THE COURT OF APPEAL

Appeal No. 2014/298

[Article 64 Transfer]

Ryan P.
Finlay Geoghegan J.
Irvine J.

Between/

Una Ruffley

Respondent/Plaintiff

- And -

The Board of Management of St. Annes School

Appellant/Defendant

JUDGMENT of Ms. Justice Irvine delivered on the 8th day of December 2015

1. This is the defendant's appeal against the judgment and order of the High Court (O'Neill J.) delivered on 9th May, 2014, whereby he awarded the plaintiff, Ms. Una Ruffley, damages of €255,276 and costs on foot of her claim for bullying and harassment in the course of her employment as a special needs assistant ("SNA") in the defendant's National School.

2. The issue on this appeal is whether the actions of the defendant in the context of disciplinary proceedings involving the plaintiff, amounted to bullying in the work place and if so whether there was a causal link between that bullying and certain psychological injuries allegedly suffered by the plaintiff, thus meriting the aforementioned award of damages.

Background facts
3. I will now engage with the background facts. Having done so I will then summarise the findings of the trial judge that are material to my conclusions.

4. Ms. Ruffley, a SNA at St. Anne's School since 1999, was engaged with a pupil in the sensory room of the school on 14th September, 2009, when the pupil fell asleep. Ms. Ruffley was concerned about the child and as a result she rang the class teacher, Ms. Bramhall, who in turn rang the school principal, Ms. Dempsey.

5. Ms. Dempsey made her way to the sensory room and found the door locked. After three attempts it was opened by Ms. Ruffley. She was told to let the child sleep for twenty minutes and then return him to his classroom.

6. The following day, 15th September, 2009, Ms. Ruffley was summoned to the principal's office and was informed that her action in locking the door raised disciplinary concerns. Her response was that she hoped there would be equal treatment for all of the SNAs who she believed locked the door of the sensory room from time to time.

7. The same afternoon there was a second meeting attended by Ms. Ruffley, Ms. Bramhall and another SNA, Louise Webb. During the meeting Ms. Ruffley advised that she regularly locked the door principally to prevent children under supervision from trying to leave the room, as they might, if afflicted by ADHD. She advised that to her knowledge other SNAs did the same thing. She also complained that she had never been instructed not to lock the door. The meeting ended with a discussion about the future needs and programme for the subject child. The concern was that if the child concerned on the day in question didn't want to stay in the sensory room and had previously tried to run out, as Ms. Ruffley had maintained was the position, then thought needed to be given to the possible alteration of his programme to make sure it was appropriate and attractive for him. At the end of the meeting Ms. Ruffley was much relieved and felt that her explanation for what had occurred had been accepted.

8. On 18th September, 2009, a further meeting took place concerning the child the subject of the door locking incident. His progress was to be reviewed over a four week period and the necessary paperwork to facilitate that review was to be completed by Ms. Ruffley.

9. In a letter of the same date, a letter that Ms. Ruffley maintained she had never seen, Ms. Dempsey advised how the plan for the child's review would be conducted. Ms. Ruffley would log his activities on a daily basis. The letter also stated that no disciplinary action would be taken in respect of the door locking incident but noted that it had been a "serious situation" and that if there was another breach or lack of improvement in her performance that disciplinary action could result.

10. At the end of the four week review period there was a discrepancy in the forms that had been completed by Ms. Ruffley concerning the ability of the pupil to lie on a swing. This activity was part of the pupil's occupational therapy. Ms. Ruffley accepted that she had made a mistake in ticking the box on the relevant forms which indicated, incorrectly, that the pupil had successfully engaged with this activity. Ms. Bramhall, who was conducting the review, refused to let Ms. Ruffley correct the forms and instead noted her conduct as a "miscommunication". At a further meeting between Ms. Dempsey and Ms. Ruffley on 19th October, 2009, Ms. Dempsey, according to the plaintiff, remonstrated with her about her having recorded incorrect information on the relevant forms.

11. Ms. Dempsey considered that Ms. Ruffley's performance had not improved over the four week review period and that her incorrect completion of the forms raised a further disciplinary issue. Resulting from the form filling errors, which were described by the trial judge as a "trap", Ms. Dempsey decided that disciplinary action against Ms. Ruffley was warranted and so she brought the matters about which she was concerned to the attention of the chairperson of the board of management ('the board") Mr. Christy Lynch. Mr. Lynch is also the Chief Executive Officer of KARE, an organisation with some 340 members of staff that provides services to people with intellectual disabilities. He considered the door locking incident a matter of real importance from a child safety perspective and

instructed Ms. Dempsey that the matter should be brought to the board's attention at its next meeting. In the meantime, on the 20th October, 2009, Ms. Dempsey instructed all of the SNAs that the sensory room door should never be locked.

12. The door-locking incident was first discussed by the board on 23rd November, 2009. A few days prior to that meeting Ms. Dempsey had advised Ms. Ruffley that her conduct would be raised at that meeting. However, no particulars of the complaint to be made against her were furnished nor any indication given to her as to the likely outcome of the meeting.

13. During the board meeting the identity of Ms. Ruffley was not disclosed. Following a discussion concerning the events as outlined by Ms. Dempsey, four of the six board members considered that the SNA implicated in the door locking incident ought to be dismissed. Ms. Dempsey and Mr. Lynch were not in favour of such a severe sanction and urged the adoption of a lesser sanction. Eventually it was agreed that a Stage 4 warning would be imposed. However, the precise terms of the sanction could not be finalised until the board's right to impose that sanction and its precise terms could be clarified with KARE. Further, the board considered that if the plaintiff was due any salary increment in the near future that it would be appropriate to suspend its payment, a step that could not be taken without clarification from the Department of Education.

14. On the 21st December, 2009, an exchange took place between the plaintiff and Ms. Dempsey in the course of which Ms. Ruffley was informally advised that she was to receive a warning that would remain on her record for six months.

15. On the 18th January, 2010, the plaintiff was asked to attend a meeting with Mr. Lynch and Ms. Dempsey. Ms. Ruffley went to the meeting accompanied by a fellow SNA. The meeting was a straightforward one in the course of which the board's decision was communicated to her. The warning, it was advised, would remain on her record for 18 months. Ms. Ruffley was shocked by this news and she complained that in the pre-Christmas encounter with Ms. Dempsey she had been told that the warning would remain on her record for only six months.

