

THE HIGH COURT**2008 2378 P****BETWEEN****JOHN DELANEY****PLAINTIFF****AND****CENTRAL BANK OF IRELAND****DEFENDANT****Judgment of Miss Justice Laffoy delivered on 15th day of April, 2011.****1. The case and the defence to it on the pleadings**

1.1 These proceedings were commenced by plenary summons which issued on 20th March, 2008. At that stage, the seminal event at the heart of these proceedings had not yet occurred. That was the notification by the solicitors for the defendant (the Bank), the plaintiff's employer, to the plaintiff's solicitors by letter dated 7th July, 2008 that, in the light of a report which the Bank had received from Dr. Damian Mohan, Consultant Forensic Psychiatrist, which was dated 30th May, 2008 and which I will consider in depth later, and Dr. Mohan's views in relation to the seriousness of the plaintiff's condition, the Bank required that the plaintiff should not return to work on 10th July, 2008. The plaintiff did not return to work on 10th July, 2008 and he has not been permitted to return to work since. He is being treated by the Bank as being on sick leave and in accordance with the Bank's Sick Leave Regulations, having used up 183 days sick leave at full pay and 184 days sick leave at half pay, he has been receiving the "pension rate of pay", which the Court was told, in his case, represents forty per cent of his normal gross salary and seventy five per cent of full service pension. In the plenary summons, the plaintiff claimed a broad range of reliefs: declaratory relief; injunctive relief and damages for various alleged wrongs. At the hearing, counsel for the plaintiff did not pursue any relief other than a very discrete form of declaratory relief. In outlining the case as pleaded in the statement of claim and as responded to in the defence, I propose to focus on the pleas on which the relief now sought is based.

1.2 The statement of claim was delivered on 30th March, 2009, after the seminal event, and the defence was delivered on 30th June, 2009.

1.3 In the statement of claim, having pleaded the facts in relation to his employment by the Bank – that he was employed as an economist in November 2001 and was promoted to the position of senior economist in 2002 – the plaintiff pleaded the following matters:

- (a) On 29th March, 2006 he had made a complaint to a Rights Commissioner of bullying and harassment against the manager of the department of the Bank in which he worked.
- (b) By agreement, an external investigator had been appointed to investigate the complaints. By a submission dated 23rd November, 2006 the plaintiff had made a "full complaint under the grievance procedure" to be adjudicated upon by the mutually agreed investigator, Dr. Brian Aylward. In that submission he had made complaints of bullying against the former manager referred to in (a) above and his successor, and complaints against two other parties.
- (c) Dr. Aylward produced a report dated 3rd January, 2008 in which the plaintiff's complaints of bullying were not upheld, certain findings were made against employees of the Bank, but there was no finding that the plaintiff made frivolous or vexatious complaints.

In answering those allegations in the defence, the Bank put the plaintiff on proof, save that the appointment of Dr. Aylward was admitted and the fact that he produced his report on 3rd January, 2008, in which the complaints of bullying were not upheld. It was further pleaded that, insofar as Dr. Aylward made certain other findings against employees of the Bank, these comprised two occasions only of inappropriate behaviour and none of bullying.

1.4 The plaintiff pleaded that, following the making of the complaint referred to above, the plaintiff was isolated in the workplace, particularising aspects of that allegation, and further that, beginning in November 2007, a decision was made to exclude him from attending meetings outside the Bank or being involved in external work including European Commission related meetings and tasks. Those allegations were denied in the defence. The plaintiff then pleaded the circumstances in which he came to be the subject of Dr. Mohan's report. As a result of a letter dated 17th October, 2007 from the Human Resources Manager of the Bank to him advising him of management concerns regarding his mental health and wellbeing and of an appointment for him to see Dr. Mohan, he attended Dr. Mohan, the correct date of the interview being 20th December, 2007. Having asserted that his general practitioner, Dr. Aidan Ward, had reported on 19th February, 2008 that he did not suffer from a mental illness and was fit for work, the plaintiff pleaded that Dr. Mohan's report of 30th May, 2008, on the basis of Dr. Mohan's diagnosis, recommended that he be placed on sick leave until such time as he responded to treatment. He then pleaded the letter of 7th July, 2008 and that he had not been permitted by the Bank to return to work. The plaintiff also pleaded that, subsequently, he was examined by Dr. Abbie Lane, Consultant Psychiatrist, who concluded in her report dated 9th February, 2009 that he was fit to return to work. In the defence, the plaintiff was put on proof of all of those allegations. It was admitted that Dr. Lane's report had been furnished to the Bank, but the Bank had not allowed the plaintiff to return to work but, instead, had requested the plaintiff to attend for further assessment by a third psychiatrist.

1.5 The plaintiff then pleaded that by reason of the matters pleaded earlier, the Bank was in breach of the plaintiff's employment contract including the implied duty of trust and confidence owed by the employer to the employee and was guilty of specified wrongs,

including breach of the plaintiff's constitutional right to earn a livelihood. The particulars of the alleged wrongdoing on the part of the Bank which form the basis of the relief now claimed by the plaintiff against the Bank are –

- (a) requiring the plaintiff to undergo examination by a psychiatrist appointed by the Bank, where this was not justified and, in particular, where a general practitioner had not required it,
- (b) relying on the report of Dr. Mohan to exclude the plaintiff from his duties without affording the plaintiff an opportunity to rebut its contents,
- (c) improperly seeking to influence Dr. Mohan in the compilation of his report,
- (d) furnishing information to Dr. Mohan upon which his report was based, which information was not furnished to the plaintiff,
- (e) relying on the report of Dr. Mohan which it was alleged was fundamentally flawed, in circumstances where there was compelling evidence from the plaintiff's medical advisors that he did not and does not suffer from a mental illness,
- (f) allowing persons against whom complaints had been made to Dr. Aylward to make decisions regarding the referral of the plaintiff to a psychiatrist "without having a person independent of those persons to vet the decision to assess for objectivity", and
- (g) excluding the plaintiff from the workplace, imposing an unlawful disciplinary sanction on him in the absence of fair procedures and, in effect, suspending him indefinitely.

The Bank's defence to those allegations, as pleaded, was that it acted fairly, properly and reasonably as a responsible employer would act. All of the alleged wrongdoing was denied and each particular thereof. Further, it was pleaded that the Bank was fully entitled as employer to take the actions which it did.

1.6 On the first day of the hearing, when opening the plaintiff's case, counsel for the plaintiff conceded that the injunctive relief which the plaintiff sought in the statement of claim was not available, as a matter of law, to the plaintiff. That was a correct concession to make because, for instance, the Court would not have granted a perpetual injunction against the Bank restraining it from embarking upon or taking any steps towards the termination of the plaintiff's appointment as senior economist with the Bank. As to the declaratory relief which the plaintiff now seeks, at the end of the hearing (Transcript, Day 4, 31st March, 2011, p. 156), counsel for the plaintiff informed the Court that he was seeking a declaration that the purported decision requiring the plaintiff to be psychiatrically examined was infirm and that he was also seeking a declaration that the actual process was infirm – that Dr. Mohan's report of 30th May, 2008 is without efficacy, that is to say, a nullity, on the grounds that it was formulated in breach of fair procedures. It is by reference to that distillation of the case as pleaded and answered that I will now consider the factual background as disclosed in the evidence.

2. The factual background as per the evidence

2.1 The plaintiff, a married man with three children in the age range of approximately 11 to 18, is 48 years of age. Before taking up his employment with the Bank with effect from 3rd December, 2001, he had worked as an economist/statistician in the Central Statistics Office since 1985 with a period on secondment to the European Commission and Eurostat in Luxembourg between 1999 and 2001. His initial appointment to the Bank was in the grade A/economist category. In December 2002 he was promoted to the position of senior economist. I have already referred to one provision of the Sick Leave Regulations, which were part of the terms of employment of the plaintiff with the Bank, dealing with sick leave payment. The only other provision of the plaintiff's contract of employment which was alluded to at the hearing was another provision of the Sick Leave Regulations (Clause 3g) which provided that the Bank might, at its own discretion, "refer any member of the staff to its Medical Advisor".

