order for the Tribunal to determine the application, it was necessary to proceed to hear the evidence of the parties.

The Respondent is a provider of environmental, waste management and recycling solutions and its range of services includes the development and maintenance of facilities for the disposal of waste.

The Claimant commenced employment with the Respondent on the 12th December 2005 as a General Operative at its East Galway Connaught Regional Residual Landfill Facility, situated at Kilconnell, Ballinasloe, in the County of Galway and was in receipt of gross weekly wage of the order of €598.50 for a standard working week of 39 hours, Monday to Saturday.

The Claimant's contract of employment made provision for the payment by the Respondent to its employees of sick pay on certain terms and also contained a contractual notice period of a minimum of one month.

At or about the commencement of his employment and throughout the currency of it, the Claimant was provided with a handbook by the Respondent and he underwent training, instruction and induction, in a variety of fields, and was made aware of the Respondent's Human Resources division, as well as its Complaints and Grievance Procedures.

It appears that the Claimant's duties essentially involved maintaining the general area, preserving the integrity of the perimeter fencing and exercising vigilance against unauthorised dumping of materials.

The Claimant's case as appears from his Form T1A is that his employment with the Respondent ended on the 28th March 2007, by which time his position with the Respondent had become untenable as a result of a course of conduct displayed by the Site Supervisor towards him.

The Claimant testified that at the outset he was content in his employment with the Respondent and had developed a good relationship with the Manager of the Facility at the time, a Mr. J.J.

In or about Autumn 2006, J.J. obtained an alternative position with the Respondent and relocated to Wicklow, to be replaced at the Kilconnell premises by a Mr. T.J. The Claimant alleges that from in or about this time onwards the environment of the workplace deteriorated for him.

The Claimant testified that throughout this period of time, he considered the Site Supervisor, Mr. D.M., to be intimidating, dismissive of his presence, ignorant of him, offensive and verbally abusive of him. The Claimant testified that he felt degraded by this treatment, which he considered inexplicable.

It is to be noted however that the commencement of this alleged deterioration also coincided with an unsuccessful application by the Claimant for the position of a weighbridge operator at the premises. In this regard, it appears that the Respondent's Manager considered that the Claimant was not sufficiently qualified or competent to undertake the tasks involved in that role, notwithstanding the Claimant's assessment of his suitability for the position, having undergone some training by the Respondent

in that regard at the commencement of his employment.

By his own admission, the Claimant was annoyed by this and he also perceived that he was denied other opportunities for advancement with the Respondent that were afforded to others. It is also to be acknowledged that the position of Weighbridge Operator primarily involves static duties at an indoor workstation, whereby the operative is not exposed to the elements.

D.M. on behalf of the Respondent testified that his relationship with the Claimant when he commenced employment from December 2005 onwards was very good and that initially the Respondent was an enthusiastic employee. He considered that after a period he detected noticeable changes in the Claimant's mood and testified as to the Claimant's cheeriness, being contrasted with long periods of sullenness, during which the Claimant would not engage with other colleagues at all. D.M. expressed an opinion that once the Claimant did not obtain the position of weighbridge operator, he became "*a more awkward employee.*"

The Claimant testified as to a number of incidents that occurred in his course of his employment culminating with the events of the late March 2007, being the last occasion at which he attended at the Respondent's premises.

In the course of evidence, the Respondent introduced diary entries of the Respondent's Supervisor which were of assistance to the Tribunal principally in determining the precise chronology of the incidents as complained of by the Claimant, a number of which were in fact established occurred some time prior to September/October 2006

Needless to say, the Respondent's recollection of some of these incidents was not at all as harrowing as that portrayed in evidence by the Claimant.

For example, the Claimant testified that in or about November 2006, he passed Mr. T.J. by, as he, the Claimant was departing on his lunch break. On his return in the afternoon, the Claimant described that T.J. and D.M. approached in a jeep and accosted him, with T.J. asking why the Claimant hadn't saluted him earlier and D.M. remarking whether there was something wrong with the Claimant's hands.

In response, the Claimant testified that there was a smart exchange between the parties, whereby the Claimant held up his hands and asked T.J. why he had not saluted him. As regards this incident the Claimant testified that he was very surprised to have been approached in this fashion, that he was very angry and rather upset.

D.M. for his part testified that he had no recollection of this incident at all, until he had heard it recounted by the Claimant in the manner described. He considered it a thing of nothing and an illustration of the Claimant's sullenness on occasions, during which he would he would not engage with other colleagues.

In addition, the Claimant testified that he took serious issue with having been requested to put on the kettle and to clean the canteen. The Claimant testified that he was not going to be a dishcloth for anyone. In cross-examination on this issue, the Claimant stated it was not part of his job specifications to put on the kettle. The

Claimant noted that on the occasion in question, which appears to have been August 2006, the sink was full of dishes, whereas on any occasion that the Claimant made use of crockery and utensils he washed them after use. The Claimant remarked that the others were old enough to clean up after themselves and that he was not prepared after having come in off the bank to clean the canteen.