16. There was a meeting of the board that evening when the formal letter concerning the plaintiff's sanction was signed off. This letter was given to the plaintiff on the 20th January, 2010.

17. A bilateral meeting between Ms. Ruffley and Ms. Dempsey that was held on the 27th January, 2010, and which was intended to bring matters to an end, did nothing of the sort. The evidence as to what occurred was hotly contested at the trial. Ms. Dempsey was satisfied that this was a fairly routine meeting concerning a range of issues that needed to be dealt with. The plaintiff on the other hand maintained that she was humiliated, denigrated and reduced to tears.

18. On the 29th January, 2010, the board received a letter from a Mr. Philip Mullen of the IMPACT trade union on Ms. Ruffley's behalf. In his letter he advised that his client wished to appeal the decision of the board. He complained first, that she had been afforded no opportunity to defend herself against the complaint made against her. Secondly, that while not asserting that the locking of the sensory room door by Ms. Ruffley had been acceptable, the practice had not previously been objected to. Thirdly, he maintained that the sanction that had been imposed was too severe.

19. In response to this letter it was agreed that Ms. Dempsey and Mr. Lynch, on behalf of the board, would meet with the plaintiff and IMPACT. This meeting, at which Mr. Mullen restated the position earlier outlined in his letter, took place on the 23rd March, 2010. Concerning the plaintiff's assertion that other SNAs had also locked the sensory room door, Ms. Dempsey reported that she had consulted with 70% of them and none had admitted to her that they had locked the door. In the course of the meeting Mr. Mullen asked Mr. Lynch to request the board to withdraw the warning previously sanctioned.

20. Following upon this meeting the plaintiff decided to devise her own questionnaire for her SNA colleagues. This asked them to answer two questions. The first was whether they had ever locked the sensory room door and the second whether the principal had asked them if they had ever done so. Four SNAs answered the first question in the affirmative and three of these also answered yes to the second question. Others said they would have answered yes to the first question had they been able to do so anonymously.

21. As a result of this survey, by letter dated the 22nd April, 2010, Mr. Mullen enclosed for the board's attention the results of the plaintiff's questionnaire.

22. On the 26th April, 2010, the board considered the case that had been made on the plaintiff's behalf at the meeting with Mr. Mullen of IMPACT on the 23rd March, 2010. The minutes of that meeting record that Ms. Dempsey was asked by the board to speak with the SNAs concerning the locking of the sensory room door. Also, it was noted that Mr. Conal Boyce, a solicitor member of the board who was not present, was to be consulted as to the board's options.

23. On 20th May, 2010, Mr. Lynch wrote to the plaintiff acknowledging Mr. Mullen's letter enclosing her questionnaire. In that letter he also advised Mr. Mullen that "the board of management considered the contents of your letter and have decided to stand over their original decision with regard to this matter".

24. By letter of 27th May, 2010, addressed to the board, Messrs Burns Nolan, solicitors on the plaintiff's behalf, set out in detail conduct on the part of the defendant which it maintained amounted to bullying and harassment. It sought, inter alia, an acknowledgment that the board was aware that other SNAs had locked the sensory room door and further demanded an apology for the manner in which the plaintiff had been treated.

25. The minutes of a further board meeting held on the 8th June, 2010, record that it was agreed that there would be no revocation of the board's earlier decision.

26. The "last straw" as far as Ms. Ruffley was concerned was what she considered to be an unfair rebuke made by Ms. Dempsey one morning after the summer holidays of 2010. On her account, having arrived at the school she went outside to move her car to facilitate work that she understood was to be carried out to the car park. When she came back into the staff room other teachers were eating breakfast. Ms. Dempsey accused her of being late. She was satisfied that she was not late. Following that rebuke Ms. Ruffley went on certified sick leave and has not worked since.

27. The plaintiff was later diagnosed with clinical depression and severe anxiety for which she has required medication and counselling. Her symptoms included headaches, insomnia, diarrhoea and high levels of anxiety. These symptoms led the trial judge to conclude that the plaintiff's symptoms were referable to an identifiable psychiatric injury.

Judgment of O'Neill J.

28. To say that the findings of the trial judge were damning of the conduct of the board and Ms. Dempsey is no exaggeration. His

judgment is littered with scathing criticism of the manner in which Ms. Ruffley was treated from September, 2009, to September, 2010, inclusive. The following are some of his more significant findings and conclusions:

> (i) The plaintiff "should not have been subjected to this disciplinary process" and her "treatment throughout that process" was inappropriate
>
> (ii) The questionable "falsification" of the paperwork by Ms. Ruffley during the performance review was an irrational and conjured up basis used to justify the revival of the earlier contemplated disciplinary issue. Further, Ms Dempsey's conclusion as to "falsification" of the forms was "extreme and utterly removed from what right-thinking people would consider to be a reasonable conclusion in that regard" and was indicative of bad faith on her part.
>
> (iii) The manner in which Ms. Dempsey conducted the disciplinary process was grossly unfair and was in breach of natural justice. In circumstances where the plaintiff was given no opportunity to defend herself it was an understatement to conclude that the process represented "a departure from all of the norms of natural justice". The proper approach would have been for Ms. Dempsey to have followed up the plaintiff's account that other SNAs also locked the same door. If she had done so before the 23rd November, 2009, the board would have been aware of the common practice of locking the door and the plaintiff would have received a lesser penalty. Instead, her conduct was presented as a case of "individual misconduct" for which she was subjected to an unmerited severe sanction.
>
> (iv) The sanction was particularly unfair in that the plaintiff had never been instructed not to lock the door.
>
> (v) The plaintiff's conduct in locking the door was no more than a misdemeanour and the sanction imposed an "extreme, if not, downright intemperate" response to the incident by the board.
>
> (vi) The board's decision must have been the consequence of an "almost certainly untrue, highly biased, coloured" account given by Ms. Dempsey which "grossly and unfairly damnified the plaintiff".
>
> (vii) That until March, 2010, it may not have been clear to the board as to the practice of other SNAs who at that stage had admitted to locking the door. The board's failure to withdraw the warning at that point or reverse the decision on appeal was evidence that it had not given "any meaningful consideration" to the plaintiff's claim that it had been common practice to lock the sensory room door. Its failure to do so was evidence of persistence by the board in unfair and inappropriate conduct such that its conduct could not be considered an isolated incident having regard to its knowledge as to the adverse effect that board's decision had had on the plaintiff's wellbeing.
>
> (viii) That the manner in which the appeal had been managed by the board breached the principles of natural justice in that it had been conducted by the same body that decided the disciplinary issue at first instance and this was contrary to the legal maxim *"nemo iudex in causa sua".*

