Neutral Citation Number [2006 IEHC 327

THE HIGH COURT

2001 No. 10522 P

BETWEEN

ADAM BERBER

PLAINTIFF

AND
DUNNES STORES LIMITED

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on 24th October, 2006.

The factual background

1. The plaintiff commenced his employment with the defendant as a trainee manager in April, 1980 when he was just short of nineteen years of age. Following his training he was employed as a store manager at various locations, Enniscorthy, Wexford and Bray. He moved from store management to buying in 1988. Thereafter until November, 2000 he was involved in various facets of buying, advancing from a trainee through the positions of Group footwear merchandiser and men's footwear buyer and ultimately to men's "ready-mades" buyer. It is common case that the senior managers and executives of the defendant viewed the plaintiff's performance in his various roles positively and that it was expected that he would advance further within the business. On a management performance review in February, 2000 his performance was generally rated at the level of "effective contribution". One matter, however, which was alluded to was the fact that he is colour-blind.

2. It is the plaintiff's case that from March, 2000 onwards the attitude of senior managers and executives of the defendant towards him changed. That perception was engendered by the fact that, unlike previous years when as a buyer he spent as many as fifty days abroad sourcing and buying products, in the spring and summer of 2000 he went abroad only once on business, to a clothing show in Germany. It was also fuelled by an increased interest in the state of his health, which he perceived as unnecessary because of his attendance and work record. The plaintiff has suffered from Crohn's disease since his late teens. In July, 2000 the reason ascribed for not sending the plaintiff on a buying trip to the Far East was the concern of the defendant's Managing Director, Margaret Heffernan, that he might get ill because of his medical condition. The plaintiff's evidence was that it was at that stage that he felt that the defendant was stopping him from doing his job and that he thought there was "something bizarre going on". In the following month, August 2000, at the behest of Mrs. Heffernan, the plaintiff was requested to report to the defendant's Human Resources department on his medical condition. In October, 2000 the plaintiff was informed by his departmental head, David McDermott, that he was to be transferred from buying back to store management. The plaintiff's colour-blindness was adverted to in this context. Eventually, on 22nd November, 2000 the plaintiff was informed that he was to be moved to the defendant's store in the ILAC Centre in Dublin as either department manager of menswear or ladies' wear. This assignment was perceived by the plaintiff as a demotion. His response was to seek a meeting with Mrs. Heffernan.

3. That meeting was facilitated and it took place on 23rd November, 2000. The outcome of the meeting was that it was agreed that the plaintiff would go back into store management, that he would start in the defendant's store in Blanchardstown Shopping Centre, which at the time was regarded as the defendant's "flagship" store, that he would undergo training there with a view to "fast tracking" him through store management so that he could be appointed as store manager or a regional manager within six to twelve months. It was the plaintiff's understanding that he would start work in Blanchardstown on 4th December, 2000 and that he would start in the ladies' wear department. It is clear on the evidence that the plaintiff was unhappy about the change, but I am satisfied on the evidence that he was prepared to make the most of it. However, because of a series of unfortunate incidents, the plaintiff's career with the defendant ended within six months.

4. The first of those incidents was that when the plaintiff arrived at work in the defendant's head office in Stephen Street on 27th November, 2000 there was an email awaiting him directing him to report for duty that day in Blanchardstown. He was to take up a position in the homewares, not ladies' wear, department. The plaintiff was upset by this direction, which he considered to be at variance with his agreement with Mrs. Heffernan. He tried to contact Mrs. Heffernan but she was not available. The evidence was that she had gone abroad. The plaintiff did not go to Blanchardstown. The next day he was contacted by John McNiffe, who was the director of store operations at the time. Mr. McNiffe's evidence was that he had received a phone call from Mrs. Heffernan asking him to deal with the plaintiff. Mr. McNiffe and the plaintiff had three meetings. At the first, on 28th November, 2000, there was no resolution because Mr. McNiffe directed the plaintiff to go to Blanchardstown but the plaintiff would not agree to go until he had spoken with Mrs. Heffernan. The matter was left on the basis that the plaintiff would "sleep on it" and they would meet again the following day. There were two meetings on 29th November, 2000. At the first, that morning, the plaintiff maintained the position that he needed to speak to Mrs. Heffernan to clarify issues. The plaintiff had brought a statement which he read to Mr. McNiffe. Mr. McNiffe asked for a copy of the statement but the plaintiff refused to give it to him. Mr. McNiffe adjourned the meeting until 5 o'clock the same day. The plaintiff's evidence was that Mr. McNiffe told him to have "another think" about what he was saying and this is consistent with Mr. McNiffe's evidence. On the resumption of the meeting the plaintiff adopted the same position as he had adopted previously. Mr. McNiffe suspended him from work with pay because he would not go to Blanchardstown. Following his suspension, the plaintiff's solicitors entered the fray on his behalf.

5. In their first letter dated 7th December, 2000 the plaintiff's solicitors quoted the prepared statement which the plaintiff had read to Mr. McNiffe on 29th November, 2000, which was in the following terms:

> "I have had the opportunity to give the matter further thought. Nothing has changed overnight. I would ask again that I have the opportunity to meet with Mrs. Heffernan before I go to Blanchardstown in that we can clarify some of the commitments or promises that she made to me to discuss some of the issues that have arisen since my meeting with her on 23rd November.
>
> I am quite happy to go to Blanchardstown on the terms that I agreed, together with Mrs. Heffernan, in our one to one meeting last Thursday and I will adhere to those terms and I am quite happy to fulfil my part and carry out Mrs. Heffernan's personal request to me regarding my change of direction within the company. Remember, that all I want is to be treated fairly and honourably after twenty years of service to the company."

6. In their letter, the plaintiff's solicitors threatened proceedings if the suspension was not lifted. Further, they alleged that the defendant's conduct towards the plaintiff and the stress it had generated had resulted in him becoming ill and his doctor had certified his absence from work.

7. As I have stated, the plaintiff suffers from Crohn's disease. He was first diagnosed in 1978 during an operation after he presented with acute appendicitis. At the operation he had a right hemicolectomy and afterwards he was put on medication. He did well. The plaintiff has been treated by Professor Colm O Morain, Consultant Gastroenterologist, since 1994. In 1995 there was a recurrence of his Crohn's disease. Medication was prescribed and the plaintiff went into remission within three to six months. The plaintiff continued under the care of Professor O Morain who saw him regularly. By December, 1999 Professor O Morain recorded that the plaintiff was doing well and that, while he got intermittent symptoms, they were generally controlled. At that stage Professor O Morain planned to review the plaintiff again in six months. However, in the spring of 2000 the plaintiff had a flare up of his Crohn's disease. He was reviewed by Professor O Morain on 22nd March, 2000, who reviewed him again on 3rd May, 2000 after a colonoscopy and again on 19th May, 2000 after a "barium meal follow through", which showed a suspected loop bowel which was consistent with active Crohn's disease. Professor O Morain put him on infusions of Infliximab. By August, 2000 Professor O Morain found that the plaintiff was dramatically better. By November his symptoms were beginning to recur. He had another infusion of Infliximab. However, when Professor O Morain reviewed him on 13th December, 2000 he recorded that unfortunately the plaintiff had been through an excessive amount of stress with his job, that he had ended up in a legal wrangle. Professor O Morain recorded that this had not contributed to his well-being. He certified the plaintiff as being unfit for work until 28th December, 2000.