D.M. for his part testified that he did not recollect this encounter particularly well, but observed that the Claimant must not have been doing anything else, for him to be requested to undertake this task in the first place. D.M. testified that he couldn't recollect what the Claimant did following his refusal, but that he D.M. put on the kettle himself.

The Claimant also testified that he was made by D.M. to undertake what he perceived to be impossible tasks. This was denied by D.M. In addition, on behalf of the Respondent, both D.M. and J.F. were insistent that D.M. did not assign the Claimant to undertake impossible tasks and that D.M. would never ask employees to undertake something that he was not prepared to do himself. In cross-examination, the Claimant conceded that perhaps D.M. might have undertaken as many of the unpleasant tasks on site as he had to, but not in the Claimant's presence.

In this regard, having heard the evidence from both sides in relation to particular tasks at issue, the Tribunal was not satisfied on the balance of probabilities, that the Claimant was required by D. M. to undertake objectively impossible tasks, notwithstanding the Claimant's subjective perception of same.

The Claimant also testified as to particular incidents when he was subjected to verbal abuse by D.M. In particular, the Claimant recounted how, on a date unidentified to the Tribunal, when pipes were being laid from the landfill to a flame burner, D.M. had asked him to procure a knife from a digger. On the Claimant's account he merely sought clarification from D.M. as to the location of the implement and was met with considerable verbal abuse in riposte. The Claimant maintained that, had he been told of the precise location of the knife he would have retrieved it, but having been subjected to foul and abusive language decided to avail of a tea break instead, whereupon D.M. allegedly caught him in an arm lock and apologised for shouting at him.

In response, D.M. testified that he and the Claimant were involved in the laying of piped horizontal drains for a system of collecting gas and were on about the third day of this task. From the outset, this project entailed covering the pipes with a membrane. This required use of a knife and in the course of the work, the knife was misplaced. As a result of this, instructions were given to the employees to preserve the knife when not in use, on the floor of a digger in immediate proximity to the drains.

D.M. testified how having requested the Claimant to retrieve the knife, he proceeded to approach a digger which was approximately one hundred yards away. D.M. admitted that he shouted abuse at the Claimant on this occasion, but that in so far as an arm lock was alleged, he placed his arm on the Claimant's shoulder by way of reconciliation and apologised immediately, when he observed the Claimant taking offence at his response.

Other instances of verbal abuse were recounted by the Claimant, one in particular concerned an incident involving a burst tyre on a tractor, which the Tribunal does not propose to dwell on to any significant degree, as it occurred on the 26th March 2006, some months prior to the alleged commencement of the bullying and intimidation at work allegedly encountered by the Claimant and emanating from D.M.

On another occasion, on a date again unidentified to the Tribunal, the Claimant testified that a lorry which had travelled from Sligo had arrived at the facility and encountered the Claimant at the wheel wash, where he had engaged the driver in conversation, that D.M. had appeared and remonstrated in a robust fashion with the Claimant about finding some work to do for himself. D.M. for his part testified that the Claimant had to be prohibited from conversing with drivers such was his propensity for doing so, as complaints had allegedly been received from customers that their vehicles were being detained unduly at the facility.

7th December 2006

The Claimant's working day commenced at 8am and normally concluded by 5.30 pm. On this occasion, the Claimant testified that on a wet breezy day, after the departure of another employee he had to remain on site, standing in the dark without any illumination, on uneven ground amongst contaminated water, for the purpose of replacing covers on the landfill, as other employees including D.M. passed him by without a flicker of acknowledgement or recognition.

It was the Claimant's understanding that a digger was to attend on him. The Claimant testified that he waited on his own to no avail until 5.45pm, when the vehicle returned and commenced loading materials. He then learned that from the driver of the machine that in all likelihood they would be there for some time undertaking this task.

The Claimant described how he felt humiliated and that he left the site, shocked, cold and perished that evening and had to avail of a bath to get the life back into himself. He became upset, as he perceived that he was being ignored and was not being informed as to what was happening on site.

Although the Tribunal accepts that the Claimant might honestly have held such a perception or feelings, the Tribunal is not satisfied that an objective justification for same, or for his departure from the site was warranted, having regard to all of the circumstances surrounding this episode and the nature of the work involved on the occasion in question.

The evidence of the Respondent as outlined by Mr. J.F., to which reference is made below, was that the Claimant left the premises without covering the site, never informing anybody of his departure and left others to undertake the operation.

After this event, it is common case that the Claimant did not return to work for a period. It is equally common case that the Claimant did not communicate to the Respondent of the reason for his absence.

On the 22nd December 2006, the Respondent's Manager, Mr. T.J. visited the Claimant at his residence to inquire as to the Claimant's non-attendance at work.

