THE HIGH COURT

[2017 No. 225 C.A.]

BETWEEN

RORY DONEGAN

APPLELLANT

AND
DUBLIN CITY COUNCIL

RESPONDENT

JUDGMENT of Mr. Justice Binchy delivered on the 31st day of July, 2018

1. This judgment arises out of an appeal brought by the appellant against an order of the Circuit Court of 20th July, 2017 whereby that court dismissed an appeal of the appellant from a decision of the Employment Appeals Tribunal dated 13th September, 2016. That Tribunal had in turn adjudicated upon an appeal of the appellant from a decision of a Rights Commissioner made on 11th February, 2015.

2. The appellant was dismissed from his employment with the respondent by letter dated 21st March, 2014. As such, the fact of dismissal was not in issue in these proceedings and so the respondent was required to satisfy the Court that the dismissal of the appellant was, in all of the circumstances, fair.

Evidence of Respondent
3. The first witness called on behalf of the respondent in the matter was Ms. Eileen Quinlivan, now an executive manager of the respondent but at the relevant time a senior executive officer in the planning department of the respondent. Ms. Quinlivan gave evidence that, on 30th January, 2012, she received a written complaint from the appellant concerning the conduct of other employees of the respondent towards the appellant. Nine people were specifically identified by the appellant. He complained that the persons concerned were attempting in various ways to intimidate the appellant psychologically in the workplace. The appellant also stated in the letter-

> "I will at your convenience set out examples of my claim against the staff mentioned. I would like to personally confront the staff members listed with the claims and request a reply to these claims. The intimidation is persistent and fluctuates between the staff mentioned. DCC, I believe has a very serious problem with mob behaviour and mob rule. It is not just a case of an individual here and there. It is collective and as far as I can see DCC is playing with challenging this mob behaviour because the problem is too great."

4. Following upon receipt of this letter Ms. Quinlivan arranged to meet with the appellant on 2nd February, 2012. She said that as this meeting the appellant gave her three documents which she noted on the front page of each document as having been received on the date of this meeting. The first of these documents (the "First Document") comprises a list of dates and times of tasks undertaken by the appellant at work. The second document (the "Second Document") comprises a list of incidents or occurrences in the life of the appellant both inside and outside the workplace. Ms. Quinlivan maintained that the appellant gave her this in order to provide her with examples of the kind of behaviour that he was complaining about in the workplace. However, the appellant maintains that he did not give her this document for this purpose and had he intended it to be used for this purpose he would have subjected it to editing. Furthermore, he maintained that this document should have been kept in confidence by Ms. Quinlivan. The third document (the "Third Document") was concerned with specific complaints that the appellant had in connection with the conduct of his immediate supervisor towards him. This document refers to a number of complaints which his supervisor made to the appellant about the manner in which he carried out his duties in the workplace, and a number of meetings arising out of those complaints at which the appellant felt unfairly pressurised.

5. Ms. Quinlivan kept a written record of her meeting with Mr. Donegan. In this note she records that he reported that the conduct about which he was complaining was going on across all departments of the respondent. He felt that it was coordinated and directed by somebody although he did not know who. Ms. Quinlivan also recorded that the appellant said that he suffered from problems of antisocial behaviour near his residence. He complained of "mob" type behaviour there also.

6. She said that she suggested to the appellant that it might not be best to approach anyone on his list for the time being, as there were psychological issues involved and she felt that immediately confronting those about whom he was complaining might make matters worse for the appellant. She suggested that she would talk to Mr. Jim Lynch, who at that time was an administrative officer in the HR department of the respondent. She wanted to discuss with Mr. Lynch what he thought would be the best way to deal with the issues raised by the appellant. Her evidence was that she agreed with Mr. Donegan to defer taking any action until they had discussed the matter with Mr. Lynch and agreed a way forward.

7. The meeting with Mr. Lynch took place on 12th March, 2012. Ms. Quinlivan's notes of this meeting record that the appellant said that the problem is psychological and hard to explain. He feels conversations are directed at him. He has similar experiences outside his employment also. He said his complaints are very difficult to prove and that he had been experiencing "mobbing" at work for years. He said there was a need to appeal to the people who were doing the mobbing. He described the workplace as "a bit of a war zone". He said that he had been making complaints for two/three years.

8. He was asked had he discussed these issues with his doctor, and while he said that he had done so, he said his doctor had not been of any help. He said he did not trust doctors. Mr. Lynch suggested that the appellant should see an occupational therapist to assess the appellant, in his own interests. Ms. Quinlivan's note records that Mr. Lynch said that the appellant's place of work did not seem to be safe for him. He said he would need to make an appointment for the appellant with an occupational therapist because the appellant was putting the respondent on notice that he needed to take time off work, at least until such time as a report is available from an occupational therapist. It is recorded in Ms.Quinlivan's note of the meeting that it was agreed with the appellant that he would be placed on special leave with full pay until a report is received from an occupational therapist and the parties discuss the matter further.

9. On cross-examination by the appellant, Ms. Quinlivan confirmed that the appellant was at all times competent in the workplace. She said that to the best of her recall, the appellant had given her three documents on 2nd February, 2014 and that this was indicated on each of the documents in her own handwriting. She said that when she met the appellant on 2nd February, 2012 she suggested to him that they do not interview others about his complaints until such time as the psychological issues relating to the appellant were investigated, to ensure that he himself would be fit to go through what might be a demanding or upsetting

investigation process. The appellant put it to Ms. Quinlivan that he did not receive the support that he was entitled to in relation to the processing of his complaint, as provided for in the Code of Practice for Employers and Employees on the Prevention and Resolution of Bullying and Work, published by the Health and Safety Authority (the "Code"). Ms. Quinlivan said that she gave the appellant the support that she thought was appropriate. Grievance procedures were not invoked by agreement with the appellant until the concerns that she had identified in her interview with the appellant were investigated and addressed.

