

THE HIGH COURT

[2009 No. 2741 P.]

BETWEEN

CATHERINE HURLEY

PLAINTIFF

AND

AN POST

DEFENDANT

JUDGMENT of Mr. Justice McDermott delivered on the 6th day of October, 2017

1. The plaintiff's claim is for damages for negligence and/or breach of duty and/or breach of contract against her employer arising out of alleged bullying by her co-workers following an incident which occurred at her workplace on 26th July, 2006.

2. The plaintiff was born 6th October, 1964. She is a married lady and has two children. She was employed by An Post on 25th August, 2003 in a part-time position. She served under various contracts of employment between August 2003 and July 2011 as an ancillary postal sorter at the Cork Mail Centre, Little Island, Co. Cork. Her duties consisted mainly of video-coding mail. A good deal of this work was sedentary but also involved periods during which she would use a trolley to gather items of post from colleagues where the address had been mis-read by the computerised system or could not be read. She was employed in the centre for five four and a half hour shifts on Monday to Friday and a four hour shift on Sunday which attracted over-time. She said that she enjoyed the social side of work meeting people at breaks, for lunch and/or social drinks on Friday evening. She considered that she was friendly with most of her colleagues and got on well with her co-workers and management.

The Incident of 26th July 2006

3. On 26th July, 2006 while she was collecting postal packets with a trolley she asked a work colleague Mr. J. to pass items to her. She knew him to see but had no direct contact with him before this incident. He looked at her. He took some postal packets and fired them into the trolley. His eyes were bulging and he seemed really angry. She could not understand why he was behaving in this manner. She tried to get away from him immediately. The plaintiff's evidence is that she was shaking and in fear. He approached and came very close, almost nose to nose with her. He told her aggressively not to "f... tell me what to do". She was afraid that he was about to head-butt her. His nose was touching her nose when he uttered these words. As he said the words he pulled the trolley. She said that she was afraid of her life of him. She accepted that there was no other physical contact made by Mr. J with her in the course of the incident.

4. The plaintiff met her supervisor immediately afterwards who asked whether she was alright. She was brought to the office and asked to fill in an incident report. Ms. Paula McNamara who also witnessed the incident drove her home. While being driven home she was shaking. She had never experienced such an incident. She told her husband and father about the incident which she found very frightening. She said she was unable to return to work immediately.

5. The plaintiff returned to work on 15th August, 2006. Mr. J. was not working there at the time having been suspended. When she returned to work in the coding room she greeted her fellow employees but it was as if she had not spoken. There were three of four co-workers there at the time. She knew that there had been some resentment at the perceived treatment of Mr. J. in the wake of the incident but had not been prepared for how bad the atmosphere was. At approximately 5:50pm a colleague sat down beside her. She was the first person to say hello to her and welcome her back. She suggested that "she should not give into the atmosphere ...and she should stick it out". At 6:15pm she went out to the bench area for her break. There were a number of benches at which her colleagues took their break. She sat at a bench but when others came out they all sat separately from her. They did not engage with her or speak to her. She felt that her colleagues blamed her for the events of the 26th July and the repercussions of the incident for Mr. J. She returned to the coding room after the break but was told by her supervisor that she could go home between 8 and 9pm.

6. The following day at approximately 6pm she was approached by the Human Resources Manager, Mr. Ned Keane who asked how she was. She told him of her difficulties which he appeared to know about. She complained that people were ignoring her. He suggested that she give them time and advised that "[it] will die down". She gave full details to him of what was happening. She complained to another supervisor Mr Harrington some three weeks later.

7. The plaintiff explained how matters deteriorated. She felt that people were 'blanking' her but when she complained about this she was ignored. People went out of their way to be disobliging and would deliberately inconvenience her in ways that were petty but relentless. She felt that 75% of her colleagues were ignoring her. This continued into September and October 2006. She felt she was being ostracised and that it was getting worse. Small incidents occurred. When commencing a shift, she was obliged to sign in. Pens were supplied for this purpose. She described how these were habitually removed by others signing in to inconvenience her. On other occasions doors were slammed in her face.

8. In November 2006 matters were not improving. She became very nervous about going to work and felt increasingly isolated there. On some shifts she never spoke to anybody. She experienced continuing pressure coming up to Christmas and was made to feel unwelcome to attend the Christmas staff gathering.

9. There was a high level of tension amongst the workforce of 132 employees followed the incident on the 26th of July. Immediately afterwards Mr. J. was suspended due to his alleged behaviour towards Mrs Hurley and his gross insubordination towards management staff dealing with the issue. He allegedly pushed them and was verbally abusive and truculent towards them. He later attempted to return to the workplace. The Gardaí had to be called to ensure that he did not. Management remained on duty on the gates to prevent him from gaining access to the premises. During this period the plaintiff remained out sick. She believed that the trade union supported Mr. J. in his dealings with management and that she was not offered any support. She concluded that she was victimised by her colleagues following her return and Mr. J's suspension and ultimate dismissal. Most of her work colleagues considered that his dismissal was unfair. She considered that her ostracisation and isolation by her colleagues occurred because they blamed her over what happened to Mr. J.

10. The plaintiff spoke to a number of people including Mr. McCarthy her supervisor and Mr. Ned Keane, the Human Resource Manager and Mr. Harrington. She attended her general practitioner Dr. Lucy Fleming on 5th January, 2007. She did not attend work after the Christmas break from the 28th December as she felt unable to cope with the stress. She obtained a medical certificate for a further ten days and was encouraged to discuss her situation with her supervisor with a view to resolving the matters with her colleagues. When she returned to work the same isolation continued.

11. The plaintiff was unaware that there had been a number of similar incidents prior to this incident between Mr. J with other employees and management. It was suggested to the plaintiff in cross-examination, that she did not make any attempt to communicate with her co-workers on her return. In addition, it was suggested that there were a large number of pens available at signing in. Some people tended to walk away with the pens but there were a sufficient number of pens for staff to register their attendance. Furthermore, it was suggested that the slamming of the doors did not occur because the doors were spring-loaded and could not be slammed. It was also pointed out that she had not identified any co-worker who had allegedly slammed a door in her face. In essence it was suggested that the doors could not be slammed because they had a retarding mechanism which prevented that happening. No technical evidence was adduced to support this proposition. It was suggested that she was not treated in the way alleged and if she was that it did not qualify as behaviour tantamount to bullying or harassment.

Prior to the Incident

12. Mr. J. had a history of disciplinary infractions prior to the incident of the 26th July. On 16th June 2006 a complaint was received from a staff member Ms. L that Mr. J. had verbally abused her. He acted in an aggressive manner towards the complainant by standing close to her and blocking her path when she was attempting to do her work. He then verbally abused his supervisor. On 14th July Mr. J. was reported to have behaved in an aggressive manner to an employee when he was moving some postal packages. The employee felt shocked at his attitude and informed him that he was a supervisor and was simply doing his job. The following day Mr. J. was also reported for refusing to obey instructions and querying the authority and grade of his supervisor.

13. In the records of the incident of 16th June, 2006 Mr. J. was reported to have acted aggressively towards Ms L who was accused of doing something behind his back. He was approached by Mr. Ned Keane the Human Resources Manager on the 22nd June, 2006. He was informed about this complaint and given an opportunity to reply. He stated that he had no recollection of any such incident. He was asked to read a copy of the complaint and furnish a response. He declined to do so and stated that he would throw it in the bin. Due to his cavalier attitude, his lack of respect to the members of management and disrespectful dealing with members of staff it was recommended that some form of disciplinary action be taken against him.