8. The plaintiff's absentee record in the years 1995 to 2000 mirrors the medical evidence. He missed only one day from work in the years 1995, 1996 and 1999. He had no absence in 1998. He was absent for five days in 1997 and for seven days in the year 2000 up to 21st November. That record clearly justifies Professor O Morain's opinion that the plaintiff was very positive towards his work, towards life in general and towards his disease.

9. Returning to the chronology of events, the defendant's solicitor's response dated 12th December, 2000 to the plaintiff's solicitor's letter sought to justify Mr. McNiffe's decision to suspend the plaintiff on the basis that the position adopted by the plaintiff at his meetings with Mr. McNiffe, his persistence in seeking to speak to Mrs. Heffernan and in refusing to explain his issues to Mr. McNiffe, was unreasonable. However, it stated that the defendant was prepared to overlook the incident provided the plaintiff reported for work in Blanchardstown as soon as his doctor certified him as being fit to return to work. The plaintiff reported for duty in Blanchardstown on 28th December, 2000. From this point onwards, practically everything of significance which occurred was recorded in the inter partes correspondence.

10. I have some general observations to make in relation to the evidence.

11. First, on the plaintiff's side the only witness of fact was the plaintiff. On the defendant's side the witnesses of fact were Conor Sills, who was the manager of the defendant's store at Blanchardstown at the time, Tim O'Mahony, who was involved in human resources management for the defendant and who testified in relation to the preparation of a training plan in March, 2001 and professed little or no knowledge of anything else, and Mr. McNiffe. The defendants did not call any witness as to what transpired up to and at the meeting with Mrs. Heffernan on 23rd November, 2000.

12. Secondly, while there is very little conflict in relation to primary facts, there is huge conflict as to the inferences to be drawn from primary facts and, in particular, the motivation of the parties.

13. On the plaintiff's side, in the first letter from the plaintiff's solicitors, the letter of 7th December, 2000, no doubt on the basis of the plaintiff's perception, the plaintiff's solicitors attributed malign intent to Mrs. Heffernan in relation to the plaintiff's career with the defendant and this allegation was persisted in up to and throughout the hearing. The suggestion was that Mrs. Heffernan was intent on ousting the plaintiff from his employment with the defendant and that she was motivated by jealousy of the plaintiff's brother who in February, 2000 had had a very significant business success and whose subsequent philanthropy had been the subject of media attention. In their letter of 12th December, 2000 the defendant's solicitors explained a comment made by Mrs. Heffernan on 23rd November, 2000, that the plaintiff did not need to work, as a lighthearted comment. I have no doubt, taking an overview of the evidence, that the comment was just friendly banter. I do not think it would be proper to draw any inference other than that Mrs. Heffernan was motivated by sound management considerations in deciding to transfer the plaintiff out of buying and back to store management. However, I believe that the plaintiff's reaction, as manifested in his solicitors' letter of 7th December, 2000, should have rung an alarm bell with the senior management of the defendant as regards the state of his health.

14. On the other side, the defendant suggested that the proper inference to be drawn from the plaintiff's conduct is that he had no intention of making the transfer to Blanchardstown work and that he had an ulterior motive in acting as he did. Indeed, Mr. McNiffe's evidence was that his perception at his very first meeting with the plaintiff on 28th November, 2000 was that he had his "own agenda", that he wanted out and, as I understand it, Mr. McNiffe's evidence was that the plaintiff was orchestrating a situation in which he could get a severance payment or compensation. From an early stage Mr. McNiffe was expressing his scepticism about the plaintiff's motivation. In a letter of 12th January, 2001 he stated that he was very concerned that from the very outset the plaintiff had no real intention of giving the change a chance to work. I do not think it would be proper to draw the inference suggested by the defendant from the plaintiff's conduct. The plaintiff wanted to stay in the employment of the defendant but he wanted to retain his position as a buyer. While he was not happy about the change to store management, he did agree to it. As I will detail later, some of his behaviour might be characterised as unreasonable, but I think that is attributable to the fact that his trust in the defendant's senior management and executives had been shattered rather than to any grand design to leave the defendant with a severance package or compensation.

15. Thirdly, although the plaintiff's solicitors were writing on his behalf to the defendant, during the six months following 7th December, 2000 the defendant's responses from Mr. McNiffe were sent directly to the plaintiff at his home address, sometimes by courier and sometimes on Saturday. While I can understand the defendant's position, that the plaintiff was still an employee and it was entitled to communicate directly with him, there is no doubt that the course adopted heightened the distrust of the plaintiff and increased the stress he was under.

16. While the plaintiff reported for work in Blanchardstown on 28th December, 2000, in fact he worked only for about four days at the branch before ceasing to work because of ill health. He contended that his treatment at Blanchardstown exacerbated his ill health. One complaint was that a document entitled "Drapery Management Analysis", which, in effect, was the weekly duty roster for managers and, accordingly, widely circulated, included his name under the heading "new trainees". This was characterised by the plaintiff's solicitors, no doubt on the basis of the plaintiff's perception, as humiliating, defamatory and vindictive. The plaintiff also complained that the personalised homewares training plan which was furnished to him on his arrival was appropriate to a newly-joined trainee and failed to take account of the plaintiff's experience with the defendant for almost twenty-one years. These complaints were the subject of a letter of 11th January, 2000 from the plaintiff's solicitors to the defendant in which it was alleged that the plaintiff's reception at Blanchardstown was but a continuation of a course of treatment which began the previous February and which was designed to sideline him out of management and out of the defendant. An undertaking was sought that an appropriately devised training schedule to fast track the plaintiff to store management would be produced and implemented without delay and that the

offending roster be withdrawn immediately and replaced with an appropriate description of the plaintiff.