10. The next meeting involving the appellant, Ms. Quinlivan and Mr. Lynch took place on 17th April, 2012. In the meantime, on 27th March, 2012 the appellant had attended for medical assessment by a doctor at Corporate Health Ireland ("CHI"), which assessment was arranged by the respondent. The doctor who conducted this assessment, namely a Dr. Lynda Sisson, gave evidence and I will return to her evidence presently. For now it is sufficient to say that in her report she concluded with the following opinion:-

> "In my opinion Mr. Donegan is currently unfit for work. I have advised him of this today. I have advised him that I think it is important that he attend his G.P. and access appropriate treatment either through his G.P. or through a specialist at this stage. Mr. Donegan tells me that he does not have a G.P. and would be unlikely to trust a G.P. on this occasion. I have offered Mr. Donegan a names (sic) and numbers of G.P.s in his area but he has politely refused my offer on this occasion.
>
> Once Mr. Donegan accesses appropriate treatment it is likely that he will make a full recovery and can be expected to return to work in his usual capacity. However, until such time as he accesses appropriate treatment, his condition is unlikely to improve and if anything he has potential for disimprovement."

11. The reason given by Dr. Sisson for her opinion that Mr. Donegan was unfit for work was that he was showing evidence of paranoid behaviour. The report of Dr. Sisson was discussed at the meeting on 17th April, 2012. The appellant did not accept Dr. Sisson's conclusions. He felt that her opinion was not a qualified opinion and said that she was being told what to say. Ms. Quinlivan's minutes of this meeting record that Mr. Lynch denied any such suggestion, and he informed the appellant that the respondent could not take the appellant back to work until he received whatever treatment is deemed necessary to help him recover.

12. The same minutes also record that the appellant said that he had attended with a General Practitioner ("G.P.") since meeting with Dr. Sisson (notwithstanding that he had indicated to Dr.Sisson that he would not do so). He had attended with a Dr. Kennedy, the Union doctor who had advised him that he did not have a medical problem. The meeting concluded on the basis that the respondent would not allow the appellant to return to work until he had whatever medical intervention was required. Mr. Lynch suggested that the appellant should ask Dr. Kennedy to contact Dr. Sisson, but the appellant said that Dr. Kennedy had indicated that Dr. Sisson should contact him if she wished to speak with him.

13. In her evidence, Dr. Sisson said that the appellant was clearly unwell when she saw him and was not fit to participate in any investigation in the workplace, whether the complaints were his about others or vice versa (her report had mistakenly indicated that the appellant was the subject of complaints). Dr. Sisson noted that, apart from the appellant's complaints about his treatment in the workplace, he was also complaining about treatment he was receiving outside the workplace. He complained of "mobbing" events outside his flat and sleepless nights. He had made complaints to gardaí about antisocial behaviour outside his flat. As regards the workplace, he gave Dr. Sisson specific examples of complaints, some of which she thought were quite unusual in nature. One related to a silver surfer on his computer screen which the appellant felt was placed there by somebody else in the workplace and was deliberately intended to refer disparagingly to some incident in his past. Another was about a female worker who he considered to be dressing inappropriately and provocatively. On cross-examination by the appellant, Dr. Sission agreed that she accepted that what the appellant was saying was true but she was concerned about his perception of events and that there was evidence of a paranoid condition. She herself was not sufficiently qualified to investigate this further and felt that the appellant required specialist intervention, i.e. assessment by a psychiatrist. She felt that whatever the condition the plaintiff might have was treatable and the purpose of having the appellant see a psychiatrist was to identify a pathway back to the workplace for the appellant.

14. Mr. Lynch gave evidence and confirmed the accuracy of the notes of the meetings kept by Ms. Quinlivan. He confirmed that the respondent was insisting that the appellant receive treatment before the respondent could consider permitting him to return to work. Mr. Lynch felt that the appellant presented as being both under stress and distressed at the meeting of 12th March, 2013. He said that he thought that the respondent should look out for the appellant's welfare and this was why the appellant was referred for medical assessment. The payment made to the appellant by the respondent during this period was a discretionary payment. Somewhat paradoxically, the appellant could not be placed on ordinary sick leave because he himself had not presented certificates as to his unfitness for work.

15. The appellant remained out of work and was further assessed on behalf of the respondent on three separate occasions by a Dr. Niall McNamara of CHI. These assessments were conducted on 15th June, 2012, 21st December, 2012 and 18th January, 2013. Dr. McNamara conducted these assessments because Dr. Sisson no longer worked with CHI. Dr. McNamara also gave evidence, and while I will deal with his evidence presently, for now it is sufficient to say that his reports of these consultations with the appellant confirm that he formed similar conclusions to those of Dr. Sisson: on 15th June, 2012 he considered that the appellant was suffering from mild paranoia and would require specialist intervention before being in a position to return to work. He said that he would endeavour to arrange this through the appellant's G.P.

16. On 21st December, 2012 he found the appellant's situation to be unchanged and, in spite of numerous efforts in the intervening period, he had been unable to make contact with the appellant's doctor. The situation remained unchanged when Dr. McNamara saw the appellant on 18th January, 2013 but by this time he had managed to contact the appellant's G.P. who indicated that he was going to review the appellant over the next week. In a further report of 1st March, 2013, Dr. McNamara said that he had had contact with the appellant's G.P. and discussed his concerns. However, he remained of the opinion that the appellant was unfit to return to work pending the opinion of a specialist. Dr. McNamara gave evidence confirming all of the above.