2.2 The events which led up to the investigative process conducted by Dr. Aylward, the issues raised in that process, the conduct of the process and its outcome in the form of a report by Dr. Aylward, which was not put in evidence, formed the backdrop to events from October 2007 onwards and it is necessary to allude to them, although counsel for the plaintiff was at pains not to place too much emphasis on them. While the genesis of the Aylward process was a complaint made on an informal basis by the plaintiff to a senior manager of the Bank in November 2004, obviously, from the plaintiff's perspective, the initiation of the pleadings before the Rights Commissioner was a watershed in the plaintiff's conduct of his complaint. Of significance is the fact that it was at that point, 29th March, 2006, that the plaintiff's solicitors commenced acting for him in connection with his complaint. The process before the Rights Commissioner escalated in June 2006 into proceedings before the Labour Court. The hearing before the Labour Court was scheduled for 2nd November, 2006. On that day, an agreement was reached between the plaintiff and the Bank which led to the appointment of Dr. Aylward and his investigation. That investigation started at the beginning of 2007 and was ongoing throughout that year. As I understand the position, the plaintiff's solicitors represented him in the process and the Bank was represented by its solicitors. Dr. Aylward was investigating the original complaint by the plaintiff of bullying and harassment against his former manager and also a charge of bullying and harassment against the former manager's successor, Mr. John Kelly. It is important that I should emphasise that the complaint against Mr. Kelly was not upheld by Dr. Aylward. There were additional complaints against a former senior official of the Bank to whom the plaintiff had made his original complaint against his former manager and against the then Head of Human Resources, Mr. Jim Cummins, in relation to their failure to investigate the plaintiff's original complaint, which were also investigated by Dr. Aylward.

2.3 While the plaintiff's complaints were under investigation, first by the Rights Commissioner and the Labour Court, and then by Dr. Aylward, the plaintiff was continuing to work in the Statistics department of the Bank through 2006 and 2007. There were two distinct contradictory strains in the evidence adduced before the Court. The plaintiff's evidence was that he was being assigned very little work, that he was being sidelined and isolated, and that he was not receiving fair and equitable treatment in relation to his application for professional training. On the other hand, Mr. Joe McNeill, who was appointed Deputy Head of Statistics in February 2006, and to whom the plaintiff primarily reported, testified that the plaintiff was underperforming and that he was not actually delivering on the tasks which had been assigned to him. Mr. McNeill also gave evidence of problems in relation to the interaction of the plaintiff with his colleagues. Specific examples were given of deterioration of the working relationship between the plaintiff and work colleagues and, in particular, the two economists who worked with him, both of whom testified. A raft of e-mails was put in evidence with a view to corroborating each side's version of events.

2.4 Despite Mr. McNeill's belief that the plaintiff was underperforming and that his working relationship with his colleagues was giving

rise to difficulties, no consideration was given by him to invoking a disciplinary process against the plaintiff. Mr. McNeill explained that, because the Aylward process was going on in the background during 2007, it was increasingly difficult for him to intervene in the workplace, as he put it, without the whole process being coloured by the Aylward process. Apart from that, the disciplinary route was not considered because of the plaintiff's history of stress related sickness, which I will outline later. Although Mr. McNeill testified that the plaintiff was a difficult employee, he felt that the Aylward process and the plaintiff's whole interaction with the Bank could not be isolated from his work and, therefore, the Bank did not consider the disciplinary route.

2.5 The plaintiff was absent from work on sick leave twice during 2006, on each occasion for three weeks. The first period was in early April 2006. At that stage the plaintiff was certified by his general practitioner, Dr. Ward, as being absent due to stress or, perhaps, stress in the workplace. The relevant certificate was not put in evidence. In any event, following his return, the plaintiff was referred by the Bank to its medical officer, Dr. W. L. Halley, who furnished a report to the Bank, which was dated 25th May, 2006. In setting out his conclusion, Dr. Halley stated that he found the plaintiff to be an anxious individual, but he was glad to report that they had a very pleasant long discussion on his problems in work. Dr. Halley stated that he would strongly encourage management to do whatever was necessary in accordance with established procedures to resolve the situation. The plaintiff was absent again from work in the last quarter of 2006 and, once again, Dr. Ward certified his absence as due to stress. That absence more or less coincided with the impending Labour Court hearing and the commencement of the Aylward process. The plaintiff's next absence on sick leave commenced on 15th May, 2008 when Dr. Ward certified him as being unable to attend work due to work related stress. However, at that stage, the plaintiff had been interviewed by Dr. Mohan. Presumably in connection with the plaintiff's referral to Dr. Mohan, Dr. Ward had written to the Bank on 19th February, 2008 stating that the plaintiff was fit for work and that he had no symptoms of stress at that time and that he was not on any medication. He also stated that the plaintiff did not need referral to a psychiatrist.

2.6 Mr. McNeill definitely had concerns about the plaintiff in September and October 2007, as had the plaintiff's two colleagues who testified, Dr. Gillian Phelan and Ms. Mary Cussen, both of whom who had reported to him when they joined the Bank. On the evidence, I am satisfied that Mr. McNeill, Dr. Phelan and Ms. Cussen had genuine concerns about the plaintiff, in whom they had noticed a change. While I have no doubt that they had the plaintiff's best interests in mind, I think it is reasonable to infer that they genuinely did not know how to address the situation, particularly with the Aylward process in the background. The situation in which they found themselves was very difficult.

2.7 What happened is that Mr. McNeill and Dr. Phelan consulted Mr. Noel O'Driscoll, who, at the time, was the Employee Assistance Officer in the Bank. Mr. O'Driscoll had no contact with the plaintiff at that time. His evidence was that he was concerned enough by what he heard to take the matter further. While it is not clear precisely how this came about, there was a meeting prior to 17th October, 2007 in the Human Resources Department of the Bank, which was attended by Mr. O'Driscoll, by Mr. McNeill and Mr. Kelly, who was the Head of the Statistics Department at the time, and by Mr. Cummins and Mr. Pat Moloney from the Human Resources Department, and also by a solicitor from the firm acting on behalf of the Bank in connection with the plaintiff's complaints before the Labour Court, in the Aylward process and in these proceedings. As a result of that meeting the letter of 17th October, 2007 issued to the plaintiff.

2.8 That letter, which was sent by Mr. Cummins as Head of Human Resources, informed the plaintiff that management in the Statistics Department and personnel in Human Resources had health and safety concerns regarding his mental health and well-being. The letter continued:

"To ensure that we are carrying out our duty of care to staff, it is normal for the Bank to seek professional advice. Accordingly, to facilitate that advice, an appointment has been scheduled for you to see Dr. Damian Mohan, a Consultant Forensic Psychiatrist"

The details of the appointment were given and the plaintiff was asked to confirm that he would attend. The plaintiff's evidence was that he was utterly shocked when he received the letter. It was not an exaggeration to describe it, as the plaintiff's counsel did, as a "bolt from the blue". There had been no complaint by his superiors to the plaintiff about his conduct and there had been no intimation to him by his superiors of their concerns.

2.9 Correspondence ensued between the plaintiff's solicitors and the Bank's solicitors. In a letter of 26th October, 2007 the Bank's solicitors stated that the report was being sought –

"in order to determine [the plaintiff's] fitness for work, whether or not there are any health and safety concerns that our client needs to address and whether or not any reasonable accommodation is required".

Earlier in that letter the Bank's solicitors had stated that the Bank, as the plaintiff's employer, was entitled to send him for review when it had concerns and was obliged to do so in compliance with the Health, Safety and Welfare at Work Act 2005 (the Act of 2005). The issue raised as to whether or not any reasonable accommodation was required is an implicit reference to the Employment Equality Act 1998 (the Act of 1998), as amended, and, in particular, s. 16(3) of that Act. Subsequently, the plaintiff's solicitors informed the Bank's solicitors that the plaintiff was agreeable to attending an appointment with Dr. Mohan. The appointment was arranged for 20th December, 2007 and the plaintiff attended.

2.10 In advance of the appointment, the Bank's solicitors wrote to Dr. Mohan on 19th December, 2007. That letter summarised the plaintiff's complaints and how they were dealt with, starting at June 2004, and informed Dr. Mohan that Dr. Aylward's report would not be available until January 2008. Some of the factual matters set out in the history are not in evidence before the Court. Certain documentation was furnished to Dr. Mohan, which was itemised as follows in the letter:

- (i) complaints of the plaintiff received from the plaintiff's solicitors dated 23rd November, 2006;
- (ii) responses to the allegations;
- (iii) supplementary notes of Mr. Kelly;
- (iv) Labour Court settlement agreement dated 2nd November, 2006;
- (v) "Recent issues relating to [the plaintiff] with supporting documentation"; and
- (vi) correspondence *inter partes*.

Dr. Mohan's task was formulated as follows:

"Arising out of concerns relating to [the plaintiff's] mental health, well-being and behaviour [the Bank] seeks your views in order to determine [the plaintiff's] fitness for work, whether or not there are any health and safety concerns that the Bank needs to address, and whether or not any reasonable accommodation is required."

Neither the plaintiff nor his solicitors were informed that the documentation in question was being furnished to Dr. Mohan.