17. The defendant's response, which was a letter dated 12th January, 2001 from Mr. McNiffe, was that the plaintiff should have made his complaint in the first instance to his line manager, Mr. Sills, that the description in the roster was an oversight, and that the plaintiff had to give the training programme a chance to work and that that required a degree of flexibility on his part. The plaintiff was requested to return to work the following Monday. It was intimated that Mr. McNiffe would meet him shortly afterwards to go through any issues he had. However, the plaintiff was certified as unfit for work from then until 21st February, 2001. There was a consistent flow of correspondence both ways in the interim, each side sticking to the position which had been adopted.

18. On 21st February, 2001 the plaintiff's solicitors advised the defendant that Professor O Morain had indicated that the plaintiff might return to work. However, as a precondition to returning, the plaintiff required confirmation in relation to the training programme and his future career path and he also required that an agreed communication would be distributed to all management and staff within Head Office and all stores to correct the misdescription in the roster. The defendant's response, through Mr. McNiffe, was consistent with the line previously taken by the defendant: the plaintiff should raise any issues he had with his line manager, rather than resorting to solicitor's correspondence; the description of him as a "new trainee" was a genuine mistake; and the plaintiff in his demands was continuing to move "the goalposts". Once again the plaintiff was asked to report for work in Blanchardstown on 1st March, 20001.

19. Following further correspondence in a similar vein a meeting was held on 7th March, 2001 between the plaintiff, who was accompanied by a solicitor, and Mr. McNiffe, who was accompanied by the defendant's solicitor. Following the meeting, on the same day, Mr. McNiffe, on behalf of the defendant, wrote to the plaintiff setting out the matters which had been agreed. This gave rise to disagreement as to what had been agreed, which led to another spate of correspondence. The points in issue before the plaintiff eventually returned to work in Blanchardstown were as follows:

(1) In the letter of 7th March, 2001 Mr. McNiffe stated as follows in relation to the plaintiff's progression after the training period:

> "As we stressed at the meeting and as I think was accepted by you, that the level you achieve will depend entirely on your performance. I believe that after you have completed your training programme that you should be capable of being assigned to a 'number two' position in a medium sized store graduating to the 'number one' position. In my estimation this will realistically take you approximately 18 months from the date that you start your training programme. That said, it is possible to do it in a shorter period but once again that is up to your performance. Should you perform to the expected level you should be in a position to become a store manager."

The plaintiff's solicitors took issue with the foregoing, suggesting that the defendant was resiling from Mrs. Heffernan's agreement with the plaintiff that he would be fast tracked to a store manager or regional manager position within six to twelve months, that the eighteen-month period was new, and the graduation via a number two position to a number one position was also new. The defendant did not accept that argument and in a letter dated 16th March, 2001 from Mr. McNiffe it was stated as follows:

> "The position of the company has been set out at length in correspondence, namely that your progression to senior store manager and the time it takes will depend on your performance. There is no point in guaranteeing that in twelve months' time you will be ready to take on the role of a senior manager if you have not acquired the appropriate skills and experience …"

A similar line had been taken in a letter dated 8th March, 2001 from the defendant's solicitors to the plaintiff's solicitors. The plaintiff's solicitors in a letter of 16th March, 2001 sought confirmation that the timeframe stipulated by Mrs. Heffernan, six to twelve months, would be adhered to. The defendant's response, in a letter dated 20th March, 2001 from Mr. McNiffe, was that the basis of the plaintiff's return to work would be as set out in his letter of 16th March and not on any other basis. In that letter Mr. McNiffe gave the plaintiff an ultimatum to return to work on the following Thursday; otherwise disciplinary action would be taken against him. The plaintiff's solicitors' final word on this point was that he was relying on the undertaking given to him by Mrs. Heffernan that the period within which he would be appointed to a senior store manager or regional manager position would be six to twelve months. In short, the parties never achieved consensus on this issue.

(2) A training programme was to be formulated by Mr. O'Mahony for the plaintiff following a meeting on the evening of 7th March, 2001 between the plaintiff and Mr. O'Mahony and Mr. Sills. In his letter of 7th March, 2001 Mr. McNiffe stated that it had been agreed that the final decision as to what should or should not be included in the training plan was with the defendant and that, while the plaintiff's input would obviously be helpful in designing the programme, the defendant reserved the right to decide what should or should not be included in the programme. There was some delay in producing the programme, which was sent to the plaintiff on 14th March, 2001. The plaintiff's solicitors raised some points in relation to the training programme in their letter of 20th March, 2001. Mr. McNiffe in his response, which was the letter of 20th March, 2001 in which he threatened disciplinary action, expressed exasperation and no inclination to accede to the points made by the plaintiff. In their next letter of 21st March, 2001 the plaintiff's solicitors persisted. However, as in the case of the issue dealt with at (1) above, there was no further resolution of this issue before the plaintiff returned to work, Mr. McNiffe's letter being the final letter in which this issue was addressed.

(3) In his letter dated 7th March, 2001 Mr. McNiffe recorded that it had been agreed that an announcement would be sent in internal mail in relation to rectifying the mistake in the roster in January and the text of the announcement was set out. There was delay in sending out the announcement and it was not in fact sent out until 23rd March, 2001. It was sent to department heads, store managers and regional managers of the defendant in this State. It was sent out in the name of Tony Candon, who was the head of textile operations. In a letter dated 10th April, 2001 addressed to the Managing Director of the defendant the plaintiff complained that the announcement was not in the terms agreed on 7th March, 2001 and that it had not been circulated as agreed. The plaintiff alleged that the defendant had acted in bad faith in unilaterally altering the announcement. He sought that the agreed announcement should be issued and circulated by email to all staff and management in the head office and by internal post to all stores in Northern Ireland, the United Kingdom and Spain. A further letter of complaint in relation to the content of the announcement and its circulation was sent by the plaintiff's solicitors to the defendant's solicitors on 1st May, 2001. Having compared the announcement in the form sent with the proposed text as set out in the letter of 7th March, 2001, I am of the view that the substance of the actual announcement was as agreed and I do not consider the variations made to be of significance, although I find it

difficult to understand why the text was varied given the context in which the announcement was being made. The plaintiff expected the announcement to be made by Mr. McNiffe, and, having regard to the evidence, I think he was justified in that expectation. He was certainly justified in his expectation that circulation would be to all staff in head office by email and by internal post to all stores in Ireland, the U.K. and Spain, because Mr. McNiffe in his letter of 20th March, 2001 confirmed that that would be the case. Again, it is difficult to understand, given the context, why this agreement was not adhered to. Having said that, it seems to me that the objections he made were points on which the plaintiff might reasonably have yielded.