17. In his evidence, Dr. McNamara confirmed that he shared the views of Dr. Sisson, and that he too had concluded that the appellant almost certainly had an underlying psychiatric problem, and that the appellant required assessment by a psychiatrist. He considered that the presence of the symptoms exhibited by the appellant, coupled with the nature of his complaint, meant that he was unfit for work. He said that the kind of treatment that the appellant required was treatment that would normally be arranged through a G.P. and so he tried making contact with the appellant's G.P. He said that he felt that the appellant had very little insight into his condition and that it was for this reason he was not engaging with his G.P.. When he eventually did get to speak with the appellant's G.P., the G.P. was not in agreement that a psychiatric referral was necessary, but he felt that this was almost certainly because the G.P. did not have the full picture available to him. Dr. McNamara remained of the view that it would have been inappropriate for the respondent to take the appellant back to work without assessment by a psychiatrist. The appellant asked Dr. McNamara whether he believed the appellant's complaints. Dr. McNamara said that this was really not the issue. He felt that the

appellant was misperceiving events at work and it was for this reason that he needed specialist assessment. Dr. McNamara also mentioned that the appellant made a complaint about him to the Medical Council.

18. On 3rd April, 2013 there was a further meeting between Mr. Lynch, the appellant and a Union representative. Mr. Lynch said that the purpose of this meeting was to "move things on". The appellant had been on special leave (on full pay) for more than a year, which was very unusual. The respondent had received Dr. McNamara's letter of 1st March in which he said that the appellant remained unfit for work, pending specialist opinion. Mr. Lynch said that at the meeting on 3rd April he explained to the appellant that he would have to attend for specialist opinion in order to establish his fitness for work. It was also explained that the respondent would pay for such an opinion. The minute of the meeting records that Mr. Lynch said to the appellant that if the appellant did not attend for specialist evaluation, he would not be living up to the terms of his contract of employment. The minutes of the meeting record that the appellant responded by confirming that he understood. The minutes also record that in the course of this meeting the appellant expressed disappointment that there had been a lack of communication from the HR department of the respondent. He expressed suspicion about the opinions of the doctors whom he had met. He said that he was not sick and was competent for work. Mr. Lynch made it clear that the special leave would have to come to an end and urged the plaintiff either to obtain from his own doctor a certificate to the effect that he was unfit for work or to attend with a specialist for evaluation. Mr. Lynch said the objective of the meeting was to persuade the appellant to attend for specialist evaluation with a view to getting him back to the workplace. He said that at this meeting it was agreed that they would meet again on the 15th April, and in the meantime the appellant was to consult further with his own doctor. Mr. Lynch said it was emphasised at this meeting that the respondent was genuinely trying to get the appellant back to work. It is clear from the minutes of the meeting that the appellant did not agree and he is recorded as saying that "it seems you want me out".

19. In the event, there was no meeting on 15th April and the parties next met on the 7th June, 2013. The appellant had not been to see a specialist in the meantime. Mr. Lynch again emphasised that the appellant would have to see a specialist and that the respondent was willing to pay for the cost of the appellant consulting with a specialist and reporting to the respondent. The appellant replied that there was "no way" that he was going to see a specialist. The minutes record that the appellant referred to the Code, and said that when an employee lodges a grievance with an employer about workplace bullying, that employee should be permitted to continue to work normally during investigation of that grievance, and not be victimised. He said that he made a complaint and then it was he who was required to see a doctor. He again expressed the view that he was "being pushed out the door". In his evidence, Mr. Lynch denied this. He said that it was the opposite – from the very beginning the respondent was doing everything that it could to protect the appellant and preserve his employment.

20. There then followed a series of letters between the appellant and the respondent. The respondent wrote to the appellant on 26th July, 2013 informing him that pay would cease with effect from 19th August, 2013 and that from that date he was required to submit medical certificates to cover his absence from work and also indicating that he was receiving appropriate treatment. In his correspondence, the appellant maintained that he was not absent from work – he was being prevented from working by the respondent. Special leave pay was not in fact stopped until October, 2013. A Mr. Joe Carbery, administrative officer with the respondent wrote to the appellant on 5th November, 2013 requesting him to attend the HR department on 13th November, 2013 for a meeting regarding his ongoing absence from work. The appellant replied by saying that he was fit and ready for work and was being prevented from attending by the respondent itself. He said that since he was not being paid he was not going to take instruction from the respondent. On 21st November, 2013 the respondent replied to this letter informing the appellant that all employees of the respondent, whether in receipt of payment of wages or not, are required to comply with policies and procedures of the respondent. The respondent repeated that the appellant was required by the respondent to seek specialist treatment and that the respondent would if necessary arrange an appointment and pay any fees incurred. This letter concluded by saying that failure to take steps to attend the specialist could lead to disciplinary sanctions up to and including dismissal. Further letters were exchanged and on 16th December, 2013 the respondent said that it would afford the appellant one last chance to arrange an appointment with a specialist and that failure to do so would result in serious disciplinary sanctions. At the request of the Council, Dr. McNamara arranged for the plaintiff to attend for assessment by a consultant psychiatrist, a Mr. Cian Denehan on 30th January, 2014. However, the appellant said that he would not be attending this appointment and it did not go ahead. The respondent then requested the appellant to attend a meeting at the offices of the respondent on 30th January, 2014 to discuss the situation. He was warned that failure to attend could result in a recommendation for his immediate dismissal. He replied by letter on 16th January, 2014 explaining why he would not be attending and stating that since he was not being paid by the respondent he was not obliged to take instructions from it. On 3rd February, 2014, Mr. Carbery wrote again to the appellant informing him that he was recommending the appellant's dismissal with immediate effect, but with four weeks wages in lieu of notice. He informed the appellant of his right of appeal.