2.11 At the commencement of the interview with Dr. Mohan on 20th December, 2007, the plaintiff signed a document acknowledging that the examination was being carried out at the request of the Bank's solicitors, that the usual doctor/patient rules did not apply and confidentiality was, therefore, limited, and that the purpose of the review was for assessment and not treatment. In the document the plaintiff also acknowledged that he was free to discontinue the interview at any time. Dr. Mohan's contemporaneous notes of the interview were put in evidence. They were recorded on the basis of a template of the intended structure of his final report. The plaintiff's evidence to the Court was that at the end of the interview he asked Dr. Mohan how he found him. The plaintiff's understanding was that, apart from a possible concern about future depression, Dr. Mohan found him fit. I am satisfied that the plaintiff's understanding of Dr. Mohan's opinion at that time was incorrect.

2.12 In opening the case, counsel for the plaintiff, on the basis of documentation available, which I assume was discovered by the Bank, stated that Dr. Mohan pronounced the plaintiff fit for work in early January 2008. On the evidence, I am absolutely satisfied that Dr. Mohan reached no conclusion that the plaintiff was fit for work at the end of December 2007 or the beginning of January 2008 and that he did not communicate any such conclusion to the Bank. The submission made on behalf of the plaintiff was based on a misinterpretation of Dr. Mohan's notes of the interview and by drawing an incorrect, if, perhaps, understandably incorrect, inference from an internal e-mail of 3rd January, 2008 from Mr. Kelly to Mr. Cummins.

2.13 I propose considering what transpired after 20th December, 2007 up to the date of Dr. Mohan's report, 30th May, 2008, from a number of perspectives: what transpired between the plaintiff's solicitors and the Bank's solicitors; what transpired between the Bank and Dr. Mohan; and what was going on internally in the Bank.

2.14 Taking an overview of the matter, it seems logical to deal with the interaction between the Bank and its solicitors and Dr. Mohan first. It is clear from Dr. Mohan's evidence that he was under pressure to produce his report from early 2008. He was furnished with Dr. Aylward's report, which I understand was dated 3rd January 2008, by the Bank's solicitors at some stage prior to 26th February, 2008. On 26th February, 2008 Dr. Mohan sent an e-mail to the Bank's solicitors informing them that he had had an opportunity to study Dr. Aylward's report. He set out certain insights he gleaned from the documentation on which the report was based. He then set out questions which needed to be addressed at that stage, including ascertaining the plaintiff's view on the content of the report. He suggested that the following steps should be taken:

(a) that there be a joint meeting between the Bank, its solicitors and Dr. Mohan "to clarify diagnostic issues, take in to account recent progress, and agree on the best way forward, balancing [the plaintiff's] best interests and health and the obligations of the [Bank];

(b) that the plaintiff be offered a follow up appointment, to afford him right to comment on the findings of the investigation and re-assess ongoing issues; and

(c) the furnishing of a medical report to the Bank dealing with capacity/fitness to work and treatment recommendation.

What happened in response to that e-mail was that a meeting took place between representatives of the Bank and Dr. Mohan. According to Dr. Mohan's report it took place on 1st March, 2008. Present on behalf of the Bank were Mr. Kelly and Mr. McNeill from the Statistics Department and Mr. Pat Moloney, Head of Staff Relations Unit, which as I understand it is part of the Human Resources Department. Also present was a member of the firm of solicitors acting for the Bank. Following that meeting, after the plenary summons in these proceedings had issued, by letter dated 29th April, 2008, the Bank's solicitors furnished further background documentation, which included a memorandum from Mr. Kelly together with appended e-mails and certain employment contract documents relating to the plaintiff. There is no evidence of any further communication between the Bank and Dr. Mohan until he furnished his report dated 30th May, 2008, which I will consider in detail later.

2.15 Correspondence between the plaintiff's solicitors and the Bank and its solicitors recommenced with a letter of 30th January, 2008 from the plaintiff's solicitors directly to Mr. Cummins at the Bank. That letter was largely concerned with an allegation that the Bank was in breach of the plaintiff's employment contract in preventing him from attending external meetings and being involved in external work. However, there was another aspect to the letter in that the plaintiff's solicitors sought to be furnished with all notes which had been sent to Dr. Mohan in relation to the plaintiff. That letter was responded to by the Bank's solicitors by letter dated 14th February, 2008. In that letter the plaintiff's solicitors were informed that Dr. Mohan was being furnished with a copy of Dr. Aylward's report. As regards the request for documentation furnished to Dr. Mohan, the response was that this documentation would not be furnished because Dr. Mohan "was instructed" by the Bank's solicitors and the documents were "subject to legal professional privilege". By letter dated 20th February, 2008 the plaintiff's solicitors requested that Dr. Aylward's report not be furnished to Dr. Mohan, stating that, if it was furnished, it would be argued on behalf of the plaintiff that any report of Dr. Mohan was "influenced by irrelevant information" such that Dr. Mohan's report could not be relied on. That request was not complied with by the Bank's solicitors.

2.16 Following the meeting of the Bank's representatives with Dr. Mohan, by letter dated 20th March, 2008 to the plaintiff's solicitors, having stated that Dr. Mohan's report was at draft stage and that he had been unable to complete it until such time as Dr. Aylward's investigation was completed and he had sight of Dr. Aylward's report, the Bank's solicitors stated as follows:

"Both our client and Dr. Mohan are taking your client's situation very seriously. To this end, a meeting took place on 4th (sic) March, 2008, on an occasion of legal professional privilege, ... with Dr. Mohan and [the Bank] to discuss how best to proceed with [the plaintiff's] evaluation. The purpose of this meeting was to enable Dr. Mohan to arrive at a view balancing your client's best interests and health and the obligations of the Bank. In order to complete the evaluation, Dr. Mohan has requested a further interview with your client to discuss his views on the outcome of the investigation carried out by Dr. Aylward. Dr. Mohan would also like an opportunity to take account of your client's views before concluding his report."

At the time that letter was replied to by the plaintiff's solicitors on 2nd April, 2008, the plenary summons had issued. The response of the plaintiff's solicitors to the request that the plaintiff attend a further interview with Dr. Mohan was as follows:

"[The plaintiff] is not willing to attend another consultation with Dr. Mohan. He has already complied with [the Bank's]

direction, which was arguably unlawful, to attend with Dr. Mohan even where there was no G. P. referral on 20th December, 2007. It is now some fifteen weeks later and we have still not been furnished with Dr. Mohan's report. We have also serious reservations about the purpose of the review by Dr. Mohan in circumstances where you have already stated that you forwarded the report of [Dr.] Aylward to Dr. Mohan and you claim privilege over any other information given to Dr. Mohan in circumstances where no legal proceedings were in being."

It was also pointed out that the plaintiff's solicitors had furnished medical evidence that the plaintiff was not unfit for all or any of his duties, which was a reference to Dr. Ward's letter of 19th February, 2008. Despite a letter of 3rd April, 2008 from the Bank's solicitors reiterating the request that the plaintiff attend Dr. Mohan for a further interview, the purpose of which was stated to be to allow the plaintiff to set out his own views, it was made clear in a letter of 14th April, 2008 from the plaintiff's solicitors in response that the plaintiff would not attend. In that letter, the plaintiff's solicitors asked that they be furnished with all documents which were furnished to Dr. Mohan in compiling his report and a list of all persons who communicated with him and the notes of the communications. It was made clear in a letter of 17th April, 2008 from the Bank's solicitors in response that the documents sought would not be furnished.

2.17 Following the meeting between the Bank's representatives and Dr. Mohan on 1st March, 2008, documentation was prepared internally in the Bank which was referred to as "Memorandum of Mr. Kelly together with appended emails" in the letter of 29th April, 2008 from the Bank's solicitors to Dr. Mohan. Mr. McNeill confirmed that the content of the documentation was contributed to by both Mr. Kelly and by him. This documentation is clearly the source of the material in the appendices to Dr. Mohan's report, which I will now consider.

3. Dr. Mohan's report

3.1 Dr. Mohan's report is a very comprehensive document. In setting out the basis of the report, he indicated that it was based on a single interview with the plaintiff. He summarised the documentation with which he had been furnished, including Dr. Aylward's report. He also recorded the meeting with the representatives of the Bank on 1st March, 2008. Finally, he recorded the fact that the plaintiff had been offered a further consultation to discuss his views on the outcome of the investigation carried out by Dr. Aylward but had objected to attending.

3.2 Dr. Mohan's report was divided into five sections as follows:

(i) Section A contained general background information, the source of which was the plaintiff.

(ii) Section B contained an evaluation of occupational difficulties, based on the nature of reported behaviours as described by the plaintiff.