(4) Mr. McNiffe confirmed in his letter of 16th March, 2001 that he had assured the plaintiff at the meeting on 7th March, 2001 that his salary would not be reduced. In his letter of 7th March, 2001 Mr. McNiffe had indicated that he would contact the plaintiff the following week in relation to a decision on the plaintiff's complaint that his Christmas bonus, which would have amounted to £1,500, was not paid the previous Christmas. This matter was never progressed.

20. The contention between the parties continued after the plaintiff returned to work in the Blanchardstown store at the end of April, 2001 and his solicitors continued to raise issues on his behalf with the defendant. As I have stated, the letter of 20th March, 2001 was the last letter from the defendant's side and the plaintiff's letter of 10th April, 2001 and his solicitor's letter of 1st May, 2001 were not replied to. Under the agreement made on 7th March, 2001 a schedule of monthly meetings between Mr. Sills and Mr. McNiffe and the plaintiff, which were to take place at Blanchardstown at 5 p.m., presumably, to review progress, was agreed. On 9th May, 2001 the plaintiff's solicitors wrote to the defendant's solicitors complaining that the scheduled meeting due on 8th May had not taken place and complaining that that was a breach of the agreement. There was no response to that letter. It is not clear why. However, I think the defendant would have been justified in considering the complaint as unreasonable as at that stage the plaintiff had spent very little time working in the Blanchardstown store after the meeting of 7th March, 2001.

21. The plaintiff's final day at work with the defendant was 15th May, 2001. By letter dated 30th May, 2001 to the Managing Director of the defendant, the plaintiff stated that he had been advised by his solicitors and counsel that the conduct of the defendant towards him amounted to a repudiation by the defendant of its obligations to him and that his contract of employment was therefore at an end. In the letter he specifically alluded to the meeting on 7th March, 2001 and stated that he had moved to the Blanchardstown store, which was part of the agreement. He complained that his letter of 10th April 2001 had not been replied to. He referred to a disagreement with Mr. Sills on 15th May, 2001 and asserted that Mr. Sills began to shout at him in an abusive verbal attack within the hearing of other management and staff, which was both offensive and humiliating to him. He also referred to the fact that Professor O Morain had advised him that in the interests of his health he must cease working in the environment immediately. Although issue was taken with the plaintiff's assertion that he had honoured his part of the bargain in relation to moving to the Blanchardstown store, the defendant accepted the departure of the plaintiff and by letter dated 21st June, 2001 he was furnished with his P45 together with payment up to the date on which his letter of 30th May, 2001 was received by the defendant.

22. Mr. Sills, however, does not accept that he was verbally abusive to the plaintiff on 15th May, 2001, although he does agree that there was a disagreement between them, which resulted in both parties raising their voices. The source of the row was that the plaintiff was rostered for duty from 10 a.m. to 8.30 p.m., the "lock-up" shift, that day, but he believed that he was rostered for attendance from 8.30 a.m. to 6 p.m., and, in fact, he had attended at 8.30 a.m. During the morning Mr. Sills made it clear to him that he was rostered for the "lock-up" and Mr. Sills required him to attend until 8.30 p.m. The plaintiff said he could not do it. There was a dispute between the plaintiff and Mr. Sills about the roster. The plaintiff admitted in court that he was wrong; that he had looked at the roster for the previous week. There was a conflict as to whether the plaintiff admitted to Mr. Sills on the day that he had been mistaken. The plaintiff testified that he did. Mr. Sills testified that he did not and that the plaintiff accused him of having changed the roster. There is consensus that Mr. Sills made it clear to the plaintiff that he was the store manager and that the plaintiff's riposte was that Mr. Sills could deal with his solicitor.

23. I infer from the evidence that that episode was merely the culmination of tension which had existed between the plaintiff and Mr. Sills from the moment the plaintiff set foot in the Blanchardstown store on 28th December, 2000. On his first day, the plaintiff was dressed in the type of casual attire that he wore while working as a buyer in head office. He was informed by Mr. Sills that the dress code for managers was a conservative coloured suit, formal footwear and such like. The plaintiff asked Mr. Sills to put that in writing and Mr. Sills wrote a letter on 29th December, 2000 setting out the dress code for managers in the Blanchardstown store. The plaintiff's explanation of this was that he was on the defensive at that time because of all the different things that were happening to him. The plaintiff was only at work for four days at that time. During that period the issue of his description as a "new trainee" on the roster arose, but the plaintiff did not raise that with Mr. Sills.

24. In summary, the plaintiff's attendance at work during the early part of 2000 was very limited. After being absent on sick leave the plaintiff returned to the Blanchardstown store towards the end of April, 2001. His evidence was that Mr. Sills raised with him the question of his absence on sick leave around 25th April, 2001. The plaintiff was on annual leave from 27th April, 2001 to 8th May, 2001. He was out on sick leave again on 11th and 12th May, 2001. He was notified by the Human Resources department by letter dated 17th May, 2001 that he had exceeded his paid sick leave allowance at the end of April, 2001 and that his absence on 11th and 12th May and any subsequent absenteeism would not be paid for by the defendant. He was reminded of the requirements in relation to applying for social welfare. However, before that the incident on 15th May, 2001 had occurred. Mr. Sills admitted that he raised his voice on that occasion and I believe he treated the plaintiff in a manner which was out of character for him. However, given the history of the plaintiff's involvement in the Blanchardstown store and the particular circumstances which prevailed, that the plaintiff was in the wrong, that Mr. Sills was his superior and that Mr. Sills was told by the plaintiff that he could deal with his solicitor, I think Mr. Sills' conduct was understandable, if not excusable.

25. The plaintiff was out of work for a period of approximately eight months after he left the defendant's employment. At the end of January, 2002 he was successful in obtaining a position as a buyer with another retail group on terms which, as regards his remuneration package, were no less favourable than the terms he enjoyed with the defendant. His evidence was that he started looking for new employment around October or November, 2001. The plaintiff's work record since he left the defendant, when considered in the light of his medical problems, establishes beyond a shadow of a doubt that the plaintiff is not a malingerer.

The plaintiff's claim

26. Against the foregoing factual background the plaintiff's claim as pleaded and pursued falls to be considered under three headings:

(1) for breach of contract, the essence of this aspect of his claim being that the plaintiff was constructively and wrongfully dismissed by the defendant;

(2) for personal injuries, this aspect of his claim being formulated both in contract and in tort; and

(3) for defamation, as regards the incorrect description of the plaintiff as a "new trainee" in the roster.

27. I will deal with each head of claim separately.

Breach of contract
28. There was a certain element of consensus between the parties as to the terms on which the plaintiff was employed by the defendant. When his employment ceased the plaintiff was on a salary of IR£43,000, he was a participant in the defendant's Group VHI scheme and he was a member of the defendant's pension scheme. He was also entitled to the benefit of a company car. While the plaintiff claimed an entitlement to an annual bonus of £5,000 per annum, a Christmas bonus of £1,500 and annual salary reviews payable with effect from 1st January in each year, the defendant's position was that the salary reviews and the bonus were at the discretion of the defendant.