14. On 30th June, a letter was sent by Mr. Keane informing Mr. J of the serious view taken of his conduct, his attitude towards the complaint, management and staff members and an explanation was sought. He was informed that the case might involve serious disciplinary action against him up to and including dismissal.

15. Prior to this letter he had been informed by Mr. Keane by letter dated 17th June 2006 that he had come to adverse notice on five previous occasions, twice for poor performance of duties and three times for ignoring or failing to abide by management instructions during May and June 2005. He was warned that if he came under any further adverse notice his services would be terminated without further warning. Though these incidents and how the employer dealt with Mr. J were the subject of evidence during the trial they did not form part of the plaintiff's pleaded case: there was no claim for damages arising out of the employer's breach of duty to the plaintiff in failing to dismiss or otherwise suspend Mr. J. Though this history was documented during discovery no further particulars were delivered. The case was pleaded as a bullying or harassment claim.

After the Incident

16. Following the incident with Mrs. Hurley, Mr. Harrington instructed Mr. Fitzgerald, another member of the management team to suspend Mr. J immediately. When Mr. J. returned from a break at 8:40pm he was approached and asked to accompany Mr. Fitzgerald to the office as he wished to speak to him. He was told to "feck off we've been through this shit already, now feck off and leave me alone." He then walked away. Mr. Fitzgerald asked Mr. Barry, the Floor Operations Manager to accompany him to meet Mr. J. He transferred two people away from the area where Mr. J. was working. He asked whether he wanted a union official or some other person to be with him. He was informed that he was suspended from duty. Mr. J. responded aggressively and questioned his authority and told him that he was not accepting it. He told Mr. Fitzgerald to get out of the building. Mr. Fitzgerald and Mr. Barry left the floor. Mr. Harrington then arrived. Mr. Harrington then typed an official letter of suspension to Mr. J. He handed this letter to Mr. J who rejected it. He was asked to leave the premises and informed that if he did not the Gardaí would be called to have him removed. He refused to comply. The Gardaí were then called by Mr. Harrington. During the call it was alleged that Mr. J. approached Mr. Harrington and hit him on his shoulder while questioning his authority aggressively. The trio left the floor to await the arrival of the Gardaí who arrived at 9:40pm. They were informed of what had transpired. The Gardaí and Mr. Harrington approached Mr. J and called him aside in order to speak to him. He refused to comply with the request giving a number of reasons "none of which one could rationalise". He again prodded Mr. Harrington repeatedly on the shoulder questioning his authority. The issue of Mr. J's mental stability was briefly considered. Following further discussion, it was determined that Mr. J should be allowed to continue to work on his own and complete his shift rather than be removed from the floor by the Gardaí which would have involved physical restraint. At this stage Mr. Harrington met with two branch officers of the Communications Workers Union who were working on night duty and conveyed the company's position. Mr. Harrington requested that they speak discreetly with some of their members in order to explain the situation.

17. At 12:45am Ms. Karen Hassett, a supervisor, was approached by Mr. J. who appeared very agitated and wanted to know whether the Gardaí had gone. He questioned her in a very aggressive manner and sought to obtain her personal details including her address from her. He pointed his finger into her face and threatened that he would push her and crush her until she broke. She again contacted the Gardaí at 12:55am. The Gardaí attended and offered assistance. They inquired whether she would like them to remain in the building until he left. Since it was now 1:20am and Mr. J was due to end his shift at 1:30am she asked them to leave. She did not wish to aggravate the situation any further. Mr. J left at 1:30am.

18. The following day Mr. O'Sullivan, a Welfare Officer, was reported to have called to Mr. J's house. He too was greeted in a very aggressive manner and told to leave the property at once. Mr. J. threatened to "break his neck" if he did not leave. He was reported as having unleashed a barrage of verbal abuse at Mr. O'Sullivan.

19. The management instructed staff to ensure that Mr. J. was not allowed into the building to work his shift on 27th July. The gates were closed at approximately 5:45pm. Mr. J. arrived at the main entrance and was told he was not allowed to enter. The gate was opened to allow other staff into the building. He reversed his car and drove past members of staff. He went through the barriers. The Gardaí arrived at approximately 5:55pm and escorted him from the building. They spoke to him for approximately one hour outside the gate and Mr. J. then drove away.

20. The following day at approximately 2pm Mr. J. had to be escorted from the building by Gardaí. All gates were closed at approximately 5:40pm. Mr. J. again arrived and was met by members of management and informed that he was not allowed in. He parked his car at the gate near the main entrance and would not go away. Management instructed that the gate be opened to let staff and deliveries in. Mr. J. remained parked nearby until 10pm. A number of union representatives went to speak to him during that period.

21. On 31st July, 2006 a petition was sent to management signed by 96 of the 132 members of staff which expressed "our disgust at the appalling treatment of our colleague [Mr. J.] in relation to an incident that occurred on Wednesday 26th July. This incident should have been treated with sensitivity and dignity but grew into a spectacle by being mis-managed from the outset. The amount of manpower and garda presence was unjustifiable and made [Mr. J.] look like a major threat. Had the situation being managed appropriately, we feel that it would not have escalated into such an exhibition".

22. At 10:15pm on Tuesday 1st August staff members took unofficial action and removed themselves for one hour from the shop floor for the purpose of conducting a meeting about the matter in the canteen. This was done without notice to the management. Management complained to Mr. Sean McDonagh a National Officer of the Communication Workers Union on 2nd August. In particular, it was emphasised that the Union had been briefed in relation to the situation. By reply dated 2nd August Mr. McDonagh stated that the union was extremely concerned regarding developments over the past week "most particularly in relation to the security of all staff members". He sought an investigation independent of the management at Cork.

23. In a Cork Mail Centre Branch CWU Newsletter of 3rd August 2006 Mr. Gerry Brown, Branch Secretary of the Union addressed his colleagues and informed them that the matters discussed at the Tuesday night staff meeting were now the subject of discussions at the highest level between the Union and An Post. The notice requested staff "to keep their discipline end". It accepted that morale was at "an all-time low" but to do anything now other than be disciplined would only hinder these endeavours and make an already "bad" situation worse. These steps appear to have been taken unilaterally at best, without a proper understanding of, or at worst, indifference to, what had actually happened and the previous incidents of Mr. J's difficult, threatening and truculent disposition which had been repeated during the course of the latest encounter with Mrs. Hurley and its immediate aftermath. Though Mr. J may have had a mental health issue, his aggressive behaviour at this stage presented a serious problem for management and a threat to the safety and well-being of the defendant's employees.

24. It is clear from these developments that tensions were running at a very high level amongst the majority of the staff members at the sorting centre. It is also clear that there was an enormous body of sympathy for Mr. J. and a deep resentment at the manner in which he and incident had been dealt with by management. There was little or no regard for the plaintiff's position in all of this. It is also clear from much of the evidence that emerged later that a number of staff members who had signed the petition were unaware of the previous incidents and the manner in which management had been treated by Mr. J. when they approached him. It is also clear that a number of employees had already complained about Mr. J's aggressive behaviour prior to the incident on 26th July. I am satisfied that this high level of resentment was also reflected in the staff's treatment of Mrs. Hurley when she attempted to return to work in 2006 and 2007.