(iii) Section C contained an evaluation of occupational difficulties based on the nature of reported behaviours as described by the Bank. There were three segments based on different sources of information in this section. The first comprised clinical observations on Dr. Aylward's report. Dr. Aylward's overall findings were set out in para. 15.4, where it was recorded that Dr. Aylward did not uphold the plaintiff's complaint of bullying against Mr. Kelly, but he found that the former manager on two occasions did behave inappropriately but, his final conclusion was that the former manager did not bully the plaintiff. He also set out Dr. Aylward's finding in relation to the complaints made against the senior management figure and Mr. Cummins. The finding was that they acted in good faith in their dealings with the plaintiff but that there were a number of procedural deficiencies in the Bank's approach, detailing issues in relation to delays in the investigation of the complaints. The second segment related to the information which was given to Dr. Mohan at the meeting on 1st March, 2008. This segment contained some general observations, such as that Dr. Mohan was informed that the plaintiff's view of projects at work was "considered to be grandiose and unreasonable". It was also reported that his behaviour could be abusive and there could be highly convoluted exchanges in relation to simple matters. Dr. Mohan also recorded that he was referred to e-mails between the plaintiff and his colleagues. The third segment dealt with concerns raised by the Bank in relation to the plaintiff's health in the workplace. The material in this segment and in the five appendices is based on an overview provided by the Bank. Dr. Mohan has summarised what are described as the plaintiff's "interpersonal difficulties at work" into four clusters: grandiose sense of self-importance; extreme sensitivity to criticism; erratic behaviours; and distorted perception of reality. It was stated that specific examples of the behaviour referred to were supported in the appendices. I will return to this section later.

(iv) Section D dealt with recent progress and mental state examination, that is to say, the examination carried out on 20th December, 2007. In relation to progress from January to May 2008, Dr. Mohan referred to the hand-written report of Dr. Ward dated 19th February, 2008, the fact that the plaintiff objected to attending a second consultation, the allegations of breach of contract in relation to the plaintiff's preclusion from attending external meetings, the initiation of these proceedings, and the fact that the plaintiff was on sick leave from 15th May, 2008.

(v) Section E set out Dr. Mohan's opinion.

3.3 In Section E, Dr. Mohan set out his opinion under four headings as follows:

(a) In addressing the nature and degree of the plaintiff's mental symptoms, he stated that he was satisfied that the plaintiff "suffers from a disability, pursuant to the Employment Equality Acts 1998 - 2007" (para. 23.1). He recorded that the plaintiff's account of difficulties in the workplace was very much at odds with the objective evidence provided by the Bank, including the findings of Dr. Aylward (para. 23.3). His conclusion (as set out in para. 23.4) was that the plaintiff's "perspective demonstrates a distorted interpretation of the events in the work place". He continued:

"The evidence available indicates that he displays a pervasive tendency to distort experiences by misconstruing natural actions as hostile or contemptuous. He demonstrates hypersensitivity to criticism and a tenacious sense of personal rights out of keeping with the actual situation ... [The plaintiff's] tendency to experience excessive self-importance in a persistent self-referential attitude is a recurring theme which contributed to the workplace difficulties described. ... These personality traits have affected his interpersonal interactions with both his supervisors, co-workers and subordinates. It is my opinion that [the plaintiff's] presentation is consistent with traits of a paranoid personality disorder or an emerging delusional disorder. Further psychiatric evaluation would be required to establish a specific diagnosis."

Dr. Mohan went on to record (in para. 23.5) that the plaintiff's symptoms had become more severe and persistent and

had begun to "impair his occupational functioning, thus representing symptoms of a psychiatric disorder".

(b) In dealing with the findings concerning the plaintiff's fitness to work and the obligations of the Bank, Dr. Mohan set out the basis on which he concluded that the plaintiff "suffers from a disability, pursuant to the Employment Equality Acts 1998 – 2007", in that he stated that an individual suffering from a psychiatric disorder is disabled for the purposes of those Acts. He then set out his understanding of the obligations of employers thereunder. He stated (at para. 23.10):

"I have no specific recommendations to make with regard to accommodations that could be offered by the ... Bank that would facilitate [the plaintiff's] return to work at this stage. His level of insight in to his psychiatric disorder is impaired to such a degree that he would lack the requisite capacity to engage with accommodations that may be considered such as coaching or retraining".

He went on to state (at para. 23.11) that, as the Bank was not in a position to accommodate the plaintiff, it would be advisable from the Bank's perspective that the plaintiff "should be placed on sick leave, until such time as his disability, as described above has responded to treatment". He added that remaining in the workplace with "an untreated psychiatric disorder" is likely to be associated with further deterioration in the plaintiff's mental state.

(c) Under the heading "Treatment required", he stated (at para. 23.13) that the plaintiff should be advised to seek medical treatment of his illness, by requesting his G.P. to refer him for special psychiatric treatment to a Consultant Psychiatrist of his choice.

(d) As regards the prognosis, Dr. Mohan concluded that, given the plaintiff's unwillingness and/or his inability to accept that he was "suffering from a psychiatric disorder", the prospect of him engaging with meaningful psychological treatment to address the situation was poor. However, he recommended that the plaintiff's progress and response to any psychotherapeutic intervention undertaken should be formally reassessed by a doctor other than the treating doctor, before he could be deemed fit to return to work.

3.4 Returning to Section C of the report and, in particular, the final segment of it and the appendices referred to in that segment, it appears to me that, notwithstanding the evidence of Mr. McNeill, the document headed: "Issues Relating to Mr. Delaney", which was put in evidence, was the document which accompanied the letter of 19th December, 2007 from the Bank's solicitors to Dr. Mohan. I think the probability is that the appendices to the report, all of which exhibited e-mails which had emanated from or were sent to the plaintiff, memoranda, reports and suchlike, comprised the "Memorandum of Mr. Kelly together with appended emails" which accompanied the letter of 29th April, 2008 from the Bank's solicitors to Dr. Mohan. Mr. McNeill testified that he had input into the appendices, very little in some cases and significant input in other cases. His evidence was that the appendices were probably an amalgamation, which I understand to mean an amalgamation of input by him and input by Mr. Kelly. Some of the issues raised in the appendices and in the documents, including e-mails, exhibited in them were put to the plaintiff in cross-examination. However, the factual matters in those documents were never put to the plaintiff in the context of the evaluation process conducted by Dr. Mohan. Moreover, in general, they had not been put to him in the workplace in the context of a grievance procedure or disciplinary process.

3.5 The appendices together with the exhibits attached run to 34 pages. They raise a plethora of issues in relation to the basis on which it was asserted that the plaintiff demonstrated "a number of traits which make him extremely difficult to work with and/or manage, and which impose unreasonable stress on those who must interact with him", which are the opening words of Appendix 1, which is entitled "Status/Self-importance". The first example given in Appendix 1 to illustrate what is described as "the most pervasive" trait – "his obsession with status/self-importance" – is illustrative of the approach adopted in the appendices as a whole and it is also illustrative of what, in my view, was a fundamental fairness deficit in the evaluation process which Dr. Mohan was required to conduct. An e-mail, or more correctly part of an e-mail, dated 13th September, 2007 from the plaintiff to Mr. Kelly was exhibited in Appendix 1. That was an e-mail in which the plaintiff made two complaints, which can be subsumed under two broad headings: that his workload was being reduced, with no new tasks being assigned to him; and that he was being refused access to training. The contents of the e-mail were an issue which was addressed both in the document entitled "Issues Relating to Mr. Delaney", which I believe accompanied the letter of 17th December, 2007 and in Appendix 1. In Appendix 1 each of the details of the complaints made by the plaintiff in the e-mail was commented on. The comments ranged from assertions that the plaintiff had never been responsible for the particular item of work, that he failed in performance of a particular task, that allocation of a task had been agreed at a meeting at which the plaintiff was present and in respect of which he raised no objection, to that, in the case of a policy change to reduce the burden of statistical reporting, the plaintiff had not contributed and appeared "to evaluate change only to the extent that it may impact on his own perceived status". In his evidence, the plaintiff stated that he never got any substantive response to his e-mail. It is clear from Mr. McNeill's evidence that the e-mail of 13th September, 2007 was not responded to in terms of addressing the specific issues raised by the plaintiff, although Mr. McNeill testified that he would have talked to the plaintiff about the issues but they would have had different perceptions of how each issue would have been dealt with. It was in that context that Mr. McNeill described the plaintiff as a difficult employee, when he was questioned as to whether it occurred to him that the plaintiff might be insubordinate.

3.6 I have already alluded to the difficulty with which his immediate work colleagues were confronted in dealing with their genuine concerns in relation to the plaintiff. On the basis of the evidence, I am satisfied that there were matters in relation to the plaintiff's conduct and his performance in the workplace which gave rise to genuine concerns on the part of the Bank, not only in relation to the plaintiff, but also in relation to other employees in the Statistics Department of the Bank. There was a problem. What the Court is concerned with is the manner in which the problem was addressed.