29. In finding in favour of the plaintiff, the trial judge held that for over a year commencing in September, 2009, Ms. Ruffley had been subjected to repeated inappropriate behaviour that had affected her dignity in the work place. The behaviour of the defendant was, he was satisfied, "inappropriate" within the definition of bullying in the workplace. He went on to conclude that the plaintiff had suffered a definite and identifiable psychiatric injury from which she was likely to suffer for some time into the future.

30. The total amount of the judgment was €255,276. He awarded general damages of €75,000 for psychiatric injury to the date of trial, €40,000 in respect of psychiatric injury into the future and loss of earnings past and future amounting to a total of €140,276.39

31. A stay was sought pending an appeal to the Supreme Court. This was refused and that refusal was appealed. On 4th July, 2014, the Supreme Court granted a stay on condition that the appeal be expedited and the defendant pay to the plaintiff €100,000.

Submissions

32. The appellant relies on three grounds of appeal:-

> 1. That the alleged behaviour on the part of the defendant in the context of disciplinary procedures did not amount to bullying;
>
> 2. That there was no causal link established between the actions of the appellant and the psychological injuries suffered by the respondent; and
>
> 3. That the award of damages was excessive, particularly as future loss of earnings was not claimed.

33. The respondent submits:-

> 1. That the definition of and criteria for bullying as set out in *Quigley v. Complex Tooling and Moulding Limited* [2009] 1 IR 349 was strictly followed, and that a finding of bullying is supported by the facts;
>
> 2. That the medical evidence adduced at the trial showed a clear causal connection between the bullying and the psychiatric injury and;
>
> 3. That the damages were appropriate given the affect of the bullying on the respondent's life and career and that it should have been obvious that the respondent had an ongoing claim in terms of future loss of earnings.

34. I do not intend to deal with the second and third grounds of appeal insofar as I agree with the conclusions of my colleagues on these issues. I join with them in respect of their conclusion that the appeal based on ground two must fail in that causation between the plaintiff injuries and the events in question was supported by the medical evidence. Further, insofar as ground three is concerned. I am satisfied, for the reasons outlined by the President in his judgment that this aspect of the appeal must succeed.

Discussion

35. The test for determining whether conduct visited upon an individual amounts to bullying is to be found in the definition of "Workplace Bullying" as defined in para. 5 of the schedule to the Industrial Relations Act 1990 (Code of Practice Detailing Procedures for Addressing Bullying in the Workplace) (Declaration) Order 2002 (SI Number 17/2002). At para. 5, workplace bullying for the

purpose of the code of practice is defined as follows:-

> "Workplace Bullying is repeated inappropriate behaviour, direct or indirect, whether verbal, physical or otherwise, conducted by one or more persons against another or others, at the place of work and/or in the course of employment, which could reasonably be regarded as undermining the individual's right to dignity at work. An isolated incident of the behaviour described in this definition may be an affront to dignity at work but, as a once off incident, is not considered to be bullying."

36. *In Quigley* it was held by the Supreme Court that for conduct to amount to bullying it had to be as stated at para. 14:-

> "1. Repeated;
>
> 2. Inappropriate;
>
> 3. Undermining of the dignity of the employee at work."

37. Furthermore, in his judgment, Fennelly J. said at para. 17:-

> "The plaintiff cannot succeed in his claim unless he also proves that he suffered damage amounting to personal injury as a result of his employer's breach of duty. Where the personal injury is not of a direct physical kind, it must amount to an identifiable psychiatric injury".

38. Before embarking on the task of assessing whether the trial judge's conclusion that Ms. Ruffley was subjected to work place bullying was legally and objectively correct, it is perhaps worth reflecting on a number of matters relevant to the issue of bullying in the workplace.

39. First, bullying can only be identified retrospectively, that is to say its first incidence only amounts to bullying by virtue of its repetition. Secondly, incidences of inappropriate conduct do not have to be of the same nature or character to constitute bullying. Different types of behaviour when directed to one person may constitute bullying. Thirdly, what amounts to inappropriate behaviour must be objectively determined by the court and the test does not centre upon the intention of the person or persons concerned in the alleged bullying. The fact that the test is objective is clear from the decision of Kearns P. in *Glynn v. The Minister for Justice, Equality and Law Reform* [2014] IEHC 133, where he observed that the following question should be asked in relation to a claim of bullying stating at para. 52:-

> "Whether the behaviour complained of, by reference to an objective test, imports that degree of calibrated inappropriateness and repetition which differentiates bullying from workplace or occupational stress".

40. As to the nature of conduct that may amount to bullying, I agree with the views expressed by Finlay Geoghegan J. in her judgment that just because repetitive inappropriate behaviour which undermines the dignity of a person in their workplace occurs in the course of a disciplinary process, such conduct is not as a matter of principle protected from a potential finding that it amounted to bullying. Behaviour that can objectively be viewed as bullying enjoys no safe haven merely by reason of the fact that it may have taken place in the context of a disciplinary process.

41. If, for example, a worker could established that they were required to attend meeting after meeting over several weeks or months due to some alleged disciplinary issue and that in the course of those meetings that they were verbally abused, humiliated and undermined, I see no reason why such conduct might not be deemed to constitute repeated inappropriate behaviour that infringed that individual's right to dignity in the work place. That said it is important to recognise, in the context of bullying that is alleged to have occurred in the course of a disciplinary process, the difference between conduct, decisions and sanctions which might from a legal or procedural perspective be unlawful or appear harsh and circumstances which, objectively assessed, may be considered to amount to repeated inappropriate conduct that undermines the dignity of the worker in their workplace.