Further Evidence

25. A number of witnesses were called to contradict the evidence given by Mrs. Hurley. Her colleagues accepted that Mr. J was a strange or odd personality who kept to himself. They believed that he had been treated unfairly by management but rejected that this was the cause of any trouble with Mrs. Hurley. Ms. Aherne was appalled by her allegations of isolation and intimidation by staff. Ms. Donovan also rejected the specific allegations made by Mrs. Hurley about the removal of pens or paper for signing in by other staff members and the alleged incidents of door-slamming. She did not accept that Mrs. Hurley was discouraged from attending social functions. A list went up on the notice board and it was said that Mrs. Hurley could have put her name down and attended. Indeed, she suggested that Mrs. Hurley was "slightly intimidating" to some and had "a quick tongue". She was not excluded for example, from joining the lotto syndicate if she wished; all employees were eligible and could enter and withdraw from it as they wished. She had signed the petition and her perception of the matter was based on what others told her.

26. Ms. McNamara, who witnessed the incident with Mr. J. had been friendly with Mrs. Hurley. They had worked together. She did not see any bullying of the plaintiff by others following her return to work though some people may have turned against her. She considered Mrs. Hurley to be a strong personality. She acknowledged that the incident had been a "horrible" experience for Mrs. Hurley. However, she did not accept that anybody blamed her for the incident or how Mr. J. was dealt with by management. She felt that on her return Mrs. Hurley remained a bit aloof and was saying that nobody was talking to her. She did not accept that an anonymous letter had been circulated about Mrs. Hurley a suggestion also rejected by other witnesses.

27. Ms. Isherwood did not witness the incident on 26th July. She had worked with Mr. J and also found him strange- a man who loved his own company. He could be odd. She also believed that the incident was handled very badly and that Mr. J had been treated appallingly. She said that on her return to work Mrs. Hurley did not engage with anyone and sat at break-times with her headphones on but she did not recall her sitting on her own. She also rejected the allegations of door-slamming or petty behaviour such as hiding or taking pens when signing on at the commencement of a shift. New staff were not told not to socialise with Mrs. Hurley. She was not excluded from or discouraged from participating in staff social events at Christmas or otherwise.

28. I accept Mrs. Hurley's evidence that she was treated badly by her colleagues in the manner outlined by her in evidence. I do not accept the evidence given by her colleagues that this was not so. The high level of antagonism towards management, the language used in the petition and the unilateral stoppage in support of Mr. J are evidence of the creation and existence of the type of atmosphere calculated to produce the isolation and victimisation described by the plaintiff. I am satisfied that the descriptions given by her work colleagues of her being somewhat aloof and not engaging with them was a direct result of their attitude and conduct towards her which arose directly from the palpable anger at how Mr. J was thought to have been treated and her perceived close involvement in that incident. I am satisfied that she bore the brunt of the considerable anger and resentment which prevailed on the shop-floor for a considerable time in respect of this event. The matters referred to by Mrs Hurley in her evidence might individually appear to be inconsequential but an accumulation of petty daily humiliations and repeated spiteful or petty actions with a continuing social rejection or exclusion is the very essence of the bullying and harassment contemplated the legal definition set out below. Insofar as there is a conflict in the evidence on these matters I prefer the evidence of the plaintiff that she was subjected to unfriendly behaviour and social exclusion in the workplace in the mean and demeaning ways described by her over a sustained period.

29. Mrs. Hurley on her return to work on the 16th August, 2006 spoke to Mr. Ned Keane, Human Resource Manager about her difficulties with her colleagues. She says that she was advised to live with it and it would pass.

30. On the 23rd August, 2006 the Plaintiff attended the Occupational Health Office. She informed Nurse Hodgins that she had returned to work and was feeling much better. She had been absent for two weeks but was now coping well and felt that she did not

require any further appointment with the occupational health department.

31. She was thereafter absent from work for periods which are recorded in the staff records as 26th July, 2006 to 4th August, 2006, and 28th December, 2006 to 5th January, 2007. These absences were attributed to the work incident and stress arising as a result of the incident but primarily her treatment thereafter. Matters deteriorated through September, October and November 2007 and she believed that her level of ostracisation increased during that period. Some nights she had no conversation with anybody at work. She spoke to Mr Harrington. She informed Mr. Keane in November that things were not improving. She felt he was somewhat dismissive and she was not offered any advice as to what she should do. In November/December 2006 the plaintiff stated that an anonymous letter was submitted to management suggesting that her shift times be changed. She believed this request was complied with and that her shift was altered on that basis. She felt increasing pressure up to Christmas. She was out of work from 28th December to 5th January 2007 and attended Dr. Fleming. She informed the doctor that she had taken ten days of work as she felt unable to cope with the stress in the working environment due to her isolation by her colleagues following the incident in July 2006. Dr. Fleming gave her a certificate to cover the ten days and advised her to return to discuss the situation if it did not improve. She was also advised to discuss the situation with her work supervisor. On return to work Mrs. Hurley resumed her duties.

32. On 23rd January, 2007 the occupational health records for An Post indicate that she had been referred to the section for work related stress. In December 2006 she complained that she felt "blamed" by her colleagues for Mr. J.'s suspension and some of the staff were ignoring her. She said she was invited to some but not all of the nights out at Christmas. She said she had friends at work and enjoyed her job. She was currently at work and felt she was coping well. She appeared relaxed and her mood was good. She was sleeping well. She felt she was "being harassed and bullied" at work. However, friends and management were very supportive. She was advised to contact her Welfare Officer about the harassment and bullying allegations and consider her options. She felt fit for work at the time. The court is satisfied that management was fully aware of the continuing tensions caused by Mr. J.'s suspension and dismissal within the workforce at this time and the continuing isolation and stress to which Mrs Hurley was subjected by her co-workers as described by her in evidence and its effect on her health.

33. By letter dated 13th February, 2007 Mr. J. was informed that due to his unsatisfactory attendance pattern it was not intended to extend his contract beyond its date of expiration, 13th March, 2007. Mr. J. was dismissed on the basis of his "unsatisfactory attendance pattern".

34. The court is satisfied that during the period February 2007 to September/October 2007 the Plaintiff was, as advised by management, attempting to deal with the situation which management believed would pass and improve. No efforts were made by management to engage with her predicament other than by hoping that matters would improve over time. No attempt was made to caution the workforce about Mrs Hurley's treatment or advise that it was unacceptable to management or that persons engaged in such behaviour might be subject to discipline. An attempt was made in later correspondence to maintain that Mrs Hurley had never made a written complaint in accordance with the company's Code identifying those who carried out the bullying and giving specific details of the occasions of same. This completely disregards the advice given to her by local management that this treatment would likely cease. She continued to abide by this advice throughout 2007 to no avail and to the detriment of her health. The court is satisfied that this advice was given in the knowledge of the very high level of unrest in the workforce concerning this issue. The Plaintiff was left to deal with her co-workers behaviour towards her on her own and without any effective support from management. She continued to work under these conditions until September/October 2007.