29. The plaintiff's contract of employment was not in writing. As regards the basis on which the defendant was entitled to move the plaintiff from one management function to another and from one work location to another, the defendant pleaded that it was a term of the plaintiff's employment that he would be flexible and adaptable to change and that he would co-operate with the defendant and undertake such management functions as were assigned to him from time to time by the defendant. This aspect of his terms of employment was not directly addressed in the plaintiff's statement of claim and I agree with counsel for the defendant that the nearest the plaintiff got to addressing it was the assertion that this was an express or an implied term of the plaintiff's contract that, as a permanent and senior employee, he would have an opportunity of performing a demanding and rewarding role. In his closing submissions counsel for the plaintiff characterised the case made by the defendant as that it had an absolute right to deploy the plaintiff almost at will and submitted that that could not be so. He contended that redeployment had to be consensual and suggested that Mrs. Heffernan's intervention in November 2000 was a recognition of this. Strangely, there was no evidence in relation to the application of the staff handbook to the plaintiff, although this document featured in one of the authorities relied on by the plaintiff, *O'Byrne v. Dunnes Stores* [2003] 14 E.L.R. 297. On the basis of the evidence which was adduced, I find that it was a term of the plaintiff's contract of employment that the defendant acting reasonably could assign him from one work location to another and from one management function to another appropriate management function. The change of work location was not an issue for the plaintiff. What was an issue was that he wanted to stay in buying rather than be moved to store management. In my view, as a matter of contract, the defendant was entitled to transfer the plaintiff from buying to a suitable position in store management commensurate with his experience. The plaintiff agreed to the move proposed by Mrs. Heffernan on 23rd November, 2000.

30. The plaintiff has sought to set up what happened between the plaintiff and Mrs. Heffernan on 23rd November, 2000 as a free-standing agreement which the plaintiff was entitled to enforce. Counsel for the defendant, on the other hand, characterised what happened as a consultation process and asserted that the defendant had an absolute discretion to vary what was agreed during that process, for example, the start date of the new assignment or the department in which the new assignment would start, homewares rather than ladies' wear. Neither position is correct. In my view what happened on 23rd November, 2000 must be interpreted in the context of a term which the defendant admits was implied in the defendant's contract that both the employer and the employee would maintain mutual trust and confidence. While the plaintiff pleaded that it was a term of the plaintiff's contract of employment that the defendant would "maintain mutual trust and confidence" I have no doubt that counsel for the plaintiff accepted that the implied term, to use a modern idiom, is a "two-way street". But the plaintiff's case is that the defendant was in breach of its obligation under the implied term.

31. That leads to consideration of how the implied term of mutual trust and confidence is breached. Both counsel for the plaintiff and counsel for the defendant referred to the speech of Lord Steyn in *Mahmud v. B.C.C.I.* [1997] ICR 606, when that matter was on appeal to the House of Lords. Counsel for the defendant referred to the passage from the speech at p. 622 in which Lord Steyn considered the correct approach to the question whether the implied obligation had been breached in which he stated:

> "… given the existence of an obligation of trust and confidence, it is important to approach the question of a breach of that obligation correctly. Mr. Douglas Brodie of Edinburgh University, in his helpful article to which I have already referred put the matter succinctly, at pp. 121-122:
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> > 'In assessing whether there has been a breach, it seems clear that what is significant is the impact of the employer's behaviour on the employee rather than what the employer intended. Moreover, the impact will be assessed objectively.'
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> > Both limbs of Mr. Brodie's observations seem to me to reflect classic contract law principles and I will gratefully adopt this statement."

32. Later, at p. 623, Lord Steyn stated:

> "The implied obligation extends to any conduct by the employer likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee. It may well be, as the Court of Appeal observes, that the decided cases involved instances of conduct which might be described as 'conduct involving rather more direct treatment of employees'. [1996] I.C.R. 406, 412. So be it. But Morritt L.J. held, at p. 411, that the obligation:
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> > 'may be broken not only by an act directed at a particular employee but also by conduct which, when viewed objectively, is likely seriously to damage the relationship of employer and employee.'
> >
> > That is the correct approach. The motives of the employer cannot be determinative, or even relevant, in judging the employees' claims for damages for breach of the implied obligation. If conduct objectively considered is likely to cause serious damage to the relationship between employer and employee a breach of the implied obligation may arise."

33. The approach suggested by Lord Steyn, in my view, is also consonant with the approach adopted in this jurisdiction in applying the principles of the law of contract and I consider it to be the proper approach to adopt in this case. What is at issue here is the direct treatment of the plaintiff by his employer. While I did not have the benefit of the evidence of Mr. McDermottt or Mrs. Heffernan, I infer from the evidence as a whole that Mr. McDermottt and Mrs. Heffernan acted *bona fide* in deciding to move the plaintiff from buying back to store management. Rightly or wrongly, they were of the view that he could make a better contribution to the defendant's business in store management than as a buyer. But I also infer that Mrs. Heffernan had *a bona fide* concern about the plaintiff's health. The plaintiff worked in the same building as Mrs. Heffernan and the evidence indicates that their paths crossed occasionally. It is clear in the medical evidence that the plaintiff was unwell from March 2000 onwards. It must have been obvious to anyone who would meet him that he was unwell. Allied to this, he had an uncharacteristic number of absences because of illness

during 2000. Viewing the treatment of the plaintiff up to and including 23rd November, 2000 objectively, in my view, appropriate steps were taken by the defendant to allay the plaintiff's concerns in relation to the proposed move and to protect the employer and employee relationship. I infer that Mr. McDermottt or Mrs. Heffernan or both were subconsciously, if not consciously, aware of the plaintiff's vulnerability at the time.

34. However, in my view, in his treatment of the plaintiff after 23rd November, 2000 Mr. McNiffe failed to have proper regard to the plaintiff's medical condition and this applies, in particular, after the defendant was informed by the plaintiff's solicitor's letter of 7th December, 2000 of the effects of the stress generated by his suspension on the plaintiff. There is no doubt that, in the absence of knowledge as to his physical and mental condition, an objective assessment of some of the plaintiff's conduct after 23rd November, 2001 would justify the conclusion that the plaintiff was being unreasonable, particularly, if the incident was viewed in isolation. Samples of such conduct are his refusal to share with Mr. McNiffe the issues which were troubling him and his insistence on speaking to Mrs. Heffernan on 28th and 29th November, 2000, his reaction to Mr. Sills' instruction in relation to dress code on 28th December, 2000, and some of his requirements in relation to the training programme produced on 14th March, 2001, for example, his requirement that he should join Mr. Sills at all store and head office meetings.