42. Given that the test as to whether conduct amounts to bullying is an objective one, the threshold at which conduct may be considered inappropriate, as opposed to wrong, harsh, insensitive or misguided, cannot be decided in a vacuum and must be assessed in the context of all of the relevant circumstances.

Jurisdiction of the Appellate Court

43. The decision of McCarthy J. in *Hay .v. O'Grady* [1992] 1 IR 210, has long been relied upon as guiding the approach to be adopted by an appellate court when considering a decision of a judge of the High Court at first instance. In brief he advised:

> (i) That if the findings of fact made by the trial judge are supported by credible evidence, the appellate court is bound by such findings no matter the weight of the testimony against them.
>
> (ii) That an appellate court should be slow to substitute its own inference of fact where such depends upon oral evidence of recollection of fact and a different inference has been drawn by the trial judge. However, in the drawing of inferences from circumstantial evidence, an appellate court is in as good a position as the trial judge.

The Conduct of the Defendant and Ms Dempsey

44. For the purpose of assessing whether the trial judge's finding that the plaintiff was subjected to inappropriate conduct amounting to workplace bullying for over a period of one year can be sustained, it is first necessary to analyse the conduct of the board and Ms. Dempsey over all of the relevant period for the purpose of assessing whether it can be objectively considered to have been inappropriate. That this is necessary is clear from paragraphs 14 and 15 of the notice of appeal in which the defendant challenges the trial judge's findings of fact that the defendant persisted in inappropriate conduct that undermined the plaintiff's dignity in the workplace for a period in excess of one year. This brings into play each and every finding of inappropriate conduct on the part of Ms. Dempsey and the board over the period September 2009 –September 2010.

45. Having considered whether any conduct on the part of the board and/or Ms. Dempsey was inappropriate over the relevant period I will then consider whether any such conduct might reasonably be considered to have been repetitive within the definition of bullying. Implicit in the requirement that the inappropriate conduct be repeated is, I believe, the requirement that the incidents of inappropriate conduct are reasonably proximate to each other. Otherwise, the incidences may amount to no more than individual and isolated events even though they might have a common thread. It is not easy to define what the necessary proximity is, but significant breaks in behaviour must, in my opinion, reduce the extent to which inappropriate behaviour has the ability to undermine

the dignity of the individual in their workplace. In other words I don't accept that it necessarily follows that the same three events occurring within a period of one month and which might reasonably be considered to amount to bullying would necessarily amount to bullying if they happened over a period of three years.

46. As to what amounts to behaviour that may fall within the definition of "inappropriate", that is not a straightforward question. For example, a body which acts outside its competence or jurisdiction or behaves in a fashion contrary to what might be expected might be described as acting inappropriately. However, it's difficult to see, save in exceptional circumstances, how such conduct might be considered inappropriate in the bullying sense. That type of conduct is highly unlikely to undermine the dignity of the worker in the work place.

47. As to what the right to dignity in the workplace means, it is submitted that such a right entitles a person to be treated with reasonable fairness in the eyes of others. I agree with that submission. I also accept that a person who contends that their dignity in the workplace was interfered with does not have to prove a diminution of their standing in the eyes of fellow workers albeit that proof of such a fact would clearly make their claim much easier to establish. Without such proof a plaintiff would have to rely upon their own evidence to prove that their dignity was adversely affected in the workplace and in this regard it is essential to remember that whether a breach of that right has occurred is a question that must be answered by reference to an objective standard and not by reference to the subjective effect that the conduct under scrutiny may have had on the individual concerned. Otherwise the same conduct visited upon two different individuals, one more sensitive than the other, might result in a finding that one but not the other had been bullied.

48. While it is highly likely that in the vast majority of bullying cases there will be a public aspect to the undermining of the dignity of the victim, I am nonetheless satisfied that bullying can take place within the private confines of the relationship between two workers.

Inappropriate conduct on the part of the defendant

49. The first two incidents of potential relevance concern the meetings which took place on 15th September, 2009, the day after the door locking incident. At the first meeting the plaintiff was informed that the door locking incident raised disciplinary concerns. As earlier advised, the plaintiff never sought to suggest that an investigation into her conduct, if pursued, at this point would have been inappropriate. The height of her concern was to express the hope that all SNAs that locked the door would be treated equally.

50. Objectively assessed, the fact that Ms. Ruffley was told that she would be subject to disciplinary proceedings over the locked door incident could hardly be viewed as inappropriate behaviour on the part of Ms. Dempsey, even if she had been advised by Ms. Ruffley that she intended to dispute the asserted misconduct on the basis that she had never been told not to lock the door and on her understanding as to the practices adopted by other SNAs. Further, any assessment as to whether Ms Dempsey's conduct could be considered "inappropriate" in the bullying sense must be made against the backdrop of the uncontested evidence of Mr. Lynch that locking a child in a room that had no observation window amounted to an action of "restraint" contrary to The Children First national guidelines, was conduct that had placed the child concerned at risk and his uncontested evidence that all issues of a child protection nature were matters for the board.

51. The second meeting on the same day, according to the finding of the trial judge, concerned the progress of the child involved in the door locking incident, as opposed to Ms. Ruffley's own behaviour. The trial judge accepted Ms. Ruffley's evidence that she was relieved at the outcome of this meeting and that her impression was that disciplinary proceedings were not going to be pursued. Thus this meeting is immaterial to the court's conclusions.

52. The next incident of potentially inappropriate behaviour concerns the decision of Ms. Dempsey to keep Ms. Ruffley's performance under review. While it might be said that the decision to keep her performance under review had the potential to affect her confidence as a professional person, that decision, made by a member of senior management charged with the welfare and safety of special needs children, could not, objectively be considered inappropriate. The potential health and safety risk to the child concerned was not one that was in any way negated by the fact that other SNAs may have also have placed the safety of other children at risk by adopting a similar practice. Further while it is not in any sense determinative of the matter, neither the plaintiff nor Mr. Mullen when he became involved on her behalf much later in the process, ever contended that this review was inappropriate.

53. It is not necessary to deal with the letter dated 18th September, 2009, which the trial judge described as "oddly heavy-handed and unrelated to what actually was happening" at the time, given that he accepted Ms. Ruffley's evidence that she had never received the letter and accordingly its contents could not have had any adverse effect on her dignity in the workplace.