21. The appellant replied by letter of 7th February, 2014 setting out his own position again, i.e. that he was fit for work and that in his view he had been treated appallingly and unfairly and that his dismissal was the result of a predetermined effort by the staff of the respondent. He said that he had made a complaint and that, instead of investigating his complaint, the respondent had chosen to investigate the appellant.

22. By letter of 17th February, 2014, a Ms. Mary McSweeney, senior executive officer of the respondent, wrote to the appellant affording him one final opportunity to appeal the decision of the respondent as informed to the appellant by Mr. Carbery's letter of 3rd February, 2014. This lead to a further meeting on 5th March, 2014, described in the minutes (kept by the respondent) as an appeal hearing. The appellant was again accompanied by a Union representative. At this meeting, Ms. McSweeney informed the appellant that the respondent had no choice but to investigate the medical issues identified by the doctors who had seen him on behalf of the respondent before it could investigate his complaints. A Mr. Glynn, the appellant's Union representative, indicated that the appellant had had time to reconsider his position and suggested assessment by another person in CHI. Ms. McSweeney is recorded as saying: "just to confirm, we are bound by the outcome, if found fit to work we will accept this. If the doctor concurs with Dr. McNamara it will be binding. We'll arrange the appointment with a doctor in CHI other than Dr. McNamara. I will pause my decision on the appeal process until the medical report is available."

23. Following upon this, the appellant attended for assessment by Dr. Sheelagh O'Brien of CHI on 14th March, 2014. Dr. O'Brien also gave evidence in these proceedings. She is a consultant occupational physician and has been a specialist in this field since 2000. She is managing partner of CHI. She said that she had access to the appellant's medical records for the purpose of her assessment of the appellant and she put a lot of time into this assessment and took extensive notes. She met with the appellant for approximately one hour. She found that he presented well, was in good mood and made good eye contact. She said that she approached the consultation with an open mind. She was mindful that the appellant's grievances had been raised by him more than eighteen months ago and she considered that his case deserved a "fresh look". She said that she concluded beyond any doubt that the appellant exhibited evidence of paranoid behaviour. She said that this was outside the realm of her own expertise and that he needed assessment by a consultant psychiatrist. She said that while the appellant's complaints were quite plausible, there were a number of issues concerning the appellant himself which in and of themselves might not be significant, but when everything was taken together these issues were indicative of a pattern. Her perception of the appellant was of a person who was consumed by the idea that

everyone around him was talking about him, both inside and outside of the workplace. Her notes indicated that the appellant felt excluded, intimidated and manipulated, and while some of this may well be true it was also indicative of paranoia. The appellant himself raised and discussed with Dr. O'Brien the concept of "thought insertion" meaning that there are people trying to influence others to think about him in a particular way. He said that he thought that people could "mob" through the radio, although he did not think that this was happening to him. Dr. O'Brien said that she discussed all of this with the appellant and advised him that she thought that he needed assessment by a consultant psychiatrist, but he would not accept that advice.

24. When cross-examined by the appellant, she was asked why, during the course of the interview, she did not address other concerns that he had raised with the respondent about his treatment in the workplace. Dr. O'Brien said that she carried out a full mental health assessment and that if the appellant had asked her to address other issues she would have done so. The appellant put it to Dr. O'Brien that if she had asked him to explain his behaviour he could have done so. Dr. O'Brien said that the appellant expressed concern about "a lot of mobbing" in the workplace, thought insertion and concerns that he heard others outside the workplace using the word "paedophile" when he was nearby. Dr. O'Brien did not recall the appellant handing her a document entitled "grievance report" which he had prepared, although she did recall reading the Second Document. Mr. Donegan put it to Dr. O'Brien that she had no choice but to agree with the earlier reports of her colleagues for "insurance reasons", an allegation which Dr. O'Brien rejected out of hand.

25. On 21st March, 2014 Ms. McSweeney wrote again to the appellant. She noted that he had informed Dr. O'Brien that he did not agree with her conclusions and recommendations and that he would not cooperate in any assessment by a consulting psychiatrist. She informed him that in the circumstances, and as he was continuing to refuse to carry out the reasonable instruction of the respondent, she was upholding the recommendation for his dismissal. Accordingly, the appellant was dismissed with effect from 21st March, 2014 and was paid four weeks wages in lieu of notice.

26. In his evidence, Mr. Lynch said that when he met with the appellant on 12th March, 2012 he felt that the appellant was both under stress and distressed. He considered that the respondent should address the appellant's welfare in the first instance, and it was for that reason that it was decided to send the appellant forward for medical assessment. He said that it was normal practice to act on the advice of doctors retained for such purposes. Once the appellant's welfare was satisfactorily addressed and the respondent was satisfied that he was fit for work, it was the intention of the respondent to investigate his complaints. It is for this reason that the respondent did not embark upon its normal grievance procedure, or other procedures referred to by the appellant in cross-examination, such as nominating a designated contact person to offer information and assistance to the appellant in accordance with the respondent's own Dignity at Work Policy. Mr. Lynch said that he did not think that this was appropriate in the circumstances because, in his observation, the appellant was distressed, and in need of medical assessment in the first instance. Mr. Lynch denied that the respondent had made a decision about the appellant's future prior to meeting with the appellant, or that the appellant was being "pushed out the door" as suggested by the appellant. Mr. Lynch said that it was opposite; from the very beginning the respondent was doing everything possible to look after the appellant and ensure his fitness for work.

