

**THE HIGH COURT****2006 3543 P****BETWEEN****MARGARET KELLY****PLAINTIFF****AND****BON SECOURS HEALTH SYSTEM LIMITED****DEFENDANT****JUDGMENT of Mr. Justice Cross delivered on the 26th day of January, 2012****1. Introduction**

1.1 The plaintiff in these proceedings was born on 3rd May, 1947 and is a separated mother, who commenced employment with the defendants by a contract commencing on 17th February, 2003. She was initially working at the defendant's hospital in Tralee, Co. Kerry, as a temporary/part-time receptionist. At that time she was also working part-time with the local St. Vincent DePaul.

1.2 The plaintiff who represented herself commenced proceedings (which at the time were settled by counsel and with a benefit of a solicitor) by personal injuries summons claiming damages for injury, loss and damage caused by two distinct matters.

1.3 The easiest cause of action to contain is the plaintiff's claim that on 24th August, 2004, whilst carrying out her duties in the records section of the hospital (to which she had been transferred) she sustained injuries when she twisted her back when carrying files.

1.4 The much more involved and intricate aspect of the plaintiff's claim is a claim for injury and loss caused by the alleged harassment, bullying, abuse, intimidation and discrimination in the course of her employment with the defendants. The plaintiff brings this claim under the headings of negligence, breach of duty, breach of statutory duty and breach of contract and misrepresentation.

**2. The Accident at Work**

2.1 The plaintiff gave evidence by way of her extensive opening statement which she then swore to be correct and was subjected to extensive cross examination.

2.2 The plaintiff claims that the volume of her work was enormous, that she was asked to carry out impossible deadlines, she was never given any manual handling training and due to the repetitive lifting and turning, she injured her back. She cried out in pain as to the severity of this and it was witnessed by H.C., the line manager, who subsequently refused to sign an accident report form. Subsequently, in answer to questions from the bench, the plaintiff indicated that they were very short staffed on the day, H.C. was sitting down because she had injured her foot or had some sort of foot problem and there were lots of charts to be put away before any other work would commence. On that particular day, there were maybe over two hundred charts but she was not exactly sure and she was kept being told to hurry up and had to get them done before 9am.

2.3 The plaintiff had collected the charts from the ward, brought them down, logged them and had a very short time to put all the charts onto the trolley and get them back. She would grab a bundle of them and would turn around and put them on the trolley and while she was twisting, she injured the lower part of her back. She was given some painkillers by H.C. and she rang the physiotherapy department and made an appointment for her. She was never given manual handling training before the accident but was subsequently and had she been given that training, she might have been more aware of what to do.

2.4 The defendant did not call H.C. to give evidence who was the only witness but did call the highly respected engineer, Mr. Tony O'Keeffe who had a set of photographs. Mr. O'Keeffe gave evidence that the volume in weights being carried by the plaintiff were not excessive. This, of course, is not the plaintiff's allegation. He agreed that the manual training regulations were mandatory and that it was a breach of statutory duty not to have such regulations.

2.5 It was argued by Ms. Marguerite Bolger, S.C., at the conclusion of the case that there was not sufficient evidence to show that the plaintiff had her accident or that it was caused or contributed to because of the failure of the defendants (which was admitted) to have proper training in manual handling.

2.6 I have observed the plaintiff, I believe that she is a witness who is inclined to tell the truth as best she can and that her recollection of the circumstances of the accident (which is not challenged) is correct. I also accept that had the plaintiff been trained in proper handling of weights and manoeuvring as is required under the statute, the accident as a matter of probability would not have occurred.

2.7 I therefore hold that it was negligent and a breach of statutory duty on the part of the defendants not to give the plaintiff this training and that this negligence was the principle cause of the accident and the injuries sustained therefrom.

2.8 The plaintiff is entitled to succeed in relation to that aspect of her case and I find there is no contributory negligence on the part of the plaintiff.