54. In my view the earliest conduct which the trial judge might potentially have considered inappropriate relates to the interaction between the plaintiff and Ms. Dempsey concerning her suspicion that Ms. Ruffley had "falsified" rather than made consistent innocent errors in completing the pupils progress forms in the course of the four week review period.

55. Admittedly, it is not obvious why both Ms. Bramhall and Ms. Dempsey took what, at face value, might appear to have been a somewhat puritanical approach to the request made by Ms. Ruffley that she be permitted to amend the forms. However, it has to be remembered first that the completion of these forms was part of a programme put in place to ensure, in light of the earlier door locking incident, that Ms. Ruffley fully understood how the sensory room was intended to function and where it fitted in terms of the child's development programme. Secondly, the information on the forms was relevant to the child's occupational therapy programme which was being reviewed in the context of Ms. Ruffley's assertion that she had locked the sensory room door to ensure that this particular child would not try to run away, an action which suggested that the child's programme might need to be altered, and thirdly the fact that Ms. Ruffley accepted that she had ticked a box on each form, albeit on her account innocently, such that anyone reading the form would have understood that the pupil had accomplished the goal of lying on a swing.

56. It would appear that the trial judge concluded that Ms. Dempsey's conduct in deciding to bring Ms. Ruffley's conduct to the attention of the board at this stage was inappropriate given that he concluded that the plaintiff "should not have been subjected to this disciplinary process" and his reference to the issue of the forms constituting a "trap" for Ms. Ruffley.

57. I am satisfied that the trial judge was only entitled to reach this conclusion if, objectively assessed, it could be said that Ms. Dempsey's failure to accept at face value the plaintiff's explanation for the incorrect completion of the forms and to absolve her respect of the prior locking of the sensory room door without reference to the board was inappropriate and had the effect of undermining her dignity in the workplace. In other words can it objectively be stated that Ms. Dempsey's decision to refer these matters to the board was inappropriate in the bullying sense?

58. For my part I am not satisfied that there was evidence upon which the trial judge could objectively have reached such a

conclusion. Was it to bully the plaintiff because Ms. Dempsey did not accede to Ms. Ruffley's request that the forms be amended based upon her assertion, unsupported by any reasoned explanation, that she had made a series of clerical errors? Was it to bully Ms. Ruffley to seek a second opinion on her conduct in locking the sensory room door? Ms. Dempsey's decision was not made, for example, in circumstances where Ms. Bramhall had accepted that she had misinformed the plaintiff as to how to answer the question on the forms or where it was patently obvious that the question on the form was unclear. The question asked on the forms was straightforward. It required a tick box answer. The box on each form was incorrectly completed suggesting the child had achieved a milestone which he had not achieved. The forms were to be used for the purposes of guiding his occupational therapy programme and the errors left both Ms. Bramhall and Ms. Dempsey unwilling to accept at face value Ms. Ruffleys explanation that she had simply made a mistake.

59. As to the threshold at which conduct slips into the inappropriate category, the context in which it occurs is clearly material. In this regard the form filling event followed closely in time the door-locking incident. Both incidents had the potential to affect the wellbeing of the same child who had significant intellectual difficulties. Thus I am satisfied that on any objective view of these facts Ms. Dempsey's conduct in deciding to bring Ms. Ruffley's conduct to the attention of the board of management fell substantially below the threshold at which that decision, which was after all no more than a referral of Ms. Ruffley's conduct for the consideration of a higher authority, might be considered to amount to inappropriate behaviour.

60. Further, whilst not determinative of the matter, the plaintiff, even after she engaged the services of IMPACT, never sought to make the case that the decision of Ms. Dempsey to refer her conduct to the board for its consideration was inappropriate or was one that impacted on her dignity in the workplace. From an objective perspective, I venture to suggest that there are few parents of children with disabilities who would consider the referral of these two events to the board for its opinion anything other than appropriate in the circumstances. It would be extremely difficult for a school to operate if a principal could be accused of inappropriate conduct merely because they sought to transfer responsibility for a decision on a teacher's conduct to the board of management rather than adjudicating upon it themselves. Indeed the decision to refer Ms. Ruffley's conduct to the board was somewhat taken out of Ms. Dempsey's hands insofar as when she mentioned the matter informally to Mr. Lynch he made it clear that she had no option but to bring the matter to the board's attention which she duly did on the 23rd November, 2009.

61. If Ms. Dempsey's decision to bring Ms. Ruffley's conduct in respect of both incidents to the attention of the board was appropriate, then the action of the board must be considered to see whether it behaved in a manner that could be said to amount to bullying.

62. I will briefly deal with each of the trial judge's criticisms of the conduct of the board and Ms. Dempsey.

63. Insofar as Ms. Ruffley was not advised of the precise misconduct that was to be considered by the board and was afforded no opportunity of defending herself, clearly the conduct of the board offended the principles of natural justice. Those facts of themselves however, do not establish inappropriate conduct in the sense identified in Quigley. That is not to say that she could not have sought to impugn the validity of the board's decision on that basis.

64. Insofar as the trial judge concluded that it was inappropriate for Ms. Dempsey to have brought the issue concerning the locked door to the board without first conducting an inquiry into the conduct of other SNAs to ascertain whether they engaged in the same practice, here I part company with the reasoning with the trial judge and my colleague Finlay Geoghegan J. I do not accept that there is any valid basis upon which Ms. Dempsey's conduct objectively assessed could be viewed as inappropriate just because she was aware of the fact that Ms. Ruffley maintained that other SNAs locked the door and she had not before consulting the board carried out an inquiry among the other twenty five SNAs to ascertain if this was so.

65. Is it to be said that because other SNAs may also have been engaged in a practice which, it was not disputed, was in breach of The Children First national guidelines and raised significant child protection issues, that a principal of a school responsible for the welfare of children with intellectual disabilities is to be deemed to be acting inappropriately in bringing the conduct of a staff member caught "red handed" so to speak to the attention of the school's board of management without first conducting an inquiry to ascertain how many more might be culpable in respect of the same breach? Surely it is the welfare of the child that is paramount in such circumstances?