27. It was put to Mr. Lynch by the appellant that there was nothing to prevent the investigation of the appellant's complaints proceeding, regardless as to whether or not the respondent considered the appellant fit for work. Mr. Lynch agreed but he said that he felt it was appropriate that the appellant should be assessed in the first place. He agreed that before the appellant came to Ms. Quinlivan with his grievances, the respondent had no concerns about the appellant in the workplace.

28. The Court also heard evidence from Mr. Carbery, who had taken over the handling of this matter following upon the departure of Mr. Lynch and also Mr. Eoin O'Sullivan who briefly dealt with the matter immediately following Mr. Lynch's departure. Mr. Carbery introduced into evidence the attendance management policy of the respondent and referred specifically to para. 1.5 thereof which, under the heading of "duties and responsibilities in relation to attendances" states, *inter alia*:-

> "In return the council expects the following from staff:
>
> - to provide regular and efficient service.
> - When to seek and accept appropriate medical treatment to facilitate a speedy return to work.
> - To care for their health in order to provide regular and efficient service.
> - To report all incidents/accidents.
> - To observe health and safety regulations."

29. Mr. Carbery also referred to the disciplinary policy of the respondent which, at appendix 1, sets out examples of breaches of discipline. Insofar as is relevant to these proceedings, they include:

- Refusal to obey the reasonable instructions of a supervisor.
- Failure to comply with regulations governing sick leave or leave generally.
- Neglect of health, which may have repercussions for the work situation.

30. Mr. Carbery said that he familiarised himself with the facts concerning the appellant's complaint, and read the medical reports of Drs. Sissan, McNamara and O'Brien. On the basis of those reports, he did not consider the appellant fit for work, and he wrote to the appellant on 5th November, 2013 requiring him to attend a meeting in the HR department on 13th November, 2013. Mr. Carbery said that he considered this a serious matter, but he felt that as somebody without prior involvement, he might be able to make progress.

31. On cross-examination by the appellant, it was put to Mr. Carbery that he was not obliged to comply with the instructions of the respondents when he (the appellant) was not being paid. Mr. Carbery replied that the appellant previously brought a claim to a Rights Commissioner about his pay, which was rejected. He said that the appellant was still obliged to comply with instructions, notwithstanding that his pay had been suspended. As with other witnesses, he confirmed that the council was not following any particular code or procedure in its dealing with the appellant, because it was giving priority to the appellant's health. When asked by the appellant whether or not the appellant failed to follow instructions, Mr. Carbery said that the appellant failed to do so in his dealings with Mr. Carbery.

32. Mr. Carbery agreed with the appellant that there had been staff reductions in the respondent following the economic collapse

from 2007 onwards, but denied that this had anything at all to do with its treatment of the appellant. The appellant suggested that the respondent was deliberately taking an approach that would lead to the dismissal of the appellant, but this was denied by Mr. Carbery. Mr. Carbery also denied knowing anything about the referral of issues concerning the appellant to a mediator as suggested in cross-examination by the appellant.

33. The final witness called on behalf of the respondent was Ms. Mary McSweeney. She gave evidence in relation to the appeal hearing that took place on 5th March, 2014. She confirmed that the record of this meeting as handed into Court was accurate. In particular, she confirmed that it was her understanding that both the appellant and the respondent would be bound by the further assessment of the appellant by another doctor in CHI (which ultimately transpired to be the assessment carried out by Dr. O'Brien). In cross-examination, the appellant put to Ms. McSweeney that he only intended to be bound to the extent of agreeing to undergo a further assessment and nothing more. Ms. McSweeney, however, said that she understood he agreed to be bound by the outcome of the assessment. The outcome of course was that the appellant was in need of specialist evaluation.

34. The appellant called one witness on his own behalf, in addition to giving his own evidence. The witness that he called was an administrative office in the respondent, a Ms. McAdden. He questioned her about a previous complaint that he had made back in 2009, but Ms. McAdden had no recollection of this complaint or meeting with the appellant regarding the same. She said she did recall meeting with the appellant in 2010 about additional duties assigned to him, but she did not recall any meetings about a complaint. Nor did she recall anything about a possible mediation.

Evidence of Appellant

35. In his evidence, the appellant took issue with the evidence of Ms. Quinlivan regarding the documents that he gave to her at their first meeting. He said that at that meeting he only handed over the First Document. He gave her the Second Document later that day, or the next day. But the Second Document was never intended to form part of his grievance – he said that he handed this document to Ms.Quinlivan over only because he considered himself obliged to do so under the Safety, Health and Welfare at Work Act 2005 (the "Act of 2005").

36. He confirmed that Ms. Quinlivan asked him for examples of psychological bullying or, as he referred to it, "psychological mobbing". However, he said that psychological mobbing was not part of his grievance or at least it was not part of the complaint that he was making at the time. He intended at this meeting to discuss only the First Document and complaints that he had about the treatment he was receiving from his direct supervisor.

37. The appellant said that nothing happened about his complaint for some considerable time and in fact he had to raise the issue subsequently with Mr. Lynch. He said when he did subsequently meet with Mr. Lynch and Ms. Quinlivan, he was surprised that no effort was made to engage with his complaint at all. He was also surprised that Mr. Lynch had information which he had given to Ms. Quinlivan in confidence. He agreed that at this meeting with Ms. Quinlivan and Mr. Lynch he was uncomfortable and may have appeared somewhat stressed. He put this down to having consumed coffee in advance of the meeting. He felt mislead at this meeting and said that he did not get any support. He did agree however that he was referred for medical examination as a result of this meeting in order to assess whether or not he was fit to see through his complaints about bullying, which he was informed could be very stressful. However, he said he did not consent to a referral for any other purpose.