35. Mr. McNiffe adopted an uncompromising stance with the plaintiff from the outset: the plaintiff was to attend for work in Blanchardstown or else he would be suspended. After the suspension was lifted Mr. McNiffe remained entrenched in the position that he would not deal with the plaintiff until he returned to work in the Blanchardstown store, even though the plaintiff was on sick leave and the defendant had been warned of the effect which the situation was having on the plaintiff's health and well being and of the plaintiff's perception of the defendant's motivation. For three months the defendant did not yield despite repeated warnings that the situation was exacerbating the plaintiff's medical condition. No doubt Mr. McNiffe's stance was informed by his perception that the plaintiff never had any intention of allowing the move to Blanchardstown to work, a view which, in my view, was erroneous. On the evidence, it seems to me that Mr. McNiffe's stance coupled with the unfortunate inclusion of the name of the plaintiff under the heading of "new trainee" on the roster in January, 2001 and the failure to supply him with a suitable training programme had the effect of ratcheting up the plaintiff's suspicions that the defendant's objective was to oust him from his employment.

36. As regards what happened after the meeting on 7th March, 2001, I am satisfied on the evidence that Mrs. Heffernan had mentioned a timeframe of six to twelve months for the plaintiff to achieve a store manager or a regional manager position. I am not impressed by the logic which the defendant asserted underpinned the extension of the timeframe from twelve months to eighteen months, but aside from that it should have been obvious that it was going to exacerbate the plaintiff's distrust of the defendant. The delay in producing the training programme, which was about a week, would be inconsequential in the normal course of events. However, it was inevitably going to be of significance to the plaintiff because it was envisaged that he would have it before he returned to work. The insistence of the defendant that the plaintiff return to work before he got the new training programme and the threat of disciplinary action immediately after the St. Patrick's Day bank holiday weekend was unnecessarily peremptory in the context of the delay. I have already expressed my surprise that the defendant did not adhere to its promise in relation to the announcement which was to address the mistake in the January roster.

37. In my view, the plaintiff's submission that there was a series of breaches of contract on the part of the defendant and that the accumulation of those breaches resulted in a repudiation by the defendant of the plaintiff's contract is not correct. The correct interpretation of what happened is that the manner in which the defendant dealt with the plaintiff in the knowledge of the precarious nature of his physical and psychological health viewed objectively amounted to oppressive conduct. It was likely to seriously damage their employer/employee relationship and it did so. Accordingly, the defendant breached its obligation to maintain the plaintiff's trust and confidence.

38. As the defendant submitted, by reference to McDermottt on *Contract Law* (1st Edition at p. 1075), the test as to whether a breach of contract amounts to a repudiation is whether the breach goes to the root of the contract. A breach by an employer of its implied contractual obligation to maintain the trust and confidence of an employee is a breach which goes to the root of the contract. This was recognised by Lord Nicholls in *Mahmud v. BCCI* where the factual basis of the breach of the implied term was that the employer bank had conducted a dishonest and corrupt business. Lord Nicholl stated (at p. 610):

> "… as a matter of legal analysis, the innocent employee's entitlement to leave at once must derive from the bank being in breach of a term of the contract of employment which the employee is entitled to treat as a repudiation by the bank of its contractual obligations. That is the source of his right to step away from the contract forthwith.
>
> In other words, and this is the necessary corollary of the employee's right to leave at once, the bank was under an implied obligation to its employees not to conduct a dishonest or corrupt business. This implied obligation is not more than one particular aspect of the portmanteau, general obligation not to engage in conduct likely to undermine the trust and confidence required if the employment relationship is to continue in the manner the employment contract implicitly envisages."

39. A singular feature of this case is that Professor O Morain considered why the plaintiff's ill health was being prolonged and why he was not responding to treatment. He formed the view that the plaintiff's work situation was detrimental to his health. He advised the plaintiff to get out of that environment. Professor O Morain was not challenged on his opinion or on the advice he gave. Both his opinion and his advice must be accepted as being correct and, in any event, the subsequent improvement in the plaintiff's health is corroborative of this. Of course, Professor O Morain's evidence does not tell us why the plaintiff's work environment at the time was detrimental to his health. On an objective analysis of the evidence, it seems to me that the treatment of the plaintiff as being wilfully insubordinate against a background of twenty years of effective and loyal service to the defendant, and in circumstances in which it was known that the plaintiff was physically ill and suffering from stress, was what made the plaintiff's continued employment with the defendant inimical to his health and wellbeing. The plaintiff was justified in leaving his employment forthwith on receiving Professor O Morain's advice.

40. Accordingly, in my view, the defendant is entitled to the declaration he has claimed, that the defendant unlawfully repudiated his contract of employment. The other remedies he seeks for breach of contract are damages for wrongful dismissal and payment of arrears of wages and bonuses.

41. The measure of the damages to which the plaintiff is entitled for wrongful dismissal is the amount which he would have earned if his employment had continued for a period commensurate with the notice to which he was entitled under his contract with the defendant. There was no express agreement between the parties as to the length of notice of termination to which the plaintiff would be entitled on termination. Therefore, I think it appropriate to approach this aspect of the case in the manner in which a similar issue was approached by this Court (Costello P.) in *Lyons v. M.F. Kent & Company (International) Limited (in liquidation)* [1996] E.L.R. 103. Each case has to be viewed on its own facts and considered by reference to contemporary standards. The test is what period of

notice is it reasonable to imply having regard to all of the circumstances of the case. Counsel for the plaintiff argued that at least six months, and possibly nine months, notice would have been reasonable in the circumstances of this case, whereas, counsel for the defendant suggested that three months' notice would have been reasonable and pointed out, although conceding that it was not in any way determinative in this case, that the statutory period of notice would have been eight weeks. The relevant factors in this case are the plaintiff's age in May 2001 (almost forty), the length of his service with the defendant (twenty-one years), his status and level of responsibility in the defendant's business (at or approaching the upper end of middle management), and his prospects of re-employment, in particular, how long it would take to find suitable alternative employment. As it happens, the plaintiff was fortunate in that he was re-employed in a similar position to that which he left within three months of being in a position to seek alternative employment. Leaving aside the plaintiff's medical condition, which I do not think is relevant to this aspect of the case, I think that from an objective standpoint three months' notice would have been reasonable.