4. Events post Dr. Mohan's report

4.1 As recorded earlier, the plaintiff was on sick leave when Dr. Mohan's report was completed.

4.2 By letter dated 7th July, 2008 the Bank's solicitors furnished a copy of Dr. Mohan's report, including the appendices, to the plaintiff's solicitors. In that letter, Dr. Mohan's opinion was summarised and it was stated that his diagnosis was a cause of concern for the Bank. It was noted that the plaintiff was due to return to work on 10th July, 2008 following a period of certified sick leave. It was then stated:

"In the light of Dr. Mohan's report and his views in relation to the seriousness of [the plaintiff's] condition, [the Bank] requires that your client does not return to work on 10th July, 2008. As you will see Dr. Mohan recommends that your

client receive 'specialist psychiatric treatment' and that he does not return to work until he is certified fit to do so by 'a doctor other than the treating doctor'. We suggest that you furnish the within report to [the plaintiff's] medical advisors for their information and response."

The plaintiff has never returned to work, because he has not been allowed by the Bank to return.

4.3 On 11th September, 2008 the plaintiff was seen by Dr. Lane. She furnished a report on 9th February, 2009, which was sent to the Bank's solicitors by letter dated 20th February, 2009. On the basis of Dr. Lane's findings, the plaintiff's solicitors requested in that letter, *inter alia*, that the plaintiff be immediately reinstated on full salary and that he be permitted to return to work as a senior economist with the Bank. In their response dated 27th February, 2009, the Bank's solicitors noted "the significant divergence of opinion" between Dr. Lane and Dr. Mohan. They suggested that, in circumstances where Dr. Lane had not met the plaintiff's employer and had not, as far as they were aware, been furnished with documentary evidence of work related functions, her report was not as comprehensive as that of Dr. Mohan. It was suggested that Dr. Lane meet the Bank's representatives and be furnished with the relevant documentation. It was made clear that the Bank would co-operate with Dr. Lane. It was also made clear that the Bank was not prepared to allow the plaintiff to return to work. In their letter of 30th March, 2009, delivering the statement of claim in these proceedings, the solicitors for the plaintiff replied to the letter of 27th February, 2009 on the basis that Dr. Lane was happy that her report was conclusive and that she had considered the entire report of Dr. Mohan, including the appendices.

4.4 Prior to the delivery of the defence, in their letter of 16th April, 2009 to the plaintiff's solicitors, the Bank's solicitors suggested that a reasonable way of making progress in the matter would be to refer the matter to a third psychiatrist for further assessment and report. It was stated that, in view of the difficulty "in identifying an independent psychiatrist in Ireland", it was considered that such assessment and report should be carried out by a named psychiatrist based at the Institute of Psychiatry in London. It was made clear that the Bank would defray all reasonable expenses involved in the plaintiff attending for assessment. The position of the plaintiff, as communicated by his solicitors in a letter of 14th May, 2009 to the Bank's solicitors, was that he was agreeable, in principle, to being assessed by a third psychiatrist but subject to a number of preconditions. First, the plaintiff was not agreeable to being assessed by the psychiatrist nominated by the Bank because of a perceived connection between him and Dr. Mohan. Secondly, it was stipulated that the plaintiff was prepared to be assessed by a third psychiatrist agreed between the parties but only so long as the plaintiff was "assessed cold", without any briefing or documentation to be provided to the psychiatrist prior to the assessment, and that there was only one question for determination by the psychiatrist: whether the plaintiff was fit for work. Thirdly, three consultant psychiatrists, practising in this jurisdiction and by whom the plaintiff was willing to be assessed, were identified. The Bank's solicitors responded by letter of 12th June, 2009 indicating that the Bank was not prepared to agree to the preconditions stipulated by the plaintiff's solicitors. Moreover, the Bank was not agreeable to an assessment by any of the three psychiatrists identified by the plaintiff's solicitors and did not consider that it would be possible to find "an entirely independent psychiatrist in the Republic of Ireland". A named psychiatrist based in the United Kingdom was identified. While the correspondence between the parties continued, the avenue for possible resolution of the issues between the parties suggested by the Bank's solicitors in the letter of 16th April, 2009 came to naught. As I have already recorded, the defence was delivered on 30th June, 2009, at which stage the pleadings were effectively closed.

4.5 Dr. Lane reviewed the plaintiff on 23rd September, 2010 and furnished a supplemental report of 18th October, 2010. I now propose considering Dr. Lane's two reports.

5. Dr. Lane's reports

5.1 In her first report, Dr. Lane disclosed that she had access to Dr. Mohan's report. She set out the circumstances of the assessment she had conducted by summarising the plaintiff's position at work, particularly from 2004 from the plaintiff's perspective, which is consistent with the evidence of the plaintiff to the Court. Under the heading "Psychological Effects", Dr. Lane outlined what the plaintiff told her about the impact of his workplace experience on his health, particularly, from April 2006 onwards. In relation to his position in April 2006, when he attended Dr. Ward, she recorded that he told her he noticed an impact on his health at that time and he ascribed it to an issue relating to meeting quarterly deadlines that caused significant distress.

5.2 At this juncture, I think it is appropriate to observe that I am conscious that there was a difference of opinion between the plaintiff and his former manager as to how the Bank's obligations in relation to furnishing Quarterly Finance Accounts to the European Central Bank should be fulfilled and the plaintiff's position was that that was the basis of his complaint. I am also conscious that, as Mr. McNeill testified, there were a number of different viewpoints on that particular topic. From the Bank's perspective the issue in relation to the Quarterly Finance Accounts was one only of a range of complaints on the part of the plaintiff which were raised in the Labour Court proceedings and were required to be investigated by Dr. Aylward. I mention that for the purpose of clarifying that, having regard to the only relief which the plaintiff is pursuing, I consider that the Court does not have to resolve the multitude of conflicts on the facts in relation to the plaintiff's complaints about his treatment by the Bank. I have formed no view on any of those matters.

5.3 Returning to Dr. Lane's report, she noted that the plaintiff told her that in late 2006 he noticed an increase in his stress levels and from that time onwards there was a change in his interest and approach to the workplace. He told her that in 2007 he felt that things were reasonable, except for work events that led to intermittent friction. When seen for assessment in September 2008, he described a marked disturbance of his sleep due to worry about his situation. He did not feel able to function or follow through on projects. His energy and motivation were severely affected and his interest and quality of life were impaired. He experienced anxiety and panic sensations, particularly at the thought of what might happen were his job and financial status to be affected, as he was the main breadwinner. He was fearful, worried and threatened by his then current situation.

5.4 In her first report, Dr. Lane recorded the plaintiff's history, including his academic record, his work experience before his employment with the Bank, his family history and his interests outside work.

5.5 Having set out her findings on examination, Dr. Lane set out her opinion. In relation to the examination of the plaintiff, she stated that she was unable to elicit, on either general or very specific direct questioning, any paranoia, delusions, hallucinations or thought disorder consistent with a psychotic process. The plaintiff did not appear in any way suspicious, guarded or sensitive to criticism and she was unable to elicit any factors consistent with paranoid personality traits. She set out her opinion as follows:

"In my opinion [the plaintiff's] history and examination are consistent with an adjustment disorder characterised by symptoms of anxiety and mood disturbance, which vary in severity and duration, occurring on a background of stress. In my opinion this relates to his perception of what has happened to him in the workplace over the years since 2004 as it occurred in the absence of any other events or traumas over this time period."

5.6 Dr. Lane specifically considered whether the plaintiff met the criteria for a diagnosis of paranoid personality disorder as outlined in *The ICD – 10 Classification of Mental and Behavioural Disorders* (WHO; 1992). She stated that she was unable to elicit any features in the plaintiff's past history to indicate a paranoid personality disorder or a psychotic disorder. She concluded that the symptoms the plaintiff had described since 2007 were more likely explained as a reaction to stress that he encountered in the workplace.

5.7 In relation to prognosis for the future, Dr. Lane expressed the view that the plaintiff might experience further difficulties at times of similar stress in the future. Otherwise, there was nothing in his history to suggest that he should not make a full recovery. On a second review of the plaintiff on 3rd February, 2009 she was unable to elicit any residual symptoms. Therefore, she expressed the view that in February 2009 the plaintiff was fit to return to work. She considered that he did not require any further therapeutic input at that time, as the resolution of the work situation would most likely resolve his problems. In the final paragraph of her first report Dr. Lane stated that, in her opinion, the plaintiff's situation could be helped by the Bank exploring his underlying belief as outlined in 2004 in relation to the Bank's obligations in relation to the Quarterly Finance Accounts. She acknowledged that that might have already have been examined but she considered it to be "the core issue from which all other behaviours evolved". She also suggested that it might be helpful to consider mediation as a process to explore the underlying sources of conflict. Finally, she stated that consideration should also be given to finding an alternative role within the Bank for the plaintiff.