38. While the appellant accepted that three doctors had assessed him as being unfit for work pending further specialist evaluation, he did not accept their opinions in this regard. He considered all of these doctors to be associated and that they were referring him for psychiatric evaluation for insurance purposes. He said he was unwilling to undergo such an examination at the behest of the respondent, although he did try to do so privately.

39. The appellant put into evidence a copy of a report from a Dr. Searson whom it appears he attended in 2013 in response to requests from the respondent that he should attend his G.P., who in turn was to make contact with Dr. McNamara of CHI. In this report, Dr. Searson states that in his opinion the appellant "did not have a paranoid state". However, in the same report Dr. Searson said that he could not issue the appellant with a certificate of fitness for return to work because he did not have expertise in specialist occupational health or specialist psychiatric assessments. The appellant did not call Dr. Searson in evidence either before this Court or at any of the previous hearings.

40. Under cross-examination, the appellant said that the whole process was flawed and that he had been deceived by the respondent. He said that he did not know that he was being assessed as to his fitness for work; he was to be assessed as to his fitness to participate in the complaints process. He was taken by surprise when Dr. Sisson concluded that he was unfit for work, and he concluded that this was part of a strategy by respondent to reduce its staff numbers. He also considered that the unions were involved in this strategy. The appellant agreed that under his contract of employment he is obliged to comply with the instructions of his employer, but he said that that obligation only applied while he was in the employment of and being paid by the respondent. The appellant also agreed that he said he would never follow the instructions of the respondent i.e. that he had no intention of ever undergoing the specialist evaluation recommended by Drs. Sisson, McNamara and O'Brien. He said that the entire process was based on information which he had given in confidence to Ms. Quinlivan (i.e. the Second Document) which she should never have handed over to Mr. Lynch. Had the respondent followed the procedure outlined in the Code, as well as its own Dignity at Work Policy, none of this would have happened.

Submissions of Respondent

41. Counsel for the respondent submits that it is clear from the authorities that, in considering whether a dismissal was fair or unfair, the Court may have regard to the reasonableness of the conduct of the employer but may not substitute its own judgment as to whether the dismissal was reasonable for that of the employer. Counsel refers to the decision of Noonan J. in the *Governor and Company of the Bank of Ireland v. James Reilly* [2015] IEHC 241 wherein Noonan J. stated, at para. 38:-

> "The question rather is whether the decision to dismiss is within the range of reasonable responses of a reasonable employer to the conduct concerned".

42. Counsel also relied upon the decision of the Supreme Court in the case of *Ruffley v. Board of Management of St. Anne's School* [2017] IESC 33 wherein O'Donnell J. stated, at para. 40:-

> "The guarantee of fair procedures is based on the theory that if fair procedures are followed, a fair result will ensue, but there is inevitably a range of decisions which a reasonable decision-maker may take even if a judge on the same material would not make the same decision. A court exercising judicial review is not a court of appeal on the merits. A similar test is applied when reviewing the fairness of dismissals from employment. If procedural fairness is to be a component of the tort claim, a similar approach should apply."

43. The respondent further relies on the decision of *Brewster v. Thomas Burke and Minister for Labour* [1985] 4 JISLL 98 wherein Hamilton J. stated at p.4 that:-

> "It has long been part of our law that a person repudiates the contract of service if he wilfully disobeys the lawful and reasonable orders of his master. Such a refusal fully justifies an employer in dismissing an employee summarily."

44. In this case, the respondent submits that the appellant wilfully disobeyed the several requests of the respondent that the appellant should attend for assessment by a psychiatrist. That is contrary, not just to the proposition enunciated by the court in *Brewster*, but also to s. 13(1)(f) of the Act of 2005, pursuant to which an employee is obliged to undergo such assessments as may reasonably be required by his or her employer relating, *inter alia*, to the safety, health and welfare at work of the employee.

45. It is submitted that in this case the respondent was entitled, as a matter of contract and as a matter of law, to require the appellant to attend for specialist psychiatric evaluation and that it was reasonable for the respondent to require the appellant to do so, in circumstances where this had been recommended by three different occupational health doctors. It was not open to the appellant, it is submitted, to disobey this instruction because of other grievances he may have had with the respondent. The respondent had a genuine apprehension as to the psychological fitness of the appellant to pursue his complaints of bullying against others and the respondent has an overriding obligation pursuant to s. 8 of Act of 2005 to ensure, so far as is reasonably practicable, the safety of its employees.

46. Insofar as the appellant relies on the Code, it is submitted that there is no basis for the proposition (advanced by the appellant) that the Code is mandatory regardless of any other considerations. It is intended as a practical guide only. Since it was reasonable and lawful for the respondent to require the appellant to attend for specialist psychiatric evaluation, and since the appellant refused to do so having been requested to do so on several occasions, the dismissal of the appellant was fair.

Submissions of Appellant

47. The appellant places significant reliance on the Code. He argues that the respondent failed to follow the Code in several respects. The respondent did not appoint a designated person to receive and handle the complaint as required by the Code. That person should have appropriate training and expertise and be familiar with the procedures involved. The appellant submits that that did not occur in this case in that Mr. Lynch, on his own admission, was not familiar with the provisions of the Code.

48. The appellant submits that the respondent did not follow its own Dignity at Work Policy in relation to the investigation of bullying complaints, and instead of going through the step by step process for investigation of such complaints, the respondent went straight to the end of the process by having the appellant attend for medical examination. The appellant argues that none of these procedures were followed because of the perception that the respondent has that the appellant suffers from a disability, and that the appellant was discriminated against because of that perception. He submits that he has been victimised for making a complaint of bullying.