66. Maybe it would have been preferable if Ms. Dempsey had decided to pursue her investigations into the conduct of other SNAs in parallel to making a complaint about Ms. Ruffley, but to view her conduct, in light of the childcare issues involved, as inappropriate is surely from any objective standpoint untenable.

67. That this is so can perhaps be more easily demonstrated by fashioning a slightly different example of the same issue. Take a care worker in a nursing home caught restraining an elderly person by binding their hands lightly behind their back with an elasticized strapping. When caught in the act the care assistant maintains first that they took the action which they did because the patient was striking out and likely to cause themselves an injury; secondly, that to their knowledge other care workers deployed the same practice and thirdly that they had not been instructed not to engage in this practice. In such circumstances could it legitimately be contended that it would be "inappropriate" and contrary to the right to dignity of that employee in their workplace, to instigate a complaint against them and that the manager of the nursing home was mandated to take no action until such time as each care worker had been approached and asked whether they engaged in a similar practice?

68. Further, the conclusion of the trial judge that the outcome for Ms. Ruffley would have been different had Ms. Dempsey conducted an enquiry of the SNAs before reporting the matter to the board is not borne out by the evidence. It presupposes first that a number of SNAs would have admitted to Ms. Dempsey that they too had locked the sensory room door and secondly that this fact would have altered the board's view as to the significance of Ms. Ruffley's conduct.

69. The evidence was that when the plaintiff conducted her own enquiries of her fellow SNAs in March, 2010, she could only get four of the twenty six SNAs to admit that they too had locked the sensory room door. Ms. Dempsey's evidence, which was accepted by the trial judge, was that at the time of the meeting with IMPACT she had canvassed 70% of the SNAs and none had been prepared to own up to the activity. Thus, the trial judge's inference that had Ms. Dempsey carried out the same enquiry before the board meeting of 23rd November, 2009, she would have been going to the board armed with evidence to suggest that other SNAs locked the door, is unsustainable on the facts of the case. On the evidence her enquiries would have produced the same string of denials that she later received from the SNAs in advance of the meeting with IMPACT in March, 2010. Accordingly, the fact that the trial judge himself concluded after a nine day hearing that it was possible that the majority of the SNAs locked the sensory room door, is immaterial and provides no basis for drawing the inference that Ms. Dempsey or the board would by conducting such an inquiry before the 23rd November, 2009, have reached a similar conclusion.

70. Further, the trial judge's conclusion that the sanction imposed by the board would have been less severe had it known of the conduct of other SNAs is also not supported by the evidence. Even when the plaintiff and her trade union representative made the questionnaires that established that four other SNAs had admitted locking the door available to the board, it was not prepared to withdraw the warning it had initially imposed or to reduce the severity of the sanction.

71. I should also say at this point that I am satisfied that a finding that Ms. Dempsey or the board singled out Ms. Ruffley for unequal treatment and in so doing imposed an inappropriate sanction upon her which affected her dignity in the work place is not supported by the evidence. She was not in the same position as any of her other colleagues at the time. She was the only one who had been caught locking a pupil into the sensory room. Neither Ms. Dempsey nor the board had any evidence which would have enabled disciplinary proceedings be commenced against anyone else until the plaintiff's questionnaire was produced in April, 2010. Further, in light of Ms. Dempsey's uncontested evidence that every single SNA that she questioned had denied locking the door as of March, 2010, from an objective perspective it was unreasonable for the trial judge to have concluded that she had been singled out for inappropriate treatment by the board in November, 2009, when it proceeded to consider and make a finding of misconduct against her in respect of conduct which she herself had never maintained was acceptable. Further, the fact that others engaged in the same practice and had not been caught does not mean that the investigation into a single incident was inappropriate or vindictive, however flawed the form of the investigation.

72. Insofar as the judge considered that the plaintiff was singled out for unequal treatment it is true to say that by April, 2010, the board was aware that four SNAs had admitted locking the door. Is it to be said that they were then in the same position as the plaintiff and that it amounted to bullying of Ms. Ruffley, not to start an investigation into the conduct of those who had not been caught locking the door but were brave enough to admit to it to assist their colleague in the pursuit of her appeal against the board's finding? In circumstances where all of the SNAs had been instructed not to lock the sensory room door back in October, 2009, and there had been no reported incident since of such conduct since that time I venture to suggest that it would have been a wholly unjust and unfair decision for the board to have used those admissions as the basis for starting a disciplinary inquiry into the conduct of those four particularly moral SNAs. Further, to conclude that because the board was not prepared to adopt such an approach, that its decision not to reverse its earlier finding was inappropriate and undermining of the plaintiff's right to dignity in the workplace is, I believe, not sustainable on the facts as found.

73. The final adverse finding made by the trial judge in respect of the board meeting of 23rd November, 2009, was that it could be inferred from the "downright intemperate" sanction imposed by the board that it had been given an "almost certainly untrue, highly biased, coloured" account by Ms. Dempsey of the plaintiff's conduct which "grossly and unfairly damnified the plaintiff".

74. Once again, I regret to say that I am not satisfied that this inference can objectively be sustained by reference to the evidence. First, there was Mr. Lynch's unchallenged evidence that Ms. Dempsey favoured the imposition of a grade 2 or grade 3 warning and was against a more severe sanction. Secondly, even when it could be stated with absolute certainty that the board was fully aware of the plaintiff's case, namely that other SNAs locked the door and that she had not been instructed not to do this, it was unwilling to withdraw the sanction which it had considered appropriate to impose. Thirdly, it was never suggested to Mr. Lynch, the chairman of the board, in the course of cross examination, that Ms. Dempsey had presented the case to the board in the manner so found by the trial judge.

75. As to failure of the board to advise the plaintiff of the decision made on the 23rd November, 2009, that is a complaint of inaction that is incapable of being considered inappropriate in the context of a claim for damages for bullying. The plaintiff did not know that a decision concerning her conduct had been made by the board on the 23rd November. Further, the uncontested evidence was that while the board decided that a stage 4 sanction would be appropriate the same could not be finalised as Ms. Dempsey had to check the precise terms of the proposed sanction with KARE and also had to make further enquiries of the Department of Education as to whether the plaintiff was due a salary increment that might be withheld in the light of her conduct.