As Mr. T.J. did not testify before the Tribunal, the uncontroverted testimony of Claimant in these respects was that he reported to T.J. the difficulties which he was experiencing in the workplace, made complaints of verbal abuse directed towards him and outlined his feelings of degradation and humiliation, as a result. It appears that the response of T.J. concerning matters, which the Claimant had found offensive, was to describe such incidents as manifestations of the exacting standards required by D.M., the Site Supervisor.

The Claimant testified that at this meeting, T.J. did not devise any solution for him, did not provide him with any advice, or any information concerning the initiation of a formal complaint as against D.M., or the utilisation of the Respondent's grievance procedures. The Claimant also recounted that at this meeting he expressed his agreement to T.J. to resume his employment with the Respondent, but that if matters were not resolved to his satisfaction, he would leave the company.

On the 24th December 2006, the Claimant telephoned T.J. to ascertain the details of the hours of operation of the facility over the Christmas period. On learning of same, the Claimant advised T.J. that if he resolved the matter he would resume his employment. The Claimant testified that he was assured by T.J. that the matter would be dealt with on the re-opening of the facility.

The Claimant testified that on his return to work on the 27th December 2006, T.J. was not in attendance and that in the course of that day, the Supervisor had approached the Claimant and other employees who were all in company together and whilst he had a conversation with the others as to how they had fared over the Christmas period, he did not engage the Claimant in any conversation whatsoever.

The Claimant also testified how on one occasion he requested a reflective jacket from D.M. to be told that he ought to go home, obtain his other one and use it, although the Claimant testified that his spare jacket was punctured at the time.

He also testified that despite requests made of D.M. he was not provided with boots and had to purchase his own, which appears to have occurred on the 29th December 2006. The Claimant also testified that on other occasions, D.M. had brought him to the office and provided him with malodorous Wellingtons and raingear, which had been discarded by other employees.

D.M. in response categorically dismissed suggestions that the Claimant was provided with discarded materials. He conceded that it was possible that the Claimant might have perhaps been handed a coat off a hanger which had also been worn by another employee, but that to suggest that such was stinking, saturated, or discarded was totally incorrect.

Furthermore, D.M. testified that each employee was provided with identical amounts of clothing and that everyone had two pairs of boots available to them and that on this date he provided the Claimant with rain gear and boots on site as requested, having sent the Claimant home earlier to get another pair of boots, which the Claimant had advised him were there and that any purchase by the Claimant of boots and raingear on the occasion in question, was a unilateral decision by him entirely and which was in fact confirmed to him by the Claimant at the time.

It appears that T.J. returned to the facility on the 2nd January 2007. The Claimant testified that whilst at work on this date he experienced great difficulty in performing a task to which he was deputed, which difficulties were observed by D.M. and that he was obliged to cease it. The Claimant recounted that after this episode whilst he was enjoying a break and reading a magazine, D.M. snatched it out of his hands, for the perceived purpose of humiliating him. This was denied by D.M.

On the 2nd January 2007 as well, the Claimant was also advised by D.M. that T.J. wished to meet with him. The uncontroverted testimony of the Claimant was that this meeting commenced with T.J. lamenting the Claimant's unauthorised leave of absence for the period from the 2nd to the 22nd December, that monies paid to the Claimant in respect of that period would have to be worked back and that the Claimant would not be receiving a performance bonus.

The Claimant testified in his direct evidence initially that no consideration or reference was afforded or made by T.J. to the issues which had been raised by the Claimant, or to the resolution of same, whereas he had attended this meeting in the hopeful expectation that D.M. would have been in attendance and that there would have been a discussion between the parties and efforts made to resolve any issues between the parties. However, in the course of his evidence the Claimant further testified that at this meeting T.J. had asked him as to whether he was thinking about leaving his employment and when the Claimant queried this, he was questioned as to whose benefit would it be.

The Claimant testified that the meeting concluded with T.J. advising him that both the Manager and Supervisor would be closely monitoring the Claimant's future work performance. Although, the Claimant testified that he felt threatened by this and the Tribunal again accepts that the Claimant might honestly have held such feelings, the Tribunal is not satisfied that there was an objective justification for same, having regard to all of the circumstances surrounding his departure from the premises on the 7th December 2006 and his continuing absence thereafter.

In the absence of any testimony from T.J., the Tribunal unhesitatingly accepts the substance of the evidence of the Claimant as to what transpired at the meetings between the parties on the 22nd December 2006 and 2nd January 2007.

Clearly the Claimant had grievances surrounding the circumstances that were pertaining in his workplace environment, as he perceived them to be. He had been absent from his employment without explanation from the 7th to the 22nd December 2006. He had communicated his feelings to his employer. He had resumed his employment on assurances that the situation, as he perceived it to be, would be redressed. The response of the Facility Manager to these matters was quite inadequate and devoid of any degree of formality or transparency from the Claimant's perspective.