49. The appellant further submits that information that he gave to Ms. Quinlivan was disclosed to others contrary to the Protected Disclosures Act 2014. He argues that the complaint that he made about bullying was a protected disclosure for the purpose of that Act and that accordingly he was protected from dismissal as a result of having made that disclosure. He refers specifically to s. 12(1) of that Act which states that:-

> "An employer shall not penalise or threaten penalisation against an employee, or cause or permit any other person to penalise or threaten penalisation against an employee, for having made a protected disclosure."

50. The appellant also argued that he has been discriminated against on grounds of disability contrary to s. 4 of the Equal Status Act 2000. He also argues that he has been discriminated against contrary to s. 6 of the Employment Equality Act 1998 (as inserted by s. 4 of the Equality Act 2004). He further submits that even if he suffers from the condition alleged by the respondent, the respondent should still have investigated the complaint that he made.

51. The appellant submitted that the Second Document in which many incidents or events are summarised was never intended by him to be disclosed to any other person, and that had he known that it was to be used for this purpose he would have excised as much as 90% of it so that it referred only to relevant matters. He said that this document was never intended to form part of his grievance and that he only handed it over in the context of what he perceived to be his obligations under the Act of 2005.

Decision

52. The appellant's core complaint in these proceedings is that his dismissal was unfair. He contends that it was unfair because he was at all times fit for work and he does not accept the findings of the three different doctors in CHI that he was unfit for work pending specialist assessment by a consultant psychiatrist and appropriate treatment. More than that, he considers that the opinions of the doctors concerned are not impartial. He expressed the view that their opinions may have been motivated by "insurance" considerations, and he did not think a referral to a consultant psychiatrist was necessary. Nor did he think that any referral by any of these three doctors would result in an independent opinion. He said that he took steps to obtain his own independent consultant psychiatrist's opinion but it is unclear why he failed to obtain such an opinion. According to counsel for the respondent, this suggestion was made for the first time during the course of the hearing before this Court.

53. The appellant appears to be of the view that his dismissal may have been motivated by the complaints that he made regarding the conduct of his fellow workers or alternatively formed part of a larger plan to reduce the workforce of the respondent. The appellant did not advance any evidence to support these propositions.

54. The appellant is clearly very aggrieved that the complaints that he took to the respondent were not investigated, and that instead he found his own fitness for work coming under the microscope. It is not difficult to understand why the appellant would be aggrieved at this turn of events. On the other hand, he accepted that when he met with Mr. Lynch and Ms. Quinlivan in March 2012 he presented in a somewhat distressed state, although he denied that this had anything to do with his fitness for work. While he complained that Ms. Quinlivan made use of the Second Document, which he said was given to her in confidence after their first meeting and for a different purpose, Ms. Quinlivan was adamant that he gave it to her on the day that he met with her and that the appellant did not prohibit her from discussing the contents of the document with any other personnel within the respondent organisation. I think that the appellant's own recollection of this must be mistaken. I think he clearly gave this document to Ms. Quinlivan in order to provide her with instances of the kind of behaviour about which he was complaining. The appellant said that had he intended this document to be used for that purpose he would have edited the document to take out irrelevant or inappropriate entries, and he fairly acknowledged that some of the entries might appear somewhat unusual. However, if he did not give this document to Ms. Quinlivan for the purpose of providing her with examples of the kind of behaviour about which he was complaining,

and which he intended her to investigate, then it is difficult to know why he gave it to her at all. His explanation for doing so (see paras. 35 and 51 above) is unconvincing, to say the least.

55. I do not doubt at all the evidence of Ms. Quinlivan that she was concerned for the welfare of the appellant when she met with him in early February 2012, and that she considered it appropriate to investigate this further, before embarking on an investigation of the appellant's complaints. Similarly, I do not doubt the bona fides of Mr. Lynch in this regard. When the appellant met with Ms. Quinlivan and Mr. Lynch on 12th March, 2012 they found the appellant to be in a state of stress, and he himself acknowledged that he so presented, to an extent at least, on that occasion.

56. It was therefore entirely appropriate and in the interests of the appellant that he should be assessed as arranged by the respondent. An investigation into the conduct of no less than nine of the appellant's colleagues, at his instigation, was very likely to be a stressful experience for the appellant and it was entirely reasonable for the respondent to ascertain that he was both fit for work and fit to participate in such an inquiry.

57. The conclusions of Dr. Sisson bore out the respondent's concerns. So too did the conclusions of Dr. McNamara and Dr. O'Brien. But the appellant resolutely refused to accept these conclusions. He went so far as to report Dr. McNamara to the Medical Council. He persistently refused to attend for specialist evaluation. At one level it is not difficult to understand his reluctance to do so. He himself felt perfectly well. He had been considered a good and competent employee. His mental health was only questioned when he made a complaint about other employees. There was nothing especially startling about the contents of the documentation that he gave to Ms. Quinlivan or about any of his conversations with any of the three doctors with whom he consulted. As such, it is not difficult to see why he was upset at the conclusions of the doctors who examined him, and the insistence of the respondent that he should have specialist psychiatric evaluation.

58. But the key to unlocking the impasse lay entirely in his own hands. If he was, as he maintained, fit for work, then he had nothing to fear from specialist evaluation. His mistrust of doctors was not a good enough reason to decline to attend for such evaluation. He was given numerous opportunities to do so but declined on every occasion.