Health Issues

35. Prior to the symptoms of stress about which she complained in 2006 and early 2007 the plaintiff had not exhibited any significant physical or mental health symptoms. In October 2007 the plaintiff attended her general practitioner with a three week history of hip pain. This was worse after prolonged standing. She was prescribed anti-inflammatories and physiotherapy. On review on the 9th October the plaintiff also described a right shoulder and neck pain. This was her first complaint of these symptoms which suggested a soft tissue inflammation. X-rays of her hip and shoulder on 19th October were normal. The plaintiff was reviewed on the 5th November and indicated that the hip pain had settled. She had some right shoulder pain on abduction. Anti-inflammatories were continued and she was advised to continue with physiotherapy. On the 26th November, there was some improvement in respect of her shoulders. She had pins and needles down her right upper limbs suggestive of nerve root irritation. A consultation was arranged with the company doctor on the 27th November. It was anticipated that she would be able to return to work by Christmas 2007. On 13th December, she was again reviewed this time complaining of right handed pain perhaps secondary to overuse. She had right shoulder pain and reduction of abduction at the shoulder. She was referred to a consultant rheumatologist Dr. Mulcahy and also referred for a shoulder MRI scan which showed inflammation of the tendons. She was absent from work due to these symptoms between 28th September, 2007 and 7th January, 2008 as indicated the company records which attribute her absence to hip pain. There is no history of any trauma or incident that might explain the existence of these symptoms.

36. The Plaintiff was also seen by Nurse Hodgins of the Occupational Health section on 30th October, 2007. Her notes indicate that she was complaining of a painful right shoulder and hip. She was deemed unfit to work and referred for further review in November 2007. In addition, a report was furnished by Dr. Fleming to Dr. Frank O'Reilly the defendant's Chief Medical Officer dated 7th November, 2007. It outlined her history to date and in particular the symptoms exhibited by the plaintiff in her right hip, shoulder and her neck discomfort.

37. Dr. O'Reilly saw the plaintiff on 28th November, 2007. He described in a report to Mr. Keane the present state of her symptoms. He suggested a further review with Nurse Hodgins in December. On review on 14th December by Nurse Hodgins the Plaintiff was deemed to be unfit for work and a further review was arranged with her in January 2008. On that date, she indicated to Nurse Hodgins that she felt fit to return to work on Tuesday 8th January. She advised that it would be prudent for the plaintiff to avoid heavy manual handling duties but the plaintiff herself indicated that she was fit for video coding, collecting packets and light work. It was requested that these restrictions remain in place until 1st February, 2008. The advice to maintain Ms. Hurley on restricted duty was renewed by Nurse Hodgins on 29th January. Dr. O'Reilly reviewed the plaintiff on 20th February. She indicated ongoing discomfort in her neck and shoulder and felt unfit for all work because of the discomfort in her neck despite reassurances that she would be provided with duties such as video coding only which would not put an undue load on her neck or shoulder girdle. She wished to have a further review with her specialist before returning to work.

38. A further review by Nurse Hodgins took place in February 2008 at which stage it was indicated that an additional review should be held on 1st April following receipt of a further medical report from her caring specialist. The plaintiff then failed to attend an appointment on 1st April, 2008 with Nurse Hodgins. A further appointment was arranged for the 10th April, but the plaintiff left a message on the 9th stating that she was unable to attend. However, following consultation with her she attended for review by Dr. O'Reilly on 23rd April. He advised her that she was fit to return to work in a limited capacity but she indicated that she would not be interested in doing so. It was however noted that a report from her specialist was awaited. No further review was advised by Dr. O'Reilly at that stage.

39. A report was furnished to Dr. O'Reilly from Dr. Brian Mulcahy, consultant physician and rheumatologist dated 28th April. It outlines the history of his involvement with Mrs. Hurley from 28th January 2008 and the treatment which he gave to her. He proposed further intensive physiotherapy. Importantly, in the penultimate paragraph of his report he noted that Mrs. Hurley had been the victim of an altercation at work and that since then she complained that approximately 75% of her work colleagues had been ignoring her and was finding this very stressful. He noted her mood has become very low and she is very anxious about returning to work. He concluded that it was most probable that the spasm in her neck was stress related.

40. Dr. Mulcahy also stated that an MRI scan of her right shoulder on 17th January 2008 showed a small amount of subacromial fluid with evidence of tendonopathy in the supra-spinatus and sub-scapularis tendons. She had mild degenerative changes of the cervical spine which were normal for her age. By 16th September 2008 her shoulder symptoms had eased but she was complaining of a lot of neck pain and what he observed to be "pronounced spasm of her para-cervical muscles" but there was no history of injury to her cervical spine. Her mood was very low and she was most anxious about returning to work because she was being ignored by most of her colleagues. He referred her for psychiatric assessment and evaluation by Dr. Morgan a consultant psychiatrist.

41. Dr. O'Reilly on reviewing the plaintiff on 20th May noted in his report to An Post that:-

"In addition, Ms. Hurley feels today, and it is also stated quite clearly in a report from her treating doctor, that she appears to attribute part of her discomfort to an injury which she says she sustained in work a year and half ago."

Dr. O'Reilly advised her that she was fit for limited duties and was encouraged to take up roles such as video coding. She was not inclined to do this though she had been assessed by him as fit to undertake it.

42. Mr. John Dandy, Human Resources Manager Mails Processing wrote to Mrs. Hurley on 22nd August indicating that, following a meeting with her on 31st July in Cork, it was proposed to hold a work place assessment to determine her operational capabilities having regard to her condition. She was advised that if following this assessment, the company was of the view that she was fit to return to work failure to resume work within a reasonable timeframe would have serious implications for her continued employment with An Post.

43. On 3rd September Dr. Fleming wrote to Mr. Dandy outlining in detail symptoms suffered by Mrs. Hurley and confirming that her consultant had certified that she was medically unfit for work, an opinion with which she agreed.

44. Following a workplace assessment on 17th September Dr. O'Reilly having regard to her continuing complaints and correspondence from her doctors suggested that a further consultation take place within a month. On 22nd October Dr. O'Reilly noted that the plaintiff was awaiting further investigation. She had no information as to whether she would be offered any significant treatment. She was of the strong belief that she may not be able to return to work unless she feels 100% fit. She was again advised that the nature of her condition was such that individuals may return to work despite some residual symptoms especially if the work is controlled and this would apply to video coding. He added:-

"However, additional today, she mentions a bullying concern she tells me that she raised with the local management in 2006. She indicates that she is not aware of the progress of this and as a result of this bullying she has some symptoms. She was not able to explain any of these in great detail today but indicates that her doctor has made a general referral to another specialist to explore these symptoms with her."

He added that her concern and upset about this incident and that she was being blamed for the incident by other employees might be an obstacle for her return to work and might need to be explored separately while she recovers from her neck and arm pain. He suggested that "the status of her previous bullying concern should be assessed". In addition, he awaited the outcome of her further testing to determine the duties to which she might be able to return.

45. Nurse Hodgins recorded on 21st October that the plaintiff stated that she had some symptoms in relation to a bullying complaint she made to Mr. Keane in 2006. It said that it affected her mentally mostly when she thinks about it and that she is being blamed for the incident.