The Respondent's Grievance Policy & Procedures, of which the Claimant admitted he was aware, provided for both formal and informal approaches. The procedure was that issues should firstly be dealt with using the "open door"/informal approach, whereby employees should raise their issue with their immediate line manager/HR and that if

the issue was not resolved locally there was a staged escalation process, details of which were contained in the Claimant's Handbook.

Whereas at the hearing before the Tribunal criticism was made of the Claimant for having failed to exhaust the staged escalation process for the resolution of his grievances and of which he had admittedly been aware, the Respondent's handbook equally stated that it was "*the responsibility of management to take immediate action when any incidence of bullying or harassment arises or is brought to their attention. Managers will comply fully with the policy and provide leadership and support to other staff in understanding and complying with the policy. It is a requirement of management that they be objective throughout the process of investigating and managing any issues in relation to dignity at work.*" In this regard, the response of Mr. T.J. was manifestly inadequate.

On the other hand, the handbook advised the Respondent's employees that, "*if you feel you have been, or are the victim of any harassment or bullying, then you should discuss the matter with your Manager or HR or someone appropriate within the company with whom you feel comfortable to discuss the matter.*"

Whilst the Tribunal feels that it might reasonably have been open to the Claimant to at a minimum make contact with and endeavour to pursue the matter through the medium of the previous Manager of the Facility, Mr. J.J., who had relocated to Wicklow with the Respondent and with whom the Claimant testified that he had enjoyed a good inter-personal relationship, the Tribunal does not regard the Claimant's failure to do so, or to otherwise exhaust the staged escalation process entirely, as ultimately determinative of this case, one way or the other.

The Claimant testified that as 2007 progressed, he perceived things to be deteriorating. In support of this contention, the Claimant again referred to being required to undertake near impossible tasks and being directed to undertake tasks at the furthestmost boundary of the site in remote area alone, a location of 1½ to 2 miles distant, to which he was obliged to walk to carrying the necessary materials.

In respect of the latter contention, D. M. testified that the perimeter fence was not stock proof and that it was necessary to provide a boundary of 150-200 stakes coupled with three strands of barbed wire. D.M. testified that all heavy materials would have been transported to the boundary by means of a buggy and that for the duration of the fencing works he worked with the Claimant, 90% of the time. On any occasion that the Claimant had to have walked to and from the location, he would have and did leave at between 12.30 and 12.45 to go for his 1 o'clock lunch break and was paid nonetheless. As far as any tools and equipment was concerned, the most the Claimant would have been obliged to bring with him would have been a small hammer.

March 22nd 2007 — March 28th 2007

It appears that as far as the Claimant was concerned, matters came to a head in March 2007. The Claimant testified that, on a date, that he considered to be the 15th March 2007, but which the Tribunal as a matter of probability believes, was in fact the 22nd March 2007, he was approached by D.M. shortly before 8am and requested to remove a pump. The Claimant testified that he informed D.M that he would attend to this when he had his gear on.

The Claimant testified that by the time he was ready for work he was immediately confronted by D.M. who was shouting at him that he was four minutes late, which the Claimant denied. The Claimant alleged that D.M. was abusive towards him and informed him that it was his "*final warning*".

The Claimant testified to the Tribunal that he had not previously been subject to any disciplinary process by the Respondent such that this incident, as it was, could ever have constituted a final warning for him. The Tribunal accepts this to be the case and it is also noted by the Tribunal that D.M., whilst he might indeed have found the Claimant's level of work performance questionable on occasions to say the least, never had initiated any formal disciplinary process against the Claimant in that regard.

The Claimant testified that on hearing this, he determined that he could not endure any more, that he was leaving. The Claimant testified that as he was departing, D.M. came running towards him and asked the Claimant to reconsider matters. The Claimant in fact left the site, however he returned to work one hour afterwards.

D.M. testified that every employee had to be in attendance at 8am sharp and that at 7.58am he met the Claimant and instructed him as to the task to be undertaken, which was to commence a short distance from where the Claimant parked his vehicle and to which D.M. walked. As the Claimant approached, it was by then 8.04am and he informed the Claimant of the time and that he was four minutes late. D.M. testified that the Claimant became extremely agitated, commenced shouting and roaring at him and stormed off to his vehicle to depart. As the Claimant was leaving he stopped his vehicle and D.M. advised him not to leave and that if he did, the consequences could be serious for the Claimant.

After his return to work, it is common case that D.M. requested the Claimant to sweep around the wheel wash. D.M. testified that when he instructed him to undertake this task, the Claimant "*walked away as if he needed a Zimmer frame*" and that it was obvious to him that the Claimant was endeavouring to provoke a reaction from him.