59. The appellant had been placed on special leave, with full pay, and this could not continue indefinitely. The respondent needed to establish his fitness for work both to accept him back into the workplace and, if that fitness was established, to investigate his complaints. The respondent was entirely within its rights to request the appellant to attend for such examination. It would, in my view, be entirely within its rights to do so without any supporting regulations or documentation. It is clear however from both the attendance management and disciplinary policies of the respondent that it is, as a matter of contract, entitled to require the appellant to seek appropriate medical treatment to facilitate a speedy return to work. Moreover, s. 13 (1) (f) of the Act of 2005 provides that an employee shall, *inter alia*, undergo such assessment as may reasonably be required by his or her employer or as may be prescribed relating to safety, health and welfare at work or in relation to the work carried out by the employee.

60. As against all of that, the appellant contends that he was victimised by the respondent for making a complaint, and that the appellant has breached its own Dignity at Work Policy, the Code, the Protected Disclosures Act 2014, the Act of 2005 and the Equality Act 2004. He contends that the respondent's personnel were unfamiliar with their obligations under the foregoing legislation. Most particularly he says that he has been discriminated against by the respondent as a result of its perception that he has a disability and that the assessment of his fitness to work was undertaken by unqualified personnel who did not have the qualifications to determine that he was unfit for work on mental health grounds. He claims that having received his complaint the respondent should have conducted a six stage investigative process as set out in its own Dignity at Work Policy document, and medical treatment is one of the actions contemplated by the *last* stage in this investigative process. In other words, the respondent went from the beginning of the process, i.e. receiving the complaint, to the end of the process without conducting the intervening investigation. For all of these reasons, the appellant considers that his dismissal was procedurally unfair.

61. Apart altogether from procedural reasons, the appellant is convinced that his dismissal was predetermined. The appellant also argues that he was not obliged to take instructions from the respondent in circumstances where his pay had been suspended.

62. I will deal first with this last point. The parties had arrived at an impasse. The respondent would not accept the appellant back to work until he was certified as being fit for work. In order to be certified as fit for work it was necessary, in the view of the respondent, which was based upon the medical advice of no less than three different doctors, for the respondent to be assessed by an appropriate consultant psychiatrist. It was only when the appellant refused to undergo this further assessment that his pay was suspended, so his refusal to comply with the instructions of his employer came first in time. This is a matter of fact about which there is no doubt. And it was this very refusal to comply with the instructions of the respondent, notwithstanding having been offered numerous opportunities to do so, that gave rise to the dismissal of the appellant.

63. The appellant is correct in stating that the respondent did not follow the procedures prescribed by the Code or its own Dignity at Work Policy in connection with the investigation of the appellant's complaints. But the respondent found itself in a most unusual and difficult situation. From the very outset, the respondent had concerns about the fitness of the appellant to participate in an investigation of the kind that would necessarily follow upon the complaints that he made. The respondent considered it desirable and in the appellant's own interests that his fitness to participate in such an investigation should first be assessed before embarking upon the same. In the event, those concerns were proven to be well-founded. Not only did the three doctors who examined the appellant consider that he would not be fit to participate in the investigation of his complaint, they were of the view that he could not be considered fit for work pending specialist evaluation. The allegation by the appellant that the respondent and these three doctors were complicit in some kind of conspiracy against him must be rejected out of hand. Not only is the allegation fanciful, there is no evidence of it and it flies in the face of the evidence given not just by the witnesses of the respondent, but by three independent doctors who were, as you would expect, clearly motivated out of concerns for the appellant himself.

64. While the appellant argues, not unreasonably, that there was nothing to prevent the respondent investigating his complaints notwithstanding the conclusions of the doctors, it was nonetheless in my view entirely reasonable for the respondent to require the appellant to attend for further specialist assessment not least having regard to the relationship between the kind of complaints made by the appellant and the conclusions of each of the doctors who examined the appellant that he exhibited signs of paranoia. In the circumstances therefore it was entirely reasonable for the respondent to require the appellant to attend for specialist evaluation, and to defer the investigation of his complaint pending the outcome of such evaluation.

65. It is difficult not to feel some measure of sympathy for the appellant. The evidence established that he had been a good and competent employee. He brought a complaint to the respondent, and instead of investigating that complaint, the respondent chose first to investigate the appellant's fitness to participate in the investigation of his complaint. But the key to resolving the impasse in which the appellant found himself lay entirely within his own hands. All that was required of him was that he attend for specialist

evaluation, at the expense of the respondent. It is of course true that any specialist who might have examined the appellant might well have concluded that he was not fit to participate in an investigation of the complaints that he made or for that matter to return to the workplace. In that event, his complaints might well have remained unresolved indefinitely. On the other hand, whatever specialist might have examined the appellant might have concluded that he was fit to return to work and to participate in the investigation of his complaints or at least could do so subject to certain treatment or precautions. But either way, not only was it reasonable for the respondent to require the appellant to attend for such an examination, it had a duty to do so faced with the three separate opinions that had been provided by Drs. Sisson, McNamara and O'Brien.

66. Faced with the resolute refusal of the appellant to attend for such examination, the respondent could not accept the appellant back into the workplace and in those circumstances it was left with little choice but to dismiss the appellant. It follows therefore that his dismissal from employment was fair.

67. In the interests of completeness, I should add that I do not believe that the Protected Disclosure Act 2014 has any relevance to the complaints made by the appellant. The appellant brought forward a complaint of bullying in the workplace and did not even suggest that he said to Ms. Quinlivan at the time that he was making a protected disclosure within the meaning of that Act. Even if he did, in my view a complaint of bullying in the workplace is a wrongdoing of an altogether different character than that to which the 2014 Act is intended to apply. I have also given consideration to the arguments advanced by the appellant pursuant to the Employment Equality Act 1998 and the Equal Status Act 2000 and consider that these are entirely without foundation.