46. The existence of the alleged bullying incident as a factor in her continued absence from work in late 2007 and 2008 is chronicled in the company records and correspondence received from Mrs. Hurley. On 20th June, 2008 a three page letter was sent to management outlining the symptoms which she said were attributable to the treatment which she received following the incident from her fellow employees. The letter stated in respect of the incident and its subsequent events:-

"During all of this I was out sick suffering from severe stress and terrified that [Mr. J.] would find out where I lived and come after me. While all of this was going on the unions were all in support of [Mr. J.] and I the victim was offered no support. [L. J.] was eventually fired and then all my troubles started.

On my return to work I was utterly ignored by 75% of the workforce and almost two years later the situation remains the same. Even though they have been told by Paula McNamara that I did nothing wrong, they still believe that I am responsible for [Mr. J.] losing his job at An Post.

I have tried so hard to overcome the ignoring, it was getting harder and harder to continue working in a job where I was being cut out of any gatherings, parties, lotto's etc. and a lot of other things.

You may ask the question why did I not tell management? At no stage during the last two years have I ever been asked by management how I was getting on.

Now I find myself in situation where because of all the tension, worry and stress that I have been experiencing for the last number of months has taken its toll on me. I am now suffering from inflammation of the joints brought on (in my doctor Mr. Brian Mulcahy's view) by severe stress."

She adds that she could write "all day about various acts of bullying I have experienced" but states that she has outlined the whole story. She emphasised that the hardest thing was break-time when fellow employees sit on other seats available in the area and ignore her.

47. This letter was in response to a request from Mr. Keane in a telephone conversation in respect of the incident referred to by Dr. O'Reilly concerning bullying. She confirmed to Mr. Keane that she was referring to the incident with Mr. J. and the fact that her

colleagues were not talking to her. He requested that she respond in writing and raise any issues that she had and she undertook to do so.

48. Thereafter on 26th November, 2008, four months later, Mr. John Dandy wrote to Mrs. Hurley in respect of the reference made by her to a number of ongoing symptoms referable to bullying in the workplace. He stated and acknowledged that this matter had been referred to at a meeting at the Airport Hotel in Cork on 31st July, 2008 and continued:-

"... you referred to this concern regarding your fellow workers and I informed you that there was no evidence to support your claim and that you should submit such concerns in writing. To date no such complaint has been received by the Company. As previously advised you should set out any formal complaint you have in this regard in writing and forward it to the Company through the appropriate channels as set out in the Company's Dignity at Work Policy. This requires specific details of names and dates and any possible witnesses. The Company cannot investigate reports of a general nature; there must be a distinct basis with which to examine the facts. Your letter of 20th June, 2008 to Mr. Ned Keane, C.M.C., stated that you could "write all day" about various acts of bullying you have experienced since the single incidence involving a dismissed employee in August 2006 and that 75% of the workforce in the C.M.C. ignored you. However, the Company cannot examine complaints where there are no concrete examples given."

She was then informed that there could be no progress on the matter in the absence of these details. If she wished to make a formal complaint she was obliged to provide details of any incidents of bullying she had encountered before an official inquiry could be undertaken by the Company.

49. By this time, it should be noted that an authorisation had already been obtained from the Personal Injury Assessment Board to bring proceedings in respect of a claim concerning ongoing psychological injuries against the defendant on 16th October, 2008. A personal injury summons issued on the 24th March, 2009. The plaintiff was requested to furnish the particulars sought by Mr. Dandy in order to pursue and address any complaint which she had by letter to her solicitors dated 5th February, 2009.

50. By the time proceedings issued, Dr. Mulcahy had reported on 10th January, 2009, that though he had suggested that her symptoms may have been caused by lifting heavy objects, on closer questioning, it came to light that she had been involved in the altercation (with Mr.J.) when she was pushing a trolley at work and the trolley was tugged by him. He was of the opinion that this incident brought on her initial symptoms. She may have injured her shoulder and neck at that stage but those injuries may have become the focal point of chronic persistent symptoms driven by a significant underlying functional component due to the interpersonal difficulties at work.

51. By letter dated 29th February, 2009, the plaintiff was informed by Mr. Dandy on behalf of An Post that since she had not communicated with the Chief Medical Officer's office and cancelled an appointment to attend with him on 16th December, and did not forward further details of tests, the company would proceed to determine her fitness for work based on the information available to it. The letter stated that the company had no information that would indicate that she was permanently incapacitated and she was expected to resume her work in an appropriate capacity as soon as circumstances permit. The company was prepared to review her situation in two months time. Unless, however, she had resumed work within that period or there was a clear indication that she would be in a position to resume work in the immediate future, the company intended to consider the termination of her employment. This was based on her perceived inability to fulfil the terms of the contract of employment because of non-attendance at work. This was a final notice that this step would be taken. At the time of this letter, the plaintiff was noted to have been absent for a continuous period of twelve months since February 2008, and for a further period of three months in 2007.

52. A central feature of the plaintiff's claim based on the evidence of Dr. Eugene Morgan, Consultant Psychiatrist, is that as a result of the incident in 2006 at her place of work, she suffered Post Traumatic Stress Disorder (PTSD). This shocking incident and her then limited symptoms were exacerbated by her treatment by her co-workers. Her recovery from PTSD is said to have been affected by her physical symptoms and ongoing conflict with employers, trade union and fellow workers. The termination of her employment had a severe effect upon her. Her prognosis was guarded and a full recovery was not to be expected. Dr. Morgan concluded that there could be relapses with severe symptoms at times. This report was dated 16th January, 2012. Dr. Morgan had been seeing Mrs. Hurley since late early 2008 following the referral by Dr. Mulcahy. An updated report on 21st July, 2016, suggested that there had been a gradual improvement in her mental state over the previous two and a half years. Dr. Morgan concluded that her PTSD was now at a moderate scale though it might recur in the future. His prognosis was favourable but guarded. She ceased her employment in 2008 and never returned. She remained stressed by her attendance. Her anxiety levels were increased and she had flashbacks, difficulties sleeping and recriminations about what had happened to her, feelings that she had been let down by her employer, trade union and fellow employees. He stated that many psychological symptoms have an overlay of physical symptoms. He considered that there was a connection between the spasms in her neck and the stress which she experienced. He considered that the original triggering incident was the incident in July 2006. "It starts the ball rolling".

53. Mr. McQuillan, a surgeon who gave evidence in support of the defendant was of the opinion that there was no physical relationship between the incident as described in July 2006 and the symptoms manifested in 2016. He regarded the attributions of symptoms to stress at this remove to be somewhat implausible. Insofar as there is a conflict in the medical evidence in this regard I prefer and accept the evidence given by the treating doctors which provides the likely professional explanation and exposition of the chronology of her symptoms and treatment between 2006 and 2014 and the somewhat late conclusion as to the reason for the Plaintiff's physical symptoms and continuing condition.

Statute of Limitations

54. It is submitted that the plaintiff's claim is statute-barred. The date of the assault by Mr. J was 26th July 2006. She was out of work due to stress between 26th July 2006 and 15th August 2006. Since her doctor certified her as absent due to work incident stress, the plaintiff was aware that she had suffered an injury which was work related and had two years from that date to initiate proceedings. Two years and six months later she lodged an application with the Personal Injuries Assessment Board (PIAB).