42. Counsel for the plaintiff submitted that the notice period could be extended if the court considered that the manner of dismissal and the circumstances surrounding it justified that approach, relying on the majority decision of the Canadian Supreme Court in *Wallace v. United Grain Growers Limited 152 D.L.R.* (4th) 1. Even if I was of the view that an Irish court should adopt the approach adopted by the Supreme Court of Canada in that case, I am not satisfied that the plaintiff has established deliberate bad faith or vindictiveness on the part of the defendant which would warrant extending the notice period. In any event, even if such conduct were present here, an issue would arise whether an Irish Court should be persuaded by the dissenting judgment in the *Wallace* case, which was delivered by McLachlin J., that as a matter of contract law reasonable notice is related to the prospect of re-employment and other wrongs 45must find their remedy elsewhere, as being more in line with contract law in this jurisdiction.

43. Accordingly, the damages to which the plaintiff is entitled for wrongful dismissal are to be measured on the basis of the loss of three months' salary and a proportionate share of the annual bonus for 2001, which I am satisfied the plaintiff would have earned had he remained in employment with the defendant. In addition, the damages must include the annual bonus and the Christmas bonus for the year 2000, which I am satisfied the plaintiff earned but was not paid. For convenience, these sums will be quantified later.

Personal injuries claim

44. The plaintiff's personal injury claim is founded both in contract and in tort. I consider that it is not necessary to distinguish between the two causes of action because, as the English High Court (Colman J.) pointed out in *Walker v. Northumberland County Council* [1995] 1 All E.R. 737 (at p. 759), "the scope of the duty of care owed to an employee to take reasonable care to provide a safe system of work is co-extensive with the scope of the implied term as to the employee's safety in the contract of employment", a statement which was approved of later by the Court of Appeal in *Gogay v. Hertfordshire County Council* [2000] I.R.L.R. 703. Moreover, as the plaintiff's case is that he incurred a recognised psychiatric illness, not mere hurt, upset and injury to his feelings, in addition to physical injuries, as a result of the defendant's breach of its duties to him, if the plaintiff has established his case, in my view, there can be no question but that he is entitled to general damages. It is not necessary, in my view, to resort to the type of reasoning on which the decision of the House of Lords in *Eastwood v. Magnox Electric plc* [2005] 1 A.C. 503 is founded to identify that the plaintiff has, in addition to his common law action for wrongful dismissal, a separate cause of action for damages for personal injuries.

45. In any event, counsel for the defendant accepted that it was open to the plaintiff to pursue his cause of action for damages for personal injuries, but submitted that the court should adopt the tests outlined by this Court (Clarke J.) in *Maher v. Jabil Global Services Limited* [2005] 16 E.L.R. 233 as the starting point of consideration of the issue of liability. Clarke J. (at p. 246) identified the following as the relevant questions:

> "(a) has the plaintiff suffered an injury to his or her health as opposed to what might be described as ordinary occupational stress,
>
> (b) if so is that injury attributable to the workplace, and
>
> (c) if so was the harm suffered to the particular employee concerned reasonably foreseeable in all the circumstances."

46. I agree with counsel for the defendant that addressing those questions is the proper approach to the question of liability. However, before doing so, I propose considering the medical evidence.

47. Professor O Morain testified on behalf of the plaintiff and his contemporaneous reports were put in evidence. His testimony was that a recurrence of the symptoms of Crohn's disease can recur after remission without any known precipitating factor, for example, workplace stress. In the plaintiff's case, he was of the view that that stress in the workplace was not the cause of the recurrence of the plaintiff's symptoms. However, he emphasised that stress may exacerbate the symptoms or result in the patient not responding to treatment as well as might be expected. Specifically in relation to his report of 13th December, 2000 to the plaintiff's general practitioner, in which he stated that unfortunately since his previous review at the beginning of November the plaintiff had been "through an excessive amount of stress with his job" and had "ended up in a legal wrangle" which he was sure had "not contributed to his wellbeing", he explained the context: at the time the plaintiff was on very powerful anti-inflammatory treatment, probably the most potent available and it would be normal to probe him about his working environment. It was in that context that stress came to the fore.

48. In my view, it is of particular significance that Professor O Morain contemporaneously identified workplace stress as a factor in the plaintiff's condition. He did so as early as December, 2000. He did so again in a letter of 31st January, 2001 to the plaintiff's solicitors, stating that he had no doubt that the recent wrangle had exacerbated the plaintiff's symptoms and had resulted in the necessity to increase his medication. In a further report dated 25th April, 2001 he reiterated that the level of stress at work might well be exacerbating the plaintiff's symptoms. Finally, in a letter of 31st May, 2001 to the plaintiff's solicitors Professor O Morain confirmed the advice he had given to the plaintiff: that he was concerned about the deterioration of his health and that his work situation was not helping health wise and that the best approach would be for him to get out of that environment.

49. In July, 2004 the plaintiff was assessed by Dr. Paula McKay, Consultant Psychiatrist, in connection with these proceedings. Dr. McKay testified on behalf of the plaintiff and her reports dated respectively 23rd July, 2004 and 13th June, 2006 were put in evidence. Dr. McKay's conclusions were that the history and clinical findings she had elicited would accord with the development of a psychological adjustment disorder, with features of anxiety, and possible features of depression. The disorder was likely to have been of moderate severity. Dr. McKay was of the view that the occurrence of that psychological disorder was likely to have contributed to symptom severity and, possibly, symptom duration in the plaintiff's Crohn's disease. She attributed the psychological disorder to workplace stress and noted that it had been resolved when the situational stressors, the workplace difficulties and the ensuing period of unemployment, had been resolved. She noted some re-emergence of symptoms in the weeks prior to her first assessment of the plaintiff, which she put down to the impending trial of these proceedings. Her opinion was that the disorder would not lead to any

long-term psychological health difficulties for the plaintiff.

50. The plaintiff was also assessed around the same time, at the end of June, 2004, on behalf of the defendant by Dr. H.G. Kennedy, Consultant Forensic Psychiatrist, who testified and whose report dated 5th July, 2004 was put in evidence. In that report Dr. Kennedy recounted the plaintiff's description of a period of emotional distress from November, 2000 until February, 2002, when he started a new job, which consisted mainly of anger, a normal reaction to stress. He opined that symptoms of sleep disturbance and hopelessness as described were suggestive of a depressive illness during the period. However, he obviously felt handicapped by not having any general practice notes recording depressive symptoms contemporaneously. Dr. Kennedy differed from Dr. McKay as to what caused what he described as the plaintiff's "emotional reaction or depressive illness". He thought it was most likely to have been caused by a prior deterioration of his Crohn's disease, noting that pain, physical illness and high doses of steroid medication can all give rise to emotional disturbances and depressive illnesses. When testifying, Dr. Kennedy, while stating that he was in agreement with Dr. McKay about the symptoms which the plaintiff described, said that he had reservations about her diagnosis of an adjustment disorder, which he described as sitting in the same position in psychiatric nosology as a common cold vis-à-vis pneumonia and as being the absolutely least thing one can put a name to. He expressed doubts as to whether the evidence indicated that the plaintiff suffered a disorder in medical terms.