5.8 In her second report dated 18th October, 2010, which was based on a review of the plaintiff on 23rd September, 2010, Dr. Lane reiterated her opinion that the plaintiff does not fulfil the criteria for a psychiatric diagnosis and her conclusion that he remained fit for work. She went on to implicitly criticise Dr. Mohan's approach for its "strong reliance on external documentation and summary accounts by others of their interactions with" the plaintiff.

6. Expert evidence

6.1 Both Dr. Lane and Dr. Mohan testified. Their respective reports, the contents of which have been outlined above, formed the basis of their evidence. However, some matters were addressed in the evidence which I consider it appropriate to advert to. However, it is necessary to make it clear that, given the very limited form of relief which counsel for the plaintiff asked the Court to grant at the hearing, in my view, it is not the Court's function to determine whether, as regards the fitness of the plaintiff to return to work for the Bank, the opinion of Dr. Lane should be preferred to that of Dr. Mohan or vice versa. The plaintiff's complaint against, and his allegation of wrongdoing on the part of the Bank, which is the foundation of his claim for the form of relief pursued at the hearing is that the process, starting with the letter of 17th October, 2007 and ending with the letter of 7th July, 2008, whereby the plaintiff has been precluded from returning to work and, since January 2009, has been remunerated on the pension rate of pay referred to earlier, is fundamentally flawed and the outcome of the process cannot be allowed stand.

6.2 Dr. Lane, when asked whether it would be unusual to send an employee to a consultant psychiatrist in the circumstances in which the plaintiff was referred to Dr. Mohan, expressed the view that it would be. She stated that generally people would be referred to their general practitioner or their occupational health service first.

6.3 Of more significance, however, are the differing views of the two consultant psychiatrists as to the approach which should be adopted in assessing an employee's fitness for work, because each adopted a different approach. Throughout the process, the Bank, through its legal advisors laid very considerable emphasis on the fact that Dr. Mohan is a Consultant Forensic Psychiatrist, and, indeed, the basis on which the Bank's solicitors suggested that an independent psychiatrist could not be found in this jurisdiction was because most forensic psychiatrists are affiliated to the Central Mental Hospital, where Dr. Mohan practises. Dr. Mohan explained the basic difference between a forensic psychiatrist and a general adult psychiatrist as that the former takes what is referred to as a "360 degree" approach. In other words, the information to arrive at a decision comes from sources other than the evaluatee. He explained that one part of the process is interviewing the employee or the evaluatee, this part being the self report element. In addition, there are other components, which are largely the third party information, primarily, from sources where the concerns about the evaluatee's mental health arise. Dr. Mohan explained that in the case of, say, a G.P. referral on the basis of family concerns, the concerns of the family would be explored. If the referral is from an employer, the consultant forensic psychiatrist would look into the concerns of the employer and look for background information. Dr. Mohan was of the view that the difference of opinion between himself and Dr. Lane was that they had two different sets of information. He stated more than once that, if he had written an opinion on the plaintiff following the interview on 20th December, 2007, he might well have come to the same opinion as Dr. Lane.

6.4 In referring to Dr. Mohan's evidence as to the relevance of the 360 degree approach to the process, I am not overlooking the fact that, in expressing disagreement with Dr. Mohan's opinion that the plaintiff's presentation was consistent with "traits of a paranoid personality disorder or an emerging delusional disorder", Dr. Lane stressed that one cannot just look at the workplace. It is also necessary, she testified, to look at the person's functioning, socially, occupationally and in his personal life. If the person is functioning in those spheres, that is incompatible with having paranoid personality traits or disorder.

6.5 As the Court is concerned only with the process by which the plaintiff was assessed to be unfit for work, it is not necessary, and I think it would be inappropriate, to express a view on the difference of opinion of the experts on the approach which was adopted. Nor is it necessary to express a view on whether a specialist in forensic psychiatry is the optimum assessor of whether an employee is fit for duty in a civil context. Dr. Mohan pointed out that such a specialist is usually resorted to in very contentious matters which involve an in-depth examination, not just criminal matters, but also civil matters, including matters in which the issue of testamentary capacity arises. The crucial factor which underlies the difference of opinion between Dr. Mohan and Dr. Lane in the context of this case is that Dr. Mohan's opinion was informed by the material provided with the Bank's solicitors' letter of 19th December, 2007, Dr. Aylward's report, the information he was given by the Bank's representatives at the meeting on 1st March, 2008 and the documentation furnished by the Bank with its letter of 29th April, 2008 from its solicitors.

6.6 It was put to Dr. Lane in cross-examination that, while she testified that the plaintiff is fit to work, she had not given him an "unconditional certificate of fitness" to return to the post he held with the Bank within the structure which existed, referring to Dr. Lane's suggestions that the Bank should explore his underlying belief as to his original complaint, that mediation be considered and that consideration be given to finding an alternative role for the plaintiff within the Bank. Dr. Lane's response was that the plaintiff is fit to work and that, if the terms and conditions under which he was to go back could be negotiated, there was no reason why he would not be able to manage in the workplace. However, if he were to go back to the same situation as prevailed before May 2008, the likelihood is that he would become unwell again. Dr. Lane used the analogy of asthma to explain her concern. If an employee has a physical reaction to a situation in the workplace, and he or she is absent from work, and then recovers, if he or she goes back to the same situation and there has not been an accommodation, for example, by the removal of the toxin by changing the air system or whatever, the likelihood is that the person will get asthma again. Dr. Lane's evidence was that the plaintiff has an issue with the Bank which, in his eyes, has not been resolved and she suggested that, by analogy, the system within the workplace could be adjusted, if necessary, by means of a different reporting structure or having a different role, as, she stated, frequently happens in organisations.

I have outlined that aspect of Dr. Lane's evidence because of the particular reliance placed by the Bank on Dr. Lane's confirmation of her view that, if the plaintiff were to go back to the pre-existing situation before he left the Bank on sick leave in May 2008, he was at a significant risk of suffering from a further adjustment disorder.

7. Legal submissions

7.1 The Court has had the benefit of helpful and comprehensive written legal submissions, supplemented by oral submissions, from both parties. Because of the limited form of relief sought on behalf of the plaintiff at the hearing, there are some aspects of the legal submissions which I consider it is not necessary to address in detail.

7.2 First, there is a very extensive analysis in the Bank's written submissions of the duties and rights of an employer and the corresponding rights and duties of an employee under the Act of 2005 and the Act of 1998, as amended. There is also a thorough analysis of the legal principles governing an employer's common law duty of care to an employee to prevent him or her from suffering stress or psychological damage in the workplace. Insofar as is relevant to the issues which remain in the case, I will consider those submissions.

7.3 Secondly, in support of the "360 degree" approach, as adopted by Dr. Mohan, counsel for the Bank relied on the decision of the Court of Criminal Appeal in *DPP v. Moore* [2005] IECCA 141. In that case, the Court of Criminal Appeal was addressing an application by the DPP of review of a sentence where the respondent had pleaded guilty on a charge of rape. In delivering the judgment of the Court, and in setting out the conclusion on the medical evidence, Hardiman J. pointed out that it was not the role of the Court to endorse the view of one medical practitioner and condemn that of another; the role of the experts is to put the Court in a position itself to reach a conclusion on the relevant issues. However, on the question which the Court had to determine, whether the moral guilt of the respondent for the offence was reduced by reason of it being caused in whole or in part by an organic personality disorder which was the consequence of a brain injury which the respondent had suffered twenty three years previously in a road traffic accident, the Court undoubtedly and, in my view, understandably, preferred the evidence of a consultant psychiatrist who had examined the criteria for a diagnosis of organic personality disorder in very considerable detail and also had examined the history of the respondent in very great detail, including the precise details of the offence in issue and an earlier rape offence of which he was convicted, over the evidence of the respondent's consultant psychiatrists, who were described as not having had anything but the most general appreciation of the offence in issue, and none whatever of the previous offence. The Court also had evidence in the form of an MRI scan. Even if this Court had to determine whether the plaintiff was fit to return to work in July 2008 or February 2009 on the basis of the evidence of Dr. Mohan and Dr. Lane, or to express a preference for the approach of one of the consultants over the other, which, for the reasons I have outlined, it does not, very little guidance would be afforded by the decision of the Court of Criminal Appeal because the issues in that case and the competing strains of evidence were so different to what the Court would have been concerned with if it had to address those issues.