The Claimant testified that in the course of this task, he received what he described as an urgent phone call, which necessitated him having to leave the site again at 2pm for one hour and he approached D.M. about this. The Claimant testified that D.M.'s response was to the effect that, for all he cared, the Claimant could take the rest of the day off and that the Claimant also owed him an apology. The Claimant took his leave, returned afterwards and worked on his own for the remainder of the day. D.M. testified that he authorised the Claimant's leave as requested of him and that he did not see him again until 4.40pm that evening, although he accepted that the Claimant might have returned as scheduled, but that he did not report to him on his return.

The Claimant testified that on the 28th March at approximately 5pm, he was informed by D.M. that he had noted the incident of the 22nd March 2007 and that T.J. would have to give him a slap on the wrist. The Claimant testified that he got very upset upon hearing this. He said that he felt very unwell. He felt sick. He knew that his issues with D.M. were not going to be resolved, judging from the previous response of T.J., or lack thereof

In this regard, D.M. testified that in relation to the Claimant's hourly absences from his place of work on the morning and afternoon of the 22nd March 2007, the Claimant ought to have been deducted his two hourly pay in respect of his non-attendance and that such deductions were not made at the time by D.M. through inadvertence. It was for that purpose D.M. testified, that he approached the Claimant on the evening of the 28th March and informed him of the situation. D.M. testified that he could not recollect whether he ever notified T.J. about the incidents of the 22nd March 2007, but in any event no disciplinary action was ever instigated against the Claimant.

D.M. also testified that he suspected "*something was cooking*" with the Claimant at or about this time and he considered that at every opportunity the Claimant got, he was endeavouring to provoke a reaction from D.M. and that his suspicions were confirmed by J.F. who reported to him at that time a suggestion that the Claimant was considering avenues of legal redress in respect of his employment situation with the Respondent.

The Events Of The 29th March 2007

In his examination in chief, the Claimant testified how on the following morning, he was unable for breakfast and was physically ill at home and again on site, that an employee who comforted him observed this, that he had a cup of tea and was sick again after it. He described how he approached a colleague J.F. and having informed him that he wasn't well was advised to go home and sort matters.

On behalf of the Respondent, a Mr. J. F. testified that he first met the Claimant on site early on the morning of the 29th March 2007, shortly after 8 am. The Claimant was looking for the Supervisor, D.M., for the purpose of requesting one week's holidays after Easter to facilitate him undertaking a falconry course. J.F. informed the Claimant that D.M. was not on site, but would be in attendance the following day.

At around 11.30 am as J.F. was proceeding through the facility on a tractor, he observed the Claimant approaching. The Claimant reported to J.F. that he was after getting sick and that he had a sick stomach. J.F. advised the Claimant to return to the hut, to have a cup of tea and to see how he got on. J.F. recollected encountering the Claimant again some 30-45 minutes afterwards when he was leaving the hut and the Claimant reported that he wasn't great and was still very sick. J.F. advised him that he was as well off to go home and that there was no point going up on site if he was sick. The Claimant agreed and explained if he was not in attendance on the following day, that J.F. would know what the Claimant's position was.

J.F. testified that was the last he saw of the Claimant at the facility. As the Claimant was not in attendance on the following day, he explained the situation to the Supervisor, D.M. on his return.

J.F. was adamant that at no stage on the 29th March 2007 did the Claimant ever outline to him any other reason for his departure from the site, or that the Claimant would not be returning to his employment with the Respondent, or that the cause of his departure was in some way attributable to the actions and omissions of the Respondent, its servants or agents. On the contrary, J.F. testified that he had no reason other than to expect the Claimant's return to work, notwithstanding that in cross-examination, J.F. was questioned about a site diary entry of the 27th March 2007

whereby it appeared that J.F. had mentioned to D.M. on that date that he, J.F. had learned from a relative of the Claimant, that the Claimant had been attending at a Solicitor, such that it was suggested by the Claimant's Solicitor that the Claimant's failure to return to work, ought not to have come as any surprise to him J.F.

Furthermore, the Claimant in his direct evidence made no reference to having informed J.F. any other reason for his departure from the site, or that he would not be returning to his employment with the Respondent, or that the cause of his departure was in some way attributable to the actions and omissions of the Respondent, its servants or agents, although in cross-examination by Mr. Farrell, he maintained that he had so informed J.F. of the reason for his departure.

The Tribunal believes that the circumstances of the Claimant's departure from the site on the 29th March 2007 as a matter of probability, approximated in all likelihood to the version of events as provided by J.F. to the Tribunal.

On the balance of probabilities, the Tribunal was not satisfied by the Claimant, that his departure from the facility on the 29th March 2007 was in the nature as contended for by him, whereby he was terminating his employment with the Respondent, having informed his superiors on that date, that he was leaving and would not be returning, or furthermore, that in leaving the premises on that date, the Claimant was even clear in his own mind, that he was no longer in the employment of the Respondent. All the surrounding circumstances to which some reference is made below indicate otherwise.