76. The next event that occurred was the informal meeting between the plaintiff and Ms. Dempsey on 21st December, 2009, when Ms. Dempsey informally advised the plaintiff of the impending decision of the board. The trial judge does not appear to have decided that Ms. Dempsey acted inappropriately in conveying her understanding as to the likely sanction to be imposed on Ms. Ruffley so close to Christmas, even if the plaintiff was upset at the timing of the unwelcome news and accordingly nothing more need be said concerning this exchange.

2010

77. The first engagement between the management and Ms.Ruffley in 2010 occurred on the 18th January, 2010, when, accompanied by another SNA colleague, she attended a meeting with Mr. Lynch and Ms. Dempsey. That meeting was held for the purpose of formally advising Ms. Ruffley as to the board's decision. She was shocked and angry about the sanction imposed principally because Ms. Dempsey had told her in December that the warning would only remain on her record for six months and now she had been advised it would last for eighteen months. That said, the defendant's conduct at this meeting could never be considered inappropriate given that the decision of the board had to be communicated to the plaintiff and it is not suggested that anything offensive occurred in the course of that meeting.

78. Next came the meeting between the plaintiff and Ms. Dempsey on the 27th January, 2010, that being the meeting which was intended to bring closure to the earlier disciplinary matters. The trial judge concluded that Ms. Ruffley was belittled, humiliated, denigrated and reduced to tears at this meeting. From this finding it is obvious that he considered that Ms. Dempsey's conduct was inappropriate. Regrettably he gave no reasons for reaching this conclusion and he did not identify the particular conduct on the part of Ms. Dempsey which he considered undermined the plaintiff's right to dignity in the work place with the result that it is not possible to objectively assess whether his conclusions are borne out on the facts or whether his conclusions are based on his subjective view of what occurred at that meeting. However, even if the trial judge was correct that the conduct of Ms. Dempsey was inappropriate and undermined the dignity of the plaintiff in the workplace on this one occasion, given that I am satisfied from an objective perspective that conduct of this nature and effect was never repeated, on the facts the present claim does not fall within the definition of bullying as defined in *Quigley*.

79. The trial judge was of course correct in holding that the board was asked to reconsider the sanction imposed on the plaintiff. However, I do not agree with him that this occurred on two occasions. Certainly, the board was asked to reconsider its decision in the context of the appeal lodged by IMPACT, on the plaintiff's behalf by letter dated 29th January, 2010. However, to categorise the letter of the 22nd June, 2010, from Burns Nowlan, the plaintiff's solicitors, as a request to the board to reconsider its decision is, I regret to say, to misinterpret that letter. It was not a straightforward letter asking the board to reconsider its finding and the sanction imposed. The letter accused the board of bullying and harassing the plaintiff. It also raised a number of issues and sought a number of acknowledgments. These included an acceptance by the board that other SNAs had locked the same door. But central to the letter was a demand for an explanation as to why the board was not prepared to apologise to the plaintiff in light of the fact that

it had at that point confirmation that other SNAs had locked the door. Thus it cannot be stated that this was an occasion on which the board was given an opportunity to review its decision and that its failure to do so in the face of this letter amounted to the further inappropriate conduct that undermined the plaintiff's right to dignity in the workplace

80. It is common case that the board's response to the plaintiff's appeal and indeed the letter of the 22nd June, 2010, was made at a time when it had become aware that other SNAs had previously locked the door of the sensory room. That being so that the trial judge concluded that the board acted inappropriately in failing to reverse its earlier decision. This is what he said at para. 87:-

> "Up until March 2010, it may have been the case that the board were not aware of the merits of the case being made by the plaintiff, namely, that it was common practice among SNAs to lock the door of the Sensory Room, notwithstanding that Ms. Dempsey, the Principal, was well aware of the Plaintiff's case. However, from March 2010, onwards, there can be no doubt but that the board was clearly alerted to the plaintiff's case, and from not later than April 2010, were also aware that other SNAs also occasionally locked the Sensory Room door. The rejection of the Plaintiff's appeal by the board in May 2010, without any meaningful consideration of the merits of the plaintiff's case, and the subsequent failure or refusal of the board in Autumn 2010, when given a fresh opportunity, on foot of correspondence from the plaintiff's solicitor, to at all, consider the merits of the plaintiff's case at this late stage when they were aware of the impact that their now erroneous and unjust decision was having on the plaintiff was, in my view, a persistence by them in their unfair and inappropriate treatment of the plaintiff."

81. From this statement it is clear that the inference the trial judge drew from the fact that the board did not reverse its earlier decision was that it could not have fully considered the plaintiff's case when it rejected her appeal. It follows that he must have been satisfied that had the board fully considered the plaintiff's case in advance of making its decision it would have reversed its earlier finding of misconduct and withdrawn the sanction imposed. It would appear that the conduct which the trial judge deemed to be inappropriate at this late stage of the process was the failure of the board, in light of its knowledge of the plaintiff's case and the effect that the original decision was having on her, to reverse its earlier decision. I will deal with each of these findings in turn.

82. As to the inference drawn by the trial judge that no proper consideration was given to the facts of the plaintiff's case before the board rejected her appeal, I have to say that this is an inference about which I have grave reservations particularly in circumstances where Mr. Lynch, the chairman of the board, was never challenged on the matter.

83. Leaving that fact aside, I ask myself what could be the matters to which the trial judge considered the board did not give consideration? It had received in writing the case made by IMPACT in its letter of the 29th January, 2010. That letter referred to the fact that Ms. Ruffley was making the case that it had not been made clear to her that it was a health and safety breach to lock the sensory room door and that the practice had not previously been objected to. The board also had the second letter from IMPACT enclosing the result of Ms. Ruffley's questionnaire of the 22nd April, 2010, to demonstrate that other SNAs had also engaged in the same practice. It also had the details of the submissions made by Mr. Mullen on Ms. Ruffley's behalf at the meeting set up following the receipt of the appeal.

84. It seems to me that the trial judge's inference that the plaintiff's case was not properly considered can only be ascribed to his subjective view that such was the strength of the plaintiff's case that the board would have reversed its decision if it had properly applied its mind to the full facts.

85. Accepting for the purposes of argument that the board did not give full consideration to the plaintiff's case, what was the evidence from which the trial judge drew the inference that the board would necessarily have reversed the finding of misconduct had it properly considered the plaintiff's arguments?