55. Section 3(1) of the Statute of Limitations (Amendment) Act 1991 as amended by s.7(a) of the Civil Liability and Courts Act 2004 provides that:-

"An action [other than a fatal injuries action]....claiming damages in respect of personal injuries to a person caused by negligence...or breach of duty (whether the duty exists by virtue of a contract or of a provision made by or under a statute or independently of any contract or any such provision) shall not be brought after the expiration of [two] years from the date on which the cause of action accrued or the date of knowledge (if later) of the person injured"

56. Section 2(1) of the 1991 Act provides that the reference to "date of knowledge" is a reference to the date upon which the plaintiff first had knowledge of the following facts:

- "(a) that the person alleged to have been injured had been injured,
 - (b) that the injury in question was significant,
 - (c) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty,
 - (d) the identity of the defendant, and
 - (e) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant;
- and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence nuisance or breach of duty is irrelevant"

57. The court has determined for the reasons set out below that the defendant is not liable for any damage or injury sustained in respect of any alleged breach of a duty of care or negligence in dealing with Mr. J. as an employee. Indeed the pleadings do not substantively address that issue though extensive submissions were made in relation to the matter. The plaintiff was, of course, aware of the assault upon her at the time it occurred but there is no evidence that she was aware of any of the facts related to the previous history of misbehaviour, aggressive behaviour towards her co-workers or management or truculence by Mr.J. and the manner in which this had been dealt with by management.

58. The plaintiff's claim is in respect of the injuries sustained during the course of the bullying which she endured. I am satisfied that it is wholly unrealistic to tie the plaintiff's date of knowledge in this case to the date of the assault. The behaviour of which she complains began on her return to work on the 15th August 2006. The damage inflicted upon her by her co-workers was incremental in its nature and effect.

It would be hugely surprising if PTSD due to such behaviour manifested itself the day after its first occurrence. The defendant's submissions fail to take account of the insidious and continuous nature of the behaviour and its effect upon the victim. She was sent to Coventry which had a severe impact upon her health. She developed physical symptoms which were related to PTSD. The doctors treating her were actively seeking to understand these symptoms in the absence of a physical explanation such as a collision or other physical trauma and the test results obtained. PTSD was diagnosed and linked to her account of bullying and harassment in or about early 2008 when she was referred to a psychiatrist. She only then became aware that she had suffered a "significant injury" which was attributable to and caused by the bullying. While she suffered symptoms and had been absent from work for stress caused by her co-workers attitude towards her, the continuing nature of that behaviour, its incremental deleterious effects upon her health and the difficulties and delay in assessing her condition and making the diagnosis of PTSD as the source of her physical symptoms meant that she did not and could not have been aware that this behaviour had resulted in the "significant" injury which became the subject matter of these proceedings. This knowledge only became available firstly, when the symptoms manifested themselves, secondly, were diagnosed and thirdly, were attributed professionally to the behaviour about which she complains. The physical symptoms first emerged in September/October 2007. They were then investigated and PTSD was only investigated as their cause and diagnosed as such in early 2008.

59. The period of bullying continued from 15th August 2006 until 11th February 2008. The plaintiff submitted her application to PIAB on the 5th September 2008. The authorisation to proceed issued on 16th October, 2008. By the time the application to PIAB was made in excess of two years had passed since 15th August 2006 and had expired on 14th August 2008.

60. The making of an application to PIAB stops time-running under s.50 of the Personal Injuries Assessment Board Act 2003. The end of the extension period occurred on the 16th October 2008.

61. The court is satisfied that the applicant was unaware of the significant injury which she had sustained and that it was attributable to the bullying which was then on-going until she was referred to a consultant psychiatrist in early 2008. She attended Dr. Morgan who made the diagnosis. I am satisfied that it was that change in her knowledge and understanding of the serious damage which she had suffered that for the first time provided a basis for the initiation of these proceedings. It provides the effective "date of knowledge" for the purpose of the act. The court is therefore satisfied that the proceedings were issued well within a two year period of that date and are not statute barred

The duty of care

62. The initial incident in which the plaintiff was assaulted by Mr. J. occurred on 26th July, 2006. Section 8 of the Safety Health at Work Act, 2005 provides:

- "(1) Every employer shall ensure, so far as is reasonably practicable, the safety, health and welfare at work of his or her employees.
- (2) Without prejudice to the generality of subsection (1), the employer's duty extends, in particular, to the following:
 - (a) managing and conducting work activities in such a way as to ensure, so far as is reasonably practicable, the safety, health and welfare at work of his or her employees;
 - (b) managing and conducting work activities in such a way as to prevent, so far as is reasonably practicable, any improper conduct or behaviour likely to put the safety, health or welfare at work of his or her employees at risk; ..."

It was claimed in evidence and on her behalf that her employer having regard to Mr. J's unsatisfactory history prior to the assault on 26th July, 2006, ought to have been dismissed or been disciplined so as to ensure that any repetition of his behaviour would not give rise to risk of damage or injury to any of his fellow employees, including the plaintiff in the future.

63. In *Elmonten v. Nethercross Ltd and Max Usi* [2014] IEHC 91 the second defendant who had been employed by the first defendant as a head chef had been dismissed by the first defendant's general manager in a different complex. He was dismissed because he

assaulted an under chef in his prior employment. The second defendant while employed by the first defendant entered the plaintiff's office and assaulted him. The plaintiff was at the time the financial controller of the first defendant. Herbert J. considered whether the employer was vicariously liable for this assault. He also considered whether the plaintiff was entitled to succeed under s. 8 of the 2005 Act.

64. The court was asked to consider whether the defendant is vicariously liable for the assault on 26th July 2006 by applying the "close connection" test as set out by the Supreme Court in *O'Keeffe v. Hickey* [2009] 2 I.R. 302 at 378 in which Fennelly J. (Murray C.J. and Denham J. concurring) stated:

"[243] 62... I am satisfied that it is appropriate to adopt a test based on a close connection between the acts which the employee is engaged to perform and which fall truly within the scope of his employment and the tortious act of which complaint is made. That test, as the cases have shown, has enabled liability to be imposed on the solicitor's clerk defrauding the client (*Lloyd v. Grace, Smith and Company* [1912] 1 A.C. 716); the employee stealing the fur stole left in for cleaning (*Morris v. C. W. Martin & Sons Ltd.* [1966] 1 Q.B. 716) and the security officer facilitating thefts from the premises he was guarding (*Johnson & Johnson (Ire.) Ltd. v. C.P. Security Ltd.* [1985] I.R. 362). In each of these cases, the action of the servant was the very antithesis of what he was supposed to be doing. But that action was closely connected with the employment. In *Delahunty v. South Eastern Health Board* [2003] 4 I.R. 361, O'Higgins J., rightly in my view, held that there was no such close connection. The employee of the orphanage had abused a visitor, not an inmate.

[244] 63. The close connection test is both well established by authority and practical in its content. It is essentially focussed on the facts of the situation. It does not, in principle, exclude vicarious liability for criminal acts or for acts which are intrinsically of a type which would not be authorised by the employer. The law regards it as fair and just to impose liability on the employer rather than to let the loss fall on the injured party. To do otherwise would be to impose the loss on the entirely innocent party who has engaged the employer to perform the service. The employer is, of course, also innocent, but he has, at least, engaged the dishonest servant and has disappointed the expectations of the person to whom he has undertaken to provide the service. There is no reason, in principle, to exclude sexual abuse from this type of liability. That is very far, as I would emphasise, from saying that liability should be automatically imposed. The decision of O'Higgins J. [in *Delahunty v. South Eastern Health Board* [2003] 4 I.R.361] provides an excellent example of the practical and balanced application of the test. All will depend on a careful and balanced analysis of the facts of the particular case. In *Bazley v. Curry* (1999) 174 D.L.R. (4th) 45 the employees of the care home were required to provide intimate physical care for the residents. The sexual abuse was held to be closely connected."

