

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

EMPLOYEE - **claimant**

UD1916/2011

Against

EMPLOYER - **respondent**

Under

### UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms K.T. O'Mahony BL

Members: Mr P. Casey  
Mr D. McEvoy

heard this claim in Cork on 26 April  
and 12 June 2013

Representation:

Claimant:

Ms Cliona Kenny, Ernest J. Cantillon & Co., Solicitors,  
39 South Mall, Cork

Respondent:

Mr Jim Walsh, James V. Walsh & Son, Solicitors,  
1 Abercromby Place, Fermoy, Co. Cork

The determination of the Tribunal was as follows:-

This being a claim of constructive dismissal it fell to the claimant to make his case

The claimant, who is a Hungarian national and a member of the gypsy race, was employed as a general operative or yardman from February 2008 in the respondent's business which supplies agricultural equipment and feed. The employment was uneventful until sometime in 2010 when the claimant's position was that he began to experience general abuse from two Polish workplace colleagues (C1 & C2).

The claimant's position was that, initially, C1 would issue orders to the claimant. He had brought his difficulties in this regard to the attention of both the yard supervisor (YS) and the managing director (MD) who told him to work to YS's instructions.

After C2's return to work, following a period of absence during which he had been harvesting

for a different employer, the claimant's position was that he began to experience on-going abuse of a racist and hostile physical nature, from both C1 & C2. The claimant tried to solve the matter with his work colleagues but things got worse and worse.

Eventually, in or around late January 2011, the claimant made a complaint of racial abuse against C1 & C2 to MD. His position was that he had not wanted to bring the racial abuse to the attention of his employer because he was afraid but it exploded out of him and he was shaking and scared. MD spoke informally to C1 & C2 about the matter and told them to limit their interaction with the claimant to work related matters and advised both sides to keep their distance. The respondent's position was that when MD spoke to C1 & C2 they both denied having racially abused the claimant. MD instructed C1 to stop using the weighbridge canteen, which the claimant frequented, and to use the other canteen. In the event, this resulted in the claimant's being the sole user of the weighbridge canteen. MD told the claimant to report any further instances of harassment to him. The claimant was dissatisfied with the respondent's response to his complaint and on or about 8 February 2011 he put his complaint in writing, as he had been asked to do by MD. The claimant wanted MD to conduct a formal investigation into his complaints.

When the respondent failed to carry out a formal investigation the claimant sought advice from the Citizens Information Service and later went to the Gardaí. It was the claimant's position that, after the Gardaí approached MD about the matter MD became angry with him for having spoken to third parties and told the claimant that he 'did not want any more of it' and in strong language added, that if he did not desist from pursuing his complaint of racism he could seek employment elsewhere. The claimant accepted that following MD's talk with C1 & C2 they desisted from making further racial comments. The claimant's dissatisfaction with MD's response to his complaints was that he did not know what C1 & C2 had said when MD spoke to them.

The claimant went on stress related sick leave from mid-March 2011. The claimant's solicitor wrote to MD indicating that failure to investigate the claimant's complaints would lead to the matter being pursued in the appropriate tribunal. The reply from the respondent's solicitor asserted that there had been no wrong-doing on the part of C1 & C2. On 25 April 2011 the claimant resigned from his employment and subsequently lodged his claim for constructive dismissal.

### **Determination:**

The use of an informal approach to complaints of bullying and harassment depends on both parties being agreeable to that approach being adopted. It is clear in this case that the claimant did not feel that an informal approach was appropriate and made his dissatisfaction evident to MD.

The abuse in this case and in particular the nature of the racial abuse to which the claimant was subjected referring as it did to a particular aspect of Nazism, demanded definitive action, in the form of at least a full and fair investigation. No such investigation was held.

The measure taken by MD of instructing one of the perpetrators to frequent the canteen, not used by the claimant, had the effect of isolating the claimant in the workplace, thus exacerbating the claimant's situation in the workplace. The Tribunal is satisfied that

he claimant's dignity in the workplace, which had been undermined by C1 & C2, was further undermined by MD's response to his predicament, including the threat, which the Tribunal accepts occurred, to the claimant's continued employment in their last encounter.

For these reasons the Tribunal finds that the claimant was entitled to resign and claim constructive dismissal. Accordingly, the claim under the Unfair Dismissals Acts, 1977 to 2007 succeeds and the Tribunal, finding that compensation is the appropriate remedy in this case, awards the claimant €20,000.00 under the Acts.

Sealed with the Seal of the  
Employment Appeals Tribunal

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