In cross-examination, J.F. also expressed an opinion of the Claimant as a person who was "*often in a world of his own*" and regularly had the appearance of a burdened individual. The Tribunal accepts that a possible explanation for such a disposition could have been unhappiness and distress with the environment that he was encountering in the workplace. However, it is also the case that the Claimant's father had passed away some relatively short period beforehand in April 2005 and J.F. was of the impression that his father's passing had greatly affected the Claimant and as a result of which he had become depressed. It is also common case that in and around the first anniversary of his father's passing, the Respondent had provided the Claimant with details of an employee assistance programme for bereaved persons and of which the Claimant had availed of and obtained some benefit from.

Whilst the Claimant who was born on the 15th May 1967 and continues to live with and care for his elderly widowed mother, impressed the Tribunal as a fundamentally honest witness and a decent person, but a rather unduly sensitive individual.

J.F. also testified that on occasions when the Claimant would have been taken to task about his performance, he would have reacted in what J.F. considered a disproportionate fashion, although he conceded that no other person had made complaints to him about the Claimant's performance at work, other than D.M., who it appears considered the Claimant difficult to get on with in the later stages of his employment, somewhat peculiar and infuriatingly stubborn on occasions.

As regards the events of the 7th December 2007, J.F. testified that he was present on the occasion and doing what was being done every evening on site for the purpose of "*closing the bank.*" He recounted how the weather was particularly inclement and

that he, along with another colleague Mr. T.D., prior to putting the covers in place with the Claimant, were first engaged in spreading woodchips as a preliminary to the former activity. It was his understanding that the Claimant could not wait any longer and departed the site. As far as he was concerned it was not a case of consciously ignoring the Claimant, or deciding not to inform him of developments, as the Claimant did not have to be made aware of what were daily occurrences on site each evening. Having regard to the particularly inclement weather on the occasion in question, it was purely a matter of completing the task as quickly as possible and getting done and out of there.

When questioned by Mr. Nolan as to how D.M. treated employees, J.F. testified that D.M. was a very fair supervisor with all employees, provided they did what was required of them. He was insistent that D.M. did not assign the Claimant to undertake impossible tasks and that D.M. would never ask employees to undertake something that he was not prepared to do himself.

J.F. also testified that he never heard D.M. direct foul language towards the Claimant and suggested that in so far as D.M. might have had to raise his voice to the Claimant, it would have been in consequence of working in an environment where a lot of vehicles and machinery were operating.

On the balance of probabilities, the Tribunal believes that D.M. did on occasions direct foul and abusive language at the Claimant. The Tribunal also accepts that on occasions, this may have been precipitated by D.M.'s exasperation at the Claimant's activities on site, or lack thereof, however notwithstanding a dispute between the parties at the hearing as to what corrective measures were demonstrated to the Claimant by the Respondent as regards issues of his work performance, it is noted by the Tribunal that D.M. singularly failed at any stage, to initiate any disciplinary process against the Claimant in relation to his work performance.

Although the Tribunal believes as a matter of probability that D.M. was fundamentally a fair, though a somewhat exacting Supervisor, who, even on the Claimant's own admission, had previously intervened on his behalf when he was encountering inter-personal difficulties with a work colleague in February 2006 and, acknowledging, as was said in evidence, that the workplace in question was a landfill site and not a monastery, there is no doubt that the Claimant was grievously offended at being spoken to and treated by D.M. in the manner as described by him.

Although, the Tribunal accepts that the Claimant might honestly have believed that he was a victim of bullying and intimidation by D.M., from an objective assessment of the overall situation, having heard all of the evidence, the Tribunal does not believe on the balance of probabilities, that the conduct of D.M. could reasonably be regarded, by a person possessed of a reasonably robust firmament, as constituting repeated inappropriate behaviour thereby undermining that persons right to dignity at work.

On the totality of the evidence, the Tribunal does not accept on the balance of probabilities, that the conduct of the Respondent was so serious or outrageous, that a reasonable person would consider that the Claimant was entitled, or that it was reasonable for the Claimant, to have resigned his employment with the Respondent

without notice on the 29th March 2007, had he in fact done so.

In essence, on the totality of the evidence, the Tribunal was not satisfied that the Claimant demonstrated to the requisite standard, that the environment in his workplace was so oppressive as to render his position untenable such that he had no option but to resign his employment on the 29th March 2007, had he in fact done so.

Even if the Tribunal could be considered to have erred in its conclusions in any of the foregoing respects, the Tribunal determines and is satisfied in any event, for the reasons as enumerated hereunder, that in the events which happened and from an examination of all of the surrounding circumstances, the Claimant did not resign his employment with the Respondent at the time as is alleged.

Dr. J. O'R.

The Claimant's General Practitioner, Dr. J.O'R testified that the Claimant attended his medical centre on the 29th March 2007 and was seen by his colleague, Dr. S.