65. The question is said to arise in this case, as it did for Herbert J. in *Elmonten* whether the actions of Mr. J. were closely connected with his employment for the purpose of the test. The relevant factors include the nature of the employer's business, whether the risk of the sort of incident which occurred arose because of the nature of that business and/or the nature of the duties, broadly defined, which the employee was engaged to perform at the time of the incident and whether the act could be said to be incidental to or a consequence of anything which the employee was employed to do and whether at the time of the incident the employee could reasonably be said to be acting however mistakenly or excessively in the interests of the employer or was simply pursuing some private end. The court should also consider whether he was expected or encouraged to act aggressively or whether the assault arose out of vengeance, spite or resentment or intemperate behaviour on the part of the employee and other similar factors. Herbert J. accepted that the assailant went to the plaintiff's office in connection with his entitlements under the VHI Scheme applicable to employees. He was satisfied however that the attack which occurred was nothing more than a vicious attack motivated by some personal resentment which was sparked by an ungovernable temper. This was regarded as inconsistent with the interests of the employee and employer and had no close connection with any acts which fell within the scope of his employment as a head chef of the first defendant. Therefore the employer was not vicariously liable. Having considered the factors outlined by Herbert J. and the principles set by the Supreme Court in *O'Keeffe* the court is satisfied that the assault by Mr. J. on the plaintiff on the 26th July during the course of his employment while the plaintiff was engaging with him in a task on behalf of her employer. I am satisfied that Mr. J.'s assault on the plaintiff was in that way connected with the work which he was employed to do by the defendant or that absent the finding referred to below there was a basis upon which to conclude that the defendant was vicariously liable for the assault or its consequences on the application of the 'close connection' test.

66. The court is satisfied that there is a common law duty on an employer to take all reasonable precautions for the safety of its employees and not to expose them to a reasonably foreseeable risk of injury. The defendant must act as a reasonably careful and prudent employer would in the circumstances. As stated by Herbert J. in *Elmonten* s. 8 of the Safety Health and Welfare at Work Act, 2005 provides a somewhat more extensive duty on employers to provide and maintain a safe place of work and provide competent co-employees. The employer has a duty insofar as is reasonably practicable to manage work activities so that any improper conduct or behaviour likely to put the safety health or welfare of its employees at risk is addressed. Section 2(6) defines "reasonably practicable" as requiring that an employer should exercise all due care by putting in place the necessary protective and preventive measures "having identified the hazards and assessed the risks to safety and health likely to result in...injury to health in the place of work concerned" such that any further measures would be grossly disproportionate having regard to the unusual unforeseeable and exceptional nature of any circumstance or occurrence that may result in such injury. Herbert J. interpreted "improper conduct or behaviour" as including such matters as bullying, harassment, or other abuse or physical violence.

67. In *Elmonten* Herbert J. was satisfied that the evidence established that the first defendant through its general manager was aware the second defendant had on a previous occasion in a fit of temper caused a physical injury to a fellow employee in the course of their joint employment. He was satisfied that the manager knew or ought to have known that there was a very real risk not just a mere possibility, that this could occur again, if for any reason the second defendant's temper became aroused and this exposed his fellow employees, including the plaintiff to risk of physical injury. He therefore was satisfied that it was reasonably foreseeable that the second defendant was likely to prove a source of danger to other employees because of his apparently ungovernable temper. The cause of the previous assault was not a personal animosity between the second defendant and a particular fellow employee who is no longer on the scene but because of the second defendant losing his temper "to an almost maniacal level with a co worker" over some dispute or perceived grievance in the course of their work. A real risk of a recurrence therefore remained. In those circumstances the learned judge held that the employer did not exercise reasonable care or put in place measures to prevent or protect against such an event.

68. In this case it is clear from the evidence adduced and from the evidence of Ms. Rigby Jones, an expert in human resource management, that Mr. J. had been the subject of five disciplinary issues in 2005, two for poor performance and three for ignoring or failing to abide by management's instructions. He was advised on 17th June, 2005 that any repetition could without warning lead to his dismissal. He was also interviewed in June, 2006 concerning an incident with Ms. L. on 16th June. He said he had no recollection of this incident, refused to accept the complaint and was dismissive and rude to the interviewer. It was recommended to Mr. Keane that some form of disciplinary action be taken due to his behaviour when approached about this incident. Ms Rigby Jones was satisfied

there was a clear and reasonable basis to dismiss Mr. J. summarily in respect of these incidents or at least to convene a meeting to discuss the series of issues and incidents which had arisen. I am satisfied that there was a clear failure by management in relation to these earlier incidents to investigate and deal with them appropriately. However, it is also clear that the incident with Mrs. Hurley on 26th July 2006 and Mr. J.'s aggression and truculence in that incident and in his dealings with management thereafter were of a much more serious nature than the previous transgressions. The court is not therefore satisfied that the employer was in breach of his ordinary common law duty of care or the statutory duty imposed by s. 8 of the 2005 Act. The previous incidents were not as serious as those that occurred on the 26th July. The plaintiff has failed to satisfy the court on the balance of probabilities that it should conclude that the defendants had by that stage lost control over Mr. J. as an employee or should have regarded him as an employee who ought not be allowed to associate with his fellow workers because he was a danger to them. That danger crystallised on the 26th July and in subsequent dealings with management. Action, however slowly and inadequate was taken thereafter to discipline him. This led ultimately to his dismissal though it is a peculiar aspect of his dismissal that the reasons advanced by the employer for taking that step did not relate to the violent incident on the 26th July and his subsequent behaviour towards management but to the earlier less serious incidents. Nevertheless, the court is not satisfied on the balance of probabilities that the defendant was vicariously liable for the assault carried by Mr. J. on the plaintiff and any injury sustained by her as a result thereof on the 26th July.

Bullying and harassment

69. Part 5 of the Code of Practice appended to the Industrial Relations Act, 1990 defines workplace bullying:

"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."

70. This definition was approved by the Supreme Court in *Quigley v. Complex Tooling and Moulding* [2009] 1 I.R. 349. The plaintiff must establish the following matters on the balance of probabilities if she is to succeed in her action based on workplace bullying:

- (a) that the behaviour complained of by reference to an objective test establishes "that degree of calibrated inappropriateness and repetition [that] differentiates bullying from workplace stress or occupational stress" per Kearns P. in *Glynn v. Minister for Justice, Equality and Law Reform* [2014] IEHC 133;
- (b) the conduct complained of must have been repeated and undermine the dignity of the employee at work (per Fennelly J. in *Quigley v. Complex Tooling and Moulding*).
- (c) That the conduct is objectively to be considered as repeated inappropriate behaviour undermining the individual's right to dignity at work; it does not have to be deliberate (per Irvine and Finlay Geoghegan JJ. in *Ruffley v. Board of Management St. Annes School* [2015] IECA 287). It is not dependent on the intention of the perpetrator or the perception of the victim. It depends in each case on the relationship and relative positions of the individuals and the full factual context.
- (d) The conduct or actions must have taken place either at the workplace or in the course of employment;
- (e) The plaintiff must have suffered an injury to his or her health as opposed to what might be described as ordinary occupational stress;
- (f) That injury must be attributable to the conduct in the workplace or course of employment;
- (g) The harm suffered by the employee must be reasonably foreseeable by the employer in all the circumstances (per Clarke J. in *Maier v. Jabil Global Services Ltd* [2005] IEHC 130). The harm suffered by the employee must have been reasonably foreseeable: this is dependent on what the employer knows about the individual employee and the indications of impending harm to health which must be of a nature that any reasonable employer would realise that he should do something about it;
- (h) The employer must have failed to take steps which are reasonable in the circumstances bearing in mind the magnitude of the risk of harm occurring, the gravity of the harm which may occur and the cost and practicability of preventing it and the justification of furthering the risk (per *Berber v. Dunnes Stores* [2009] ELR 61).