86. It could not and never was disputed that the conduct of Ms. Ruffley in locking the sensory room door constituted a health and safety breach. While Ms. Ruffley made the case that she had not been trained by the defendant not to lock that door, a fact accepted by Mr. Lynch in the course of his evidence, his undisputed evidence was that St. Anne's only employed staff who were already trained and had qualifications and experience so that regardless of training by the defendant she should have known not to lock a vulnerable child into such a room.

87. The conduct of Ms. Ruffley in locking the door when first considered by the board, regardless of whether it was aware of her case, that other SNAs also had locked the door, viewed the conduct so seriously that four of its six members considered that the event warranted dismissal. Even IMPACT in its letter of the 29th January, 2010, did not seek to make the case that the practice was acceptable while submitting that it was not unique to the plaintiff. In these circumstances can it reasonably be inferred that the board, armed with proof that four other SNAs had engaged in the same practice, would necessarily have fully absolved Ms. Ruffley from any wrongdoing and would have withdrawn the sanction earlier imposed? In other words would it be reasonable in these circumstances to infer that the board, have considered that the wrongdoing of others, would have concluded that their wrongdoing imbued Ms. Ruffleys conduct with moral righteousness? Having regard to the severity of the sanction first imposed and the other evidence to which I have just referred, even if the inference drawn by the trial judge was correct that the board did not fully consider the plaintiff's case, an inference that I would displace, I cannot support his inference that had the plaintiff's case been fully considered by the board it would have reversed it's earlier decision.

88. It follows that if it cannot be inferred that the board would have reversed its decision on a full consideration of the arguments advanced by the plaintiff, that its conduct in standing over its earlier decision cannot be considered inappropriate. Further insofar as the trial judge concluded that it was to bully the plaintiff for the board not to reverse its earlier decision when afforded the opportunity to do so, having regard to the effect that the disciplinary process was having on the plaintiff the following point needs to be made.

89. The fact that the board was aware that the plaintiff was upset by the finding and sanction imposed at first instance, cannot be relevant to a consideration as to whether any particular conduct on its part should thereafter be deemed inappropriate. The test is an objective one. If the determination was to be made by reference to the subjective response of the individual, any rebuke of a worker could potentially amount to bullying. Insofar as the trial judge clearly factored this consideration into his conclusion that the plaintiff was bullied at this stage of the process, I regret to say that he fell into error.

Conclusion.

90. It is clear that the defendant in this case carried out an investigation into conduct on the part of the plaintiff which it considered raised significant childcare issues in the context of a school that was set up to cater to the needs of children with disabilities and who, according to its chairman Mr Lynch, are not capable of advocating on their own behalf.

91. On any objective assessment of the facts as found by the trial judge, I am not satisfied that his finding that the plaintiff was subjected to inappropriate conduct that was repeated and which had the effect of undermining her dignity in the workplace for over a year commencing in September 2009, can be sustained. While satisfied that bullying in the workplace might, depending on the particular circumstances, occur in the context of a disciplinary process and regardless of whether or not there was a public aspect to the undermining of the worker's dignity, the evidence in this case does not support the type of calibrated inappropriateness which distinguishes bullying from other types of work place wrongs. It is of particular importance in this regard that in determining whether or not particular conduct can be classified as inappropriate that such assessment is not made, as I consider it was in many instances in this case, by reference to the subjective effect of that conduct on the individual who claims that they were subjected to bullying in the workplace.

92. Insofar as the trial judge's decision was based on the particular inferences detailed in the course of this judgment, regardless of the cautionary advice of McCarthy J. in *Hay .v. O'Grady*, I am satisfied that I should displace those inferences in the manner and for the reasons advised.

93. Undoubtedly the investigation of the plaintiff's conduct by the defendant in this case was far from acceptable. It cannot be doubted but that the board in dealing with the conduct of Ms. Ruffley at first instance acted in breach of her rights to natural justice and fair procedures. She wasn't told the precise nature of the complaint it decided to investigate in November 2009, and neither was she afforded a hearing to enable her defend her alleged misconduct. To make matters worse, the same body that decided the case against her at first instance also decided the appeal which she lodged against its decision.

94. All of these factors afforded the plaintiff substantial grounds upon which she might have instituted plenary proceedings seeking a declaration as to the invalidity of both the original decision of the board and the decision which it made on the appeal. For whatever reason, she chose to eschew such an approach in favour of an action for damages for breach of duty on the part of her employer in respect of bullying in the workplace.

95. However, the fact that the board may have conducted the investigative and disciplinary process in the hopelessly flawed manner last described does not bring its conduct anywhere close to meeting the definition of bullying as set out in *Quigley*. On the facts of this particular case, objectively ascertained, the defendant could not be considered guilty of the type of repetitive inappropriate conduct which undermined the plaintiff's right to dignity in the workplace for a period of over a year as was found by the trial judge.

96. I can find only one incident, namely the meeting between the plaintiff and Ms. Dempsey on the 27th January, 2010, where the conduct of the defendant might be stated to have been inappropriate and undermined the plaintiff's dignity in the workplace. That however was an isolated event and therefore cannot give rise to a claim in damages against her employer for breach of duty based upon bullying in the workplace.

97. Regrettably, I hesitate to suggest that what happened in this case is that the trial judge tried to shoehorn what should have been a declaratory action brought to challenge the validity of the decisions and sanction imposed by the defendant into a claim for damages for a civil wrong that was unsustainable on the evidence. To that end he subjectively incorrectly categorised as inappropriate a range of actions and decisions taken by Ms. Dempsey and the board which had caused the plaintiff significant upset and proceeded to conclude that she was entitled to succeed in her claim for damages.

98. In the course of oral arguments in this court it was submitted on Ms. Ruffley's behalf that "if this is not a case of bullying, what is?" I answer that question by stating that it is not for the court to provide a remedy for a plaintiff who has been unfairly treated, regardless of the type of action which they choose to pursue. In these proceedings the plaintiff pursued a claim for damages for breach of duty based on a claim that she had been bullied in the workplace by her employer and regrettably I am forced to conclude that the trial judge was in error in finding in her favour in this regard.

99. For these reasons I would allow the appeal.