7.4 Thirdly, counsel for the plaintiff relied on a number of relatively recent Irish authorities in which the suspension of an employee was successfully challenged, for example, *O'Donoghue v. South Eastern Health Board* [2005] 4 I.R. 217. While those authorities are of relevance insofar as they address the type of issue which arises on the plaintiff's impugning of the process conducted to determine his fitness for duty in this case, apart from that they are not relevant. Although counsel for the plaintiff occasionally characterised the position in which he finds himself as being tantamount to suspension, as counsel for the Bank pointed out, the plaintiff is and continues to be the lawful incumbent of the position to which he was appointed in the Bank. His current position is that he is on sick leave and he is being remunerated by reference to the pension rate of pay in accordance with the terms of his contract of employment.

7.5 The rights which the plaintiff invokes in this case are primarily his contractual rights, express or implied. Essentially, as I understand the basis on which it is contended on his behalf that the Court should grant the limited relief which is now being pursued, it involves the following two propositions:

- (a) that as a matter of contract, the Bank had no authority to require the plaintiff to attend a psychiatrist, as it purported to do in its solicitors' letter of 17th October, 2007; and
- (b) that as a matter of contract, the plaintiff was entitled to have the process to determine his fitness for duty conducted in accordance with fair procedures but, in breach of his contractual entitlements, this did not occur and, accordingly, the decision that he was not fit to return to work communicated in the letter of 7th July, 2008 cannot stand.

7.6 I propose addressing each of those propositions separately.

8. Bank's requirement that plaintiff undergo psychiatric assessment

8.1 It was submitted on behalf of the plaintiff that the Bank had no express or implied, whether by statute or otherwise, power to require the plaintiff to attend a psychiatrist for assessment. The express power contained in the plaintiff's employment contract, by reference to the Sick Leave Regulations (Clause 3g), provided:

"The Bank may, at its own discretion, refer any member of the staff to its Medical Advisor."

That merely empowered the Bank to refer a member of staff to Dr. Halley, it was submitted. It was further submitted that s. 23 of the Act of 2005, which provides that an employer may require an employee to undergo an assessment by a registered medical practitioner, nominated by the employer, did not confer on the Bank power to refer the plaintiff directly to a consultant psychiatrist, although the Bank's "Medical Advisor" could do so. Further, it was submitted on behalf of the plaintiff that s. 23 must be read in line with the implied term of mutual trust and confidence in a contract of employment, which, it was argued, precluded a referral to a psychiatrist other than via a medical practitioner.

8.2 In relation to the application of the implied duty of mutual trust and confidence, counsel for the plaintiff referred to two English authorities: *United Bank Ltd. v. Akhtar* [1989] IRLR 507, which was a decision of the Employment Appeal Tribunal on the implementation of a mobility clause in a contract of employment; and *Bliss v. South Eastern Thames Regional Health Authority* [1987] 1 ICR 700, where the Court of Appeal held that the employer's unjustifiable demand that an employee submit for a psychiatric examination before he would be allowed to return to work destroyed the relationship of trust and confidence between the employer and employee and was a breach of the contract of employment. In the passage from the judgments in the Court of Appeal in the latter case, upon which counsel for the plaintiff relied, Dillon L.J. (at p. 713):

"The authority had this power, however, to require a medical examination only against the background of the circular, ... and in relation to an enquiry by the Three Wise Men in accordance with the procedure set out following their circular. There is no general power in an employer to require employees to undergo psychiatric examination, and there is no other relevant specific power in the plaintiff's contract of employment or under the scheme of the National Health Service. Even if Dr. Forsythe, or somebody else in the management of the authority, had formed the view that the plaintiff was suffering from mental illness which raised a risk of danger to patients, it would not have been permissible, in my judgment, for the authority to have required the plaintiff to undergo a psychiatric examination if the Three Wise Men procedure had not first been gone through. In any event, however, Dr. Forsythe's evidence is clear that he did not form any view of his own as to whether the plaintiff was suffering from mental illness, and he did not regard him as competent to form any such view."

The "Three Wise Men" referred to in that passage were a committee of three appointed under a circular which the defendant Health Authority had put in place to deal with a concern that a doctor or surgeon might, from physical or mental disability, become unfit to treat patients. The function of the Three Wise Men was to receive in confidence, and to take appropriate action on, any report of incapacity or failure of responsibility, including addiction, on the part of any member of hospital, medical or dental staff. In the case of the plaintiff, Mr. Bliss, the Three Wise Men held that the conduct complained of did not establish pathological behaviour. Notwithstanding that, the Health Authority wrote to Mr. Bliss requiring him to undergo a psychiatric examination by a consultant of its choice and, given the finding of the Three Wise Men that there was no mental or pathological illness, thereby was in breach of the implied term in the contract of employment that it, as employer, would not without reasonable cause conduct itself in a manner calculated, or likely, to damage or destroy the relationship of confidence and trust between the contracting parties. As counsel for the Bank pointed out, the *Bliss* case is distinguishable from the facts in this case in that the appropriate committee had examined Mr. Bliss. However, in my view, that does not address the real question.

8.3 Counsel for the Bank referred the Court to a more recent application of the implied term of mutual trust and confidence by the Court of Appeal in the United Kingdom in *Deadman v. Bristol City Council* [2007] EWCA Civ 822. This Court was referred to the following passage from the judgment of Moore Bick L.J. (para. 12):

"It has been recognised for some time that a contract of employment carries with it certain rights and obligations which reflect the fact that the parties' relationship has personal and social as well as economic dimensions. Two sources of such rights and obligations are of particular importance in the present case: an implied term of mutual trust and confidence which forms part of the contract of employment itself and a general duty imposed on the employer by common law to take reasonable care to avoid causing physical or mental harm to his employee. As to the former, it is now well-established that a contract of employment contains an implied term that neither party will, without reasonable and proper cause, conduct himself in a manner likely to destroy or seriously damage the relationship of trust and confidence that must exist between employer and employee: see *Malik v. Bank of Credit and Commerce International S.A.* [1998] A.C. 20. The practical consequences of what Lord Nicholls described in that case as a 'portmanteau' obligation are many and various, but I have little doubt that they include dealing with personal disputes and difficulties between employees in a way that is conducive to their individual well being and the well being of the employer's own enterprise, so far as that is reasonably possible. ... "

8.4 I think the real question in this case is whether it is appropriate for an employer, on the basis of legal advice, as distinct from medical advice, to refer an employee for psychiatric assessment as to his fitness to carry out his duties. That is a difficult question. It is particularly difficult in a situation, as here, where less than eighteen months previously the employer's own Medical Officer, Dr. Halley, had assessed the plaintiff at the Bank's request and had not seen fit to refer him for psychiatric assessment. However, I find it unnecessary to express any definitive view on the question, because the plaintiff, with the benefit of independent legal advice, agreed to attend Dr. Mohan for interview, which, in my view, precludes the plaintiff from contending at this remove that the Bank acted without reasonable and proper cause.

9. Fair procedures

9.1 As the starting point for his argument that the process on the basis of which the Bank decided that the plaintiff was not fit for work breached fair procedures, counsel for the plaintiff relied on the following oft quoted passage from the judgment of Walsh J. in the Supreme Court in *Glover v. B.L.N. Ltd.* [1973] I.R. 388 (at p. 425) in which he stated:

"The Constitution was relied upon; in particular Article 40, s. 3, of the Constitution. This Court in *In re Haughey* held that that provision of the Constitution was a guarantee of fair procedures. It is not, in my opinion, necessary to discuss the full effect of this Article in the realm of private law or indeed of public law. It is sufficient to say that public policy and the dictates of constitutional justice require that statutes, regulations or agreements setting up machinery for taking decisions which may affect rights or impose liabilities should be construed as providing for fair procedures."

I have no doubt that the decision made by the Bank and communicated to the plaintiff in the letter of 7th July, 2008 was a decision which affected the rights of the plaintiff and the process which led to that decision and, in particular, the formation of his opinion by Dr. Mohan on which the Bank relied required to be conducted in accordance with fair procedures.