51. The plaintiff's general practitioner at the time, Dr. Richard Harris, did not testify. However, in certifying the plaintiff unfit for work on 22nd January, 2001, Dr. Harris stated that he was "still suffering from bowel symptoms and stress-related problems".

52. Returning to the questions posited by Clarke J. in *Maher v. Jabil Global Services Limited* as being the starting point of a determination of liability in this type of case, I hold as follows:

> (a) The plaintiff has suffered an injury to his health, as opposed to mere ordinary occupational stress. I accept Dr. McKay's diagnosis of adjustment disorder and that it constitutes an illness or injury. On the basis of Professor O Morain's evidence, I find that that disorder exacerbated the plaintiff's Crohn's disease symptoms and hampered the treatment of those symptoms.
>
> (b) The adjustment disorder, and the consequential impact on the plaintiff's physical condition, was attributable to the manner in which the defendant dealt with the plaintiff after 23rd November, 2000. The history of the management of the plaintiff's Crohn's disease and the manner in which it has impacted on his life in general and on his working life in particular does not support the conclusion that the symptoms and treatment of his Crohn's disease were the stressors which affected his mental health at the end of 2000 and into 2001. However, on the evidence, I am satisfied that, contrary to the plaintiff's assertion, the flare up of his Crohn's symptoms in March 2000 was not attributable to workplace stress. Moreover, I do not think that the unfortunate deterioration in the plaintiff's symptoms in 2005 can be attributed either to the manner in which he was dealt with by the defendant after 23rd November, 2000 or to the fact that these proceedings were then pending.
>
> (c) I have no doubt that the physical and psychological harm which the plaintiff suffered because of the stress generated by the manner in which he was dealt with by the defendant after 23rd November, 2000 was reasonably foreseeable. Not only that, the defendant was informed as early as 7th December, 2000 of the effect of the work related stress on the plaintiff's health.

53. Aside from the factors which I have just considered, it was submitted on behalf of the defendant that the plaintiff had failed to demonstrate that the defendant was guilty of negligence or that it had been in breach of its duty of care to the plaintiff. In reliance on a passage in McMahon and Binchy on *Law of Torts*, which appears in the third edition (2000) at para 18.03, the defendant submitted that the duty of an employer towards an employee is to take reasonable care for the employee's safety in all of the circumstances of the case and that the employer's duty is not an unlimited one and that he is not an insurer. He will have discharged his duty of care if he does what a reasonable and prudent employer would have done in the circumstances. That is undoubtedly a correct statement of the law. Applying it to the facts of this case I have no doubt that the factors which I have set out earlier as constituting a breach by the defendant of its obligation to maintain trust and confidence, which I do not consider it necessary to reiterate, also constitute conduct which falls short of what a reasonable and prudent employer would have done in the circumstances. Accordingly, I am satisfied that the defendant was in breach of its duty of care to the plaintiff.

54. As I have already stated, the plaintiff was out of work for eight months after leaving the defendant's employment. I have held that, as a matter of contract law, three months notice would have constituted reasonable notice. I am satisfied that he is entitled to be compensated for his loss of income (salary and bonuses) for the remaining five months by way of special damages.

55. The assessment of general damages in this case must take account not only of the psychological symptoms which the plaintiff suffered as a result of the breach of duty but also the exacerbation and prolongation of his physical symptoms. However, on the evidence, the psychological symptoms endured for less than a year and a half and it must be assumed that the physical sequalae attributable to the psychological symptoms ceased around the same time. Allowing for the additional impact of these proceedings on the plaintiff, it seems to me that the proper measure of general damages is €40,000.

Quantification of damages for breach of contract/special damages

56. It is convenient to quantify the damages attributable to the plaintiff's loss of income under both the breach of contract claim and the personal injuries claim by reference to the uncontradicted evidence of Mr. Brendan Lynch, actuary, who was called by the plaintiff. Accordingly, I adopt Mr. Lynch's calculation of the loss (after appropriate tax and PRSI deductions) at €32,622.

Defamation claim

57. There was little focus on the defamation claim in the course of the hearing. Notwithstanding that, counsel for the plaintiff made it clear in replying to the defendant's closing submissions that it was still part of the case.

58. In their submissions, counsel for the defendant submitted that the claim should fail on the ground that it had not been properly pleaded and on the ground that the evidence did not establish that the words alleged to be defamatory, the misdescription of the plaintiff as a "a new trainee" in the January roster, did not actually cause any damage to his reputation. Further, it was submitted that the defendant's plea that the words were governed by an occasion of qualified privilege was not seriously contested.

59. The communication by Mr. Sills of the weekly duty roster to management personnel in the Blanchardstown store, in my view, was an occasion of qualified privilege. I accept Mr. Sills' evidence that the roster sheet was fairly full when he came to insert the plaintiff's name and that, in inserting it, he was not conscious of the implications of where he was inserting it and that there was no ill intent towards the plaintiff in putting his name under the heading of "new trainees". I also accept Mr. Sills' evidence that the other

managers in the Blanchardstown branch were aware of the plaintiff's status in the store.

60. Counsel for the plaintiff referred the court to the following passage from the judgment of Lord Slynn of Hedley in *Spring v. Guardian Assurance Plc.* [1994] I.C.R. 596 (at p. 628):

> "The policy reasons underlying the requirement that the defence of qualified privilege is only dislodged if express malice is established do not necessarily apply in regard to a claim in negligence. There may be other policy reasons in particular situations which should prevail. Thus, in relation to a reference given by an employer in respect of a former employee or a departing employee (and assuming no contractual obligation to take care in giving a reference) it is relevant to consider the changes which have taken place in the employer/employee relationship, with far greater duties imposed on the employer than in the past, whether by statute or by judicial decision, to care for the physical, financial and even psychological welfare of the employee."

61. It was on the last sentence in that quotation that counsel for the plaintiff laid emphasis, urging the court to apply the sentiment expressed there. In view of the finding of lack of malice on the part of Mr. Sills, as the first sentence in the quotation indicates, the defence of qualified privilege defeats the plaintiff's claim in defamation.

62. Accordingly, in my view, a case has not been made out that the defendant libelled the plaintiff and the claim for damages for defamation is dismissed.

Order

63. There will be a declaration that the defendant unlawfully repudiated the plaintiff's contract of employment and there will be an award of damages in sum of €72,622.