64. As noted by Kearns P. in *Glynn v. Minister for Justice and Equality* bullying involves a repeated course of action designed to humiliate and belittle the victim. The conduct must be intended to reduce the person's sense of self worth.

"That said, bullying, workplace stress and occupational stress are all things which, conceptually at least, are quite different from each other, though on occasion they can overlap and coincide. Occupational stress is not actionable given that occupational stress is something which every employed person may experience at some stage of his or her working life and can occur for reasons quite distinct from and unrelated to bullying. Workplace stress on the other hand may be actionable if certain legal criteria are met. It can be the result of behaviour which falls far short of bullying. It can be the result of negligence where excessive demands are made of an employee or where complaints about shortcomings in the workplace go unheeded. It lacks however that degree of deliberateness which is the hallmark of bullying.

It follows that the first question that must be asked in every bullying case is whether the behaviour complained of, by reference to an objective test, imports that degree of calibrated inappropriateness and repetition which differentiates bullying from workplace stress or occupational stress."

In *Ruffley*, Irvine J emphasised that the court must first determine whether the conduct complained of may objectively be considered to be "repeated inappropriate behaviour" and should then consider whether objectively it may reasonably be regarded as undermining the individual's right to dignity at work.

65. The court in considering the issue of liability in this case has also adopted and applied the principles set out by Laffoy J. in *McGrath v. Trintech Technologies Ltd* [2005] 4 I.R. 382 at paras. 53 to 71 and the helpful guidelines adopted and approved by the learned judge set out in *Hatton v. Sutherland* [2002] EWCA Civ. 76 [2002] ICR 612 and subsequently applied in *Quigley v. Complex Tooling and Moulding Ltd* by the Supreme Court (see also *Jackson v Cahill & Ors* (unreported High Court 6th July 2016, Moriarty J.)).

66. Dr. Morgan was satisfied that the assault on the 26th July 2006 was the triggering event for the development of PTSD in this case. He was however also satisfied that the physical symptoms of muscle spasm in the Plaintiff's neck which were chronicled from 2007 were caused by the Plaintiff's reaction to the stress under which she was placed at work by her co-workers. The stress caused by the subsequent events and incidents contributed to and caused the physical manifestations described. It is clear that Dr. Mulcahy strove to understand the shoulder injury in the context of tugging of the trolley at the time of the assault but that was not a matter that featured largely in the description of the incident at the time it occurred. It is clear that from an early stage Dr. Mulcahy was satisfied that he needed to explore reasons other than trauma for the physical symptoms of which the Plaintiff complained. Therefore he referred the plaintiff for psychiatric evaluation to Dr. Morgan. I am satisfied on the balance of probabilities that the neck spasm and symptoms described by the Plaintiff to Dr. Mulcahy and Dr. Morgan are the likely product of PTSD. In reaching this conclusion I take into account the absence of any trauma which might explain the symptoms and the satisfaction expressed that they have been found to be present on physical examination. I also accept Dr. Morgan's evidence that PTSD may give rise to muscle spasms such as the neck spasms experienced by the Plaintiff. I am therefore satisfied that these symptoms arose as a result of PTSD arising from the Plaintiff's treatment by her co-workers.

67. I am satisfied that the conduct of her co-workers towards her following her return was, on the application of an objective test, highly inappropriate repeated behaviour which must reasonably be regarded as undermining her right to dignity at work. They were adults and clearly knew what they were doing in the throes of a misguided but intense sense of grievance concerning the consequences for Mr J. of his assault on the Plaintiff and his overall behaviour. I accept the plaintiff's evidence as to how she was treated on her return to work and the serious effect of this behaviour upon her well-being, her mental health and ultimately her ability to return to her employment as set out above and as recounted in evidence. She was subjected to debilitating and humiliating treatment on a daily basis of a petty and mean kind which had the accumulated effect of undermining her health and ability to return to work in the manner described. Her co-workers are primarily responsible for this. Her employer allowed it to continue unchecked.

68. I am satisfied that the defendant's supervisors and managers on the ground in Cork were fully aware of the tensions created on the shop-floor to which I have previously referred. They were aware at an early stage that following her return to work she was subjected to the behaviour which she described. I accept her evidence in that regard and note the absence of any evidence refuting it from those in the local management team with whom she engaged on this issue. I accept that the support offered to her was minimal in dealing with a deteriorating situation. Management were facing a very angry work-force which had stopped work and circulated a petition with huge support for Mr. J. The plaintiff was simply left by her employer to ride out the storm in the hope that it would pass: it did not. I am satisfied that in advising her to do so the defendant failed to support, encourage or direct her to confront those engaged in this misbehaviour in the manner set out in the Code upon which they sought to rely in this case. The Code provides for a formal investigative process based on fair procedures to be applied upon receipt of a written complaint from an employee of bullying or harassment in the workplace. It set out a disciplinary regime that may be applied in respect of alleged wrongdoers preceded by a mediation process in which such matters may be resolved. I am satisfied that in this case no encouragement was given to the Plaintiff to abide by this procedure and she was directed down a different path by her employer for whatever reason which was completely ineffectual and damaging to her. She was left without the practical support and protection which she was entitled to expect and it was her employer's duty to provide. In addition, the evidence of Ms Rigby Jones supports the proposition that such a procedure and active intervention by an employer is necessary in the workplace if the is to fulfil its duty of care and support for victims of bullying and harassment in the workplace. However, the employer knew that at the time but chose not to follow the scheme or encourage Mrs Hurley to proceed under it. In the circumstances of this case I am satisfied that the employer is liable for the bullying and harassment which she experienced from her co-workers in the course of her employment of which it was aware and failed to address in any meaningful way. The defendant was in breach of its common law duty of care to her as an employee and under s.8 of the 2005 Act and exposed the plaintiff to the damage and injury to her health which she suffered as a result. The damage which she suffered to her health was reasonably foreseeable by the employer as is evidenced by the existence of a Code which was effectively not invoked on management advice. I do not regard the belated recourse by management to the Code in July /August 2008 as an adequate response to the bullying and harassment of which they were clearly aware locally and had ignored and/or tolerated for a number of years. Its invocation in 2008 was too little and too late for Mrs Hurley.

69. There is a further issue which remains to be addressed concerning the plaintiff's claim for special damages in respect of loss of earnings which is said by the defendant not to arise and is not pleaded and which I deferred until the issue of liability was determined. I will hear further submissions on how the court ought to address the remaining issues before assessing damages.