9.2 It is the plaintiff's case that the process which led to that opinion infringed the two common law principles of natural justice: *audi alteram partem* and *nemo iudex in causa sua*. Two other Irish authorities were cited by counsel for the plaintiff in support of his contention that fair procedures had not been observed: *Rock v. Civil Service Commission* (Unreported, High Court, Murphy J., 27th March, 1990); and *Ahern v. Minister for Industry and Commerce (No. 2)* [1991] 1 I.R. 462. In the latter case, the applicant was a senior examiner in the Patents Office and, as such, was employed by the Department of Industry and Commerce. Disciplinary procedures were instituted against him for an alleged serious breach of discipline. In view of the history of his previous behaviour, the Personnel Officer of the Department decided to refer the matter for consideration by the Medical Officer of the Civil Service. The Personnel Officer sent to the Medical Officer reports on the applicant from three officials of the Patents Office, on the basis of which the Medical Officer advised that the opinion of a psychiatrist was required and that, if the applicant refused to attend, a direction to do so on pain of suspension should be made. Having initially agreed to attend the psychiatrist the applicant changed his mind. The Chief Medical Officer advised that the applicant should be placed on compulsory sick leave until such time as he was certified by a psychiatrist as fit for full duties. That was done. The applicant sought, by way of judicial review, an order of *certiorari* quashing the decision. In fact, the decision was subsequently undone and the applicant had been allowed to, and did, return to work. The aspect of the decision of Blayney J. on which counsel for the plaintiff relied was his consideration as to whether the applicant had established grounds on which it was open to the Court to quash the decision. Blayney J. considered that he had. Having outlined the chronology and having stated that the Personnel Officer decided that it was more appropriate to take the advice of Dr. Finucane, the Medical Officer, in regard to the matter rather than continue the disciplinary procedure, Blayney J. continued:

"Reports were then obtained from Messrs. Fitzpatrick, Slavin and O'Farrell and sent to Dr. Finucane. The applicant did not see any of these reports and was unaware of their existence. The first time he had an opportunity of reading them was when he obtained them on discovery in the course of these proceedings. The reports were not confined to the incident of the 16th October, 1986, but dealt with the entire of the applicant's career since entering the Patents Office in 1971. The applicant had no opportunity of refuting any of the matters contained in these reports."

9.3 Finally, counsel for the plaintiff relied on the decision of the Court of Appeal in the United Kingdom in *R. v. Kent Police, Ex p. Godden* [1971] 2 QB 662, where the Court of Appeal held that a medical practitioner giving a decision as to whether a person was permanently disabled under a provision of the Police Pensions Regulations 1971 was performing a quasi-judicial function and under a duty to act fairly.

9.4 The type of assessment process undertaken by Dr. Mohan almost became an issue in recent judicial review proceedings: *Fitzpatrick v. Board of Management of St. Marys Touraneena National School and Anor.* (High Court, Unreported, 24th July, 2008). As Irvine J. pointed out in her judgment, the focus of the proceedings was on a demand made by the Board of Management employer of the applicant primary teacher that she submit to an independent medical examination after she notified the Board of Management of her intention to return to work following an extensive period of sick leave. At one point in the process Dr. Mohan had been nominated by the Board of Management to carry out the required medical assessment. However, the applicant refused to attend for examination by Dr. Mohan and he never conducted the examination. Nonetheless, one of the issues which the Court was asked to address was whether the Board of Management acted in breach of the principles of natural and constitutional justice in furnishing a document to Dr. Mohan, prepared by the principal of the school, which was a memorandum of the perception of the principal of the applicant's relationship with the children in the school, the other members of staff, the parents and the principal and, further, because communications had taken place between the principal and Dr. Mohan in advance of the intended medical examination of which the applicant had not been apprised. Apart from pointing out that the applicant had not established in evidence the factual basis underlying her complaint, the Court made no finding, pointing out that it was unnecessary to reach any conclusion as to whether there had been a breach of natural justice or want of fair procedures because the examination never took place.

9.5 Having considered the authorities, I am satisfied that the plaintiff has established that the process which led to the decision communicated in the letter of 7th July, 2008 was not conducted in accordance with fair procedures and infringed the two basic tenets of natural justice.

9.6 First, the request by the Bank's solicitors in their letter of 20th March, 2008 that the plaintiff attend a second interview with Dr. Mohan did not remedy the inchoate breach of fair procedures inherent in the Bank's conduct prior to that date by reason of –

- (a) the furnishing by the Bank of the documentation which accompanied their solicitors' letter of 17th December, 2007 to Dr. Mohan without apprising the plaintiff or his solicitors that such documentation had been furnished,
- (b) the refusal of the Bank to furnish to the plaintiff that material when it was sought by the plaintiff's solicitors in their letter of 30th January, 2008, and
- (c) the assertion by the Bank's solicitors that the material in question was "subject to legal professional privilege", which, in the context of the purpose for which Dr. Mohan had been retained by the Bank through its solicitors, could not have given rise to such privilege, but which demonstrates a mindset on the part of the Bank and its solicitors in relation to the process which had been set in train.

Even though the purpose of the second interview, as counsel for the plaintiff pointed out, was presented by the Bank's solicitors as being two-fold, namely, to enable the plaintiff to discuss the outcome of the Aylward process and to give Dr. Mohan an opportunity to take account of his views, the reality is that the proposed meeting would have been utterly ineffective as a means of implementing the plaintiff's right to fair procedures in the process. Not only had the Bank's solicitors refused to furnish the plaintiff with the documentation which had been furnished to Dr. Mohan before the first interview on 20th December, 2007, but, in the letter of 20th March, 2007 requesting that the plaintiff attend the second interview, the Bank's solicitors disclosed the fact that the meeting between Dr. Mohan and the Bank's representatives had taken place in early March but asserted that that was also "an occasion of legal professional privilege", the inference to be drawn being that the plaintiff was not going to be told what transpired at that meeting. The reality to which I have alluded is that, if he had attended for a second interview, the plaintiff without knowing what documentation and information had been given by the Bank to Dr. Mohan would not have been given an adequate opportunity to put his case to Dr. Mohan. In short, the plaintiff had no notice of the basis on which the Bank considered it necessary to get a determination from Dr. Mohan as to the plaintiff's fitness for work, which was the purpose of the referral to Dr. Mohan, as disclosed in the Bank's solicitors' letter of 26th October, 2007.

9.7 Secondly, the additional documentation furnished to Dr. Mohan with the Bank's solicitors' letter of 29th April, 2008 tainted the process in two respects. That documentation was acted on by Dr. Mohan without the plaintiff or his solicitors being even made aware that the documentation, some of which constitutes the appendices to Dr. Mohan's report, had been furnished to Dr. Mohan, without the plaintiff or his solicitors being aware of the contents of the documentation or the attitude of the Bank officials towards him evinced in it, which as the appendices reflect was grossly prejudicial to the plaintiff, and without the plaintiff being given an opportunity to comment on and put his case in relation to the contents of the documentation. Further, the source of the material was infected by a real likelihood of partiality or bias. Counsel for the plaintiff submitted, correctly in my view, that it was inappropriate that Mr. Kelly, whom he described as a protagonist in the bullying complaint which was the subject of the Labour Court proceedings and the Aylward process, should have been in communication with Dr. Mohan and should have been allowed to put his position to Dr. Mohan in documentation which was designed to, and obviously did, influence Dr. Mohan. The same applies to a lesser extent to Mr. Cummins. It was entirely inappropriate that Dr. Mohan should be put in a position of having to base his opinion on the view of Mr. Kelly, and to a lesser extent Mr. Cummins, as to the personal traits, the work performance and the conduct of the plaintiff in the workplace, which he did to a large extent. Whether the views of Mr. Kelly of the plaintiff were correct or not, unfortunately, the appendices to Dr. Mohan's report give rise to the perception that Mr. Kelly was allowed to be a judge in his own cause.

9.8 The decision of the Bank that the plaintiff should not return to work, which was communicated to his solicitors in the Bank's solicitors' letter of 7th July, 2008, as that letter indicates, was based entirely on Dr. Mohan's report and "his views in relation to the seriousness of [the plaintiff's] condition". For the reasons I have outlined, the process which led to Dr. Mohan's report was not conducted in accordance with the plaintiff's right to fair procedures and, accordingly, that decision cannot stand.

10. Summary of conclusions and consequences

10.1 Given that the plaintiff, with the benefit of independent legal advice, agreed to attend Dr. Mohan for interview, in my view, the direct referral by the Bank of the plaintiff to Dr. Mohan is not open to challenge at this juncture.

10.2 However, the process which was conducted after the referral and which resulted in Dr. Mohan's report and, ultimately, in the Bank's decision not to allow the plaintiff to return to work was not conducted in accordance with the plaintiff's entitlement to fair procedures and, accordingly, there will be a declaration in the terms sought by the plaintiff, namely, that that decision was arrived at in breach of the plaintiff's right to fair procedures and is null and void.

10.3 Counsel for the plaintiff submitted (Transcript, Day 4, 31st March, 2011, p. 111) that, if the Court were to hold that the decision was null and void, it would have an obvious effect, namely, that the plaintiff should be restored to the Bank's payroll and that the arrears of salary due to him should be discharged. That submission was not really addressed and I will hear the parties further on it and on the precise form of order to be made.