From the clinical records, it appeared that the Claimant reported that he had been vomiting and experiencing diarrhoea for the previous 24 hours. Clinical examination of the Claimant at that time did not reveal any abnormality and the Claimant was advised to take fluids and motillium. The Claimant was furnished with a medical certificate stating that he unfit for work due to gastro-enteritis.

It appears that the Claimant also reported at this Consultation that he was suffering from serious stress related issues at work and that he perceived himself to be a victim of bullying in the workplace since September/October 2006 and was upset. The Claimant also considered himself to be anxious and depressed. The clinical records were said to indicate that the Claimant was advised to report the matter to senior management and/or pursue it further and to return to the medical centre at a further date to discuss the problem in more detail.

It is to be noted that in so far as the Claimant alleges that he was the victim of a campaign of intimidation and bullying from as far back as September/October 2006, the date of his first presentation to the medical centre in relation to these issues was on the 29th March 2007 and there was no attendance by the Claimant in respect of his absence in December 2006. On the other hand, Dr. J.O'R testified that the Claimant had been a patient of his practice since 1992, that he considered him a sincere individual, who did not have occasion to attend for consultations very often and was not concerned about willy nilly matters.

Dr. J.O'R testified that the Claimant returned to the medical centre on the 2nd May 2007 where this witness saw him. At that time the Claimant reported to Dr. J.O'R that he was very distressed, anxious and depressed, as he considered himself a victim of bullying and intimidation at his place of work and that on occasions he had vomited before going to work in the mornings and also whilst on the way to work, such was his anxiety about the situation. There was also a report by the Claimant of sleep disturbance.

The Claimant's medical attendants did not prescribe him at any stage for his reported depression and anxiety, although Dr. J.O'R testified that as the Claimant's reported

depression appeared to be reactive in nature, the appropriate course of treatment would have been to remove him from the stressor concerned.

This witness also testified that on the 2nd May 2007, the Claimant reported to him that he felt unable to return to work and in cross-examination this witness admitted that he was not aware as at that date, that the Claimant had purportedly left the employment of the Respondent as far back at the 29th March 2007.

Furthermore in cross-examination this witness admitted that there was nothing on the clinical record to indicate that the Claimant had made known to Dr. Spooner on the 29th March 2007, that such was his position and indeed, as appears from the clinical record, the advice apparently furnished by Dr. Spooner to the Claimant as set out above would bear this out.

In addition, it appears that at all material times in the period from the 29th March 2007 up to the 19th April 2007, medical certificates were submitted by the Claimant to the Respondent alleging unfitness for work due to gastro-enteritis. The Tribunal determines that the submission of this documentation to the Respondent is fundamentally inconsistent with the Claimant, in his own mind, having left the employment of the Respondent on the 29th March 2007.

Ms. O.D.

Ms. O.D. a Human Resources Business Partner gave evidence on behalf of the Respondent. From the 8th January 2007, she was at all material times employed at the Respondent's headquarters in Dublin and it appears became aware of the Claimant's absence from work on the 24th April 2007, the last medical certificate received from him having expired on the 19th April 2007.

In cross-examination, this witness admitted that as far as she was concerned, prior to that date, no communications whatsoever had been transmitted to headquarters by Mr. T.J. their Manager in Kilconnell, outlining the Claimants grievances with the conditions of his employment and to her knowledge, Mr. T.J. had failed to do anything whatsoever to address same.

This witness also testified that in accordance with the Respondent's sick pay scheme, the Claimant was paid his full wages until the 19th April 2007. In this regard, the Tribunal determines that the acceptance by the Claimant of these monies, which were ostensibly in respect of a period of employment subsequent to the 29th March 2007, is rather inconsistent with the Claimant having left his employment with the Respondent as at that date.

On the 26th April 2007, the Claimant was written to by the Respondent confirming that an appointment had been scheduled for him with the Respondent's company doctor on the 30th April 2007 for a sickness review. The Claimant was also notified that on his return to work he would be required to attend at a disciplinary meeting concerning his unauthorised leave of absence from the 19th April 2007.

It is common case that the Claimant attended at this medical appointment at Occupational Health Galway on the 30th April 2007, and according to the Claimant, due to a breakdown in communication, the physician was not expecting him and his

sickness review did not proceed on that date.

There is no doubt that in so far as the Respondent was concerned, by then, it clearly had not been notified by the Claimant that he had ceased employment with it and the Respondent was proceeding with the issue as one of uncertified sick leave and possible disciplinary action.

The Tribunal is also of the opinion that the attendance by the Claimant at this “*sickness review*” as organized by the Respondent was utterly inconsistent with him having ceased his employment with it on the 29th March 2007.

In the course of cross-examination, the Claimant was questioned as to why he had attended at this review at all, if he had left the Respondent’s employment on the 29th March and he testified that he felt that when he was requested to attend, he considered it important to do so and “*to tell them what was happening*”.

However, the Claimant’s earlier evidence was that he was unable to discuss the matter with anyone at work in the light of what had transpired with Mr. T.J. in December and January, so it is incomprehensible how the Claimant could have considered that the company doctor of [*on his case*] his former employer could have assisted him.

The Tribunal therefore considers it a reasonable inference from the foregoing that by the Claimant’s attendance at the sickness review on the 30th April 2007, the Claimant, even in his own mind as at that date, had not left the employment of the Respondent. This is substantiated to some degree by the fact that the Claimant did also subsequently attend at the company doctor on the re-scheduled date of the 2nd June 2007.

As a result of this attendance, the reviewing physician advised the Respondent that “*information requested has been received from his medical advisers. I suggest a review consultationprior to issuing a report to allow for an up to date consideration of his condition. Please advise if this is acceptable and an appointment will be offered.*” The Tribunal is unaware as to the nature of the information received by this physician from the Claimant’s medical advisers.

In the interim, the Claimant had obviously attended at and provided a written statement to his Solicitor, Mr. Nolan, who on the 11th May 2007 had him complete Form T1A and transmitted same to the Secretary of the Employment Appeals Tribunal, which was acknowledged on the 24th May 2007.

It is common case that the Respondent’s address as provided on Form T1A and to which correspondence from the Employment Appeals Tribunal also issued was in error, so that the Respondent was unaware of these proceedings from the outset.

This witness testified that the first the Respondent learned of the Claimant apparently having left the employment of the Respondent on the 29th March 2007, was in the course of correspondence received from the Claimant’s Solicitor of the 20th June and 6th July 2007.

This correspondence was precipitated by a letter dated the 14th June 2007 from Ms.

O.D. to the Claimant, informing him that as the Respondent had not received medical certificates from him for the past couple of weeks when he had been absent from work, he was being requested to send on backdated certificates to them to cover the period of his unexplained absence by Friday the 22nd June 2007, at which time he would also be required to attend at the Respondent's company doctor for an update.

By letter to the Respondent, dated the 20th June 2007, Mr. Nolan, the Claimant's Solicitor, adverted to the Claimant having issued constructive dismissal proceedings and how he could not understand why the Respondent was seeking backdated medication certificates to cover the period of his unexplained absence.

By letter to Mr. Nolan dated the 28th June 2007, the Respondent set out its position that the Claimant had not resigned his employment with the Respondent, that he remained an employee who had been absent from work on sick leave since the 29th March 2007, had been submitting medical certificates until the 19th April and had been on uncertified sick leave thereafter.

By letter to the Respondent dated the 6th July 2007, Mr. Nolan identified "*in or around the 28th March 2007*" as the date of the Claimant leaving his employment with the Respondent. The Tribunal notes, that as appears from the contents of that letter, Mr. Nolan's instructions at the time were, that the Claimant had informed his superiors that he was leaving on that date [i.e. in or around the 28/29th March 2007] and there was no doubt that he would not be returning.

However, the Claimant's evidence to the Tribunal on direct examination did not bear this out, although in the course of cross-examination, he maintained that he outlined the situation and his position to Mr. J.F. As set out above, in relation to the parties' recollection of the sequence of events as to what transpired on the 28/29th March 2007 and as regards what was, or more importantly was not said, by the Claimant on the occasions in question, the Tribunal prefers the evidence of Mr. J.R. over that of the Claimant.

Indeed, the Respondent in its letter to Mr. Nolan of the 9th July 2007, reiterated that the Claimant had not informed the Respondent of his decision to leave their employment on the 28th March 2007 and noted that he had remained on the Respondent's payroll ever since and had not requested his P45, or any other leaving documentation, which was subsequently requested by Mr. Nolan on behalf of the Claimant by letter dated the 23rd July 2007.

Furthermore, the Tribunal is of the view that had the Claimant made an unequivocal decision to leave the employment of the Respondent as contended for and as required, there ought to have been certainty and finality in that regard as to the date of his leaving, which would not appear in fact to be the case, as borne out by the Claimant's instructions to his Solicitor, as appears from the contents of Mr. Nolan's letter of the 6th July 2007 aforesaid, which exhibits some equivocation, or uncertainty, as to the exact date on which the Claimant allegedly left his employment with the Respondent.

Under cover of letter dated the 3rd August 2007, the Respondent provided the Claimant with his P45 and final payslip encompassing any outstanding holiday pay. The Respondent treated the receipt of the letter from Mr. Nolan on the 24th July 2007

as the date of the Claimant leaving its employment.

Conclusion

In conclusion therefore, the Tribunal unanimously determines that as defined by section 1 of the Unfair Dismissals Act 1977, there was no “*dismissal*” of the Claimant from his employment with the Respondent, either on the 28th day of March or on the 29th day of March 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