2.9 I will discuss the quantum of damages later in this judgment.

**3. The Claim for Bullying and Harassment**

3.1 I propose to analyse this claim firstly on the basis of the legal principles involved and then proceed to go through the various allegations in turn of "bullying and harassment" made by the plaintiff to assess whether there is liability in respect of them.

3.2 It is important to realise, of course, that there is no separate tort of "bullying and harassment". The defendant as an employer of the plaintiff owes a duty of care not to expose their employees to injury and one of the sub-aspects of this maybe a question of bullying and harassment.

3.3 It is further important to realise that in this case, the plaintiff is not just complaining of "bullying". She makes the case that there is breach of contract, bullying, harassment, discrimination and intimidation against her.

3.4 Fennelly J. stated in *Quigley v. Complex Tooling and Moulding Limited* [2009] 1 I.R. at para. [13] and following:-

"[13] Counsel for the defendant, accepted that an employer owes a duty of care to his employees at common law not to permit bullying to take place. Both parties accepted the definition of 'workplace bullying' at para. 5 of the Industrial Relations Act 1990 (Code of Practice Detailing Procedures for Addressing Bullying in the Workplace) (Declaration) Order 2002 as an accurate statement of the employer's obligation for the purposes of this case. That definition is:-

'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.'

[14] Counsel for the defendant submitted, and I would accept, that bullying must be:-

- repeated;
- inappropriate;
- undermining of the dignity of the employee at work."

3.5 In this case, of course, the essence of the plaintiff's case is that the bullying and harassment came not merely from fellow employees but were in effect orchestrated or directed from the management of the defendant's company or what is sometimes known as corporate bullying.

3.6 I have been referred to the helpful decision of Herbert J. in *Sweeney v. Board of Management Ballinteer Community College* (Unreported, High Court, 24th March, 2011), in which Herbert J. analysed a number of the instances which the plaintiff relied on in her claim for personal injuries in what she claimed was unlawful bullying and harassment of her by the school principal.

3.7 Some of the plaintiff's complaints were upheld and others were not. At the outset, Herbert J. set out his view that there had an "escalating mutual distrust" between the plaintiff and the principal as disagreement followed disagreement. He found that:-

"the plaintiff came to believe that every action or omission on the part of Dr. C., whether actually or, as she perceived it, affecting her, was part of a conscious and deliberate campaign by him to bully and harass her."

3.8 In that case, the analysis which I found most helpful, Herbert J. was critical of a number of the aspects of the plaintiff's conduct but found certain behaviour amounted to bullying and stated:-

"In my judgment a particularly vicious form of bullying involves isolating the victim in the work place by influencing others by actual or suggested threats to their own interests and by undermining the victim's standing in the organisation and amongst colleagues by disparaging references. In my judgment this was the first indication of a firm determination on the part of Dr. C. to brook no positive interference, as he saw it, by the plaintiff in his management of the college."

3.9 In this case, I came to the conclusion that the plaintiff did hold the same belief as was held by the plaintiff in the *Sweeney* case (above) i.e. that every reaction of the management of the defendants was directed against her and that even matters that were clearly set out for her benefit were in fact part of a grand design to do her down.

3.10 I was strengthened in that view by certain aspects of the medical evidence (which I will discuss further in this judgment).

3.11 To come to that general conclusion, however, is not to decide the case as the individual actions complained of by the plaintiff will have to be analysed, as was done by Herbert J., in the *Sweeney* case above, and a decision reached as to whether any of them individually and/or collectively in all the circumstances amounts to bullying and harassment bearing in mind the plaintiff's other causes of action as pleaded.

3.12 In the United Kingdom, the Court of Appeal clarified the law in four joined stress and work cases and in *Sutton v. Hatton* [2002] 2 AR 1, the court placed considerable emphasis on the employees obligations to inform the employer of the nature of the difficulties and the fact that the difficulties are having an adverse effect on their health and Hale L.J. set out sixteen propositions for dealing with cases of bullying and harassment.

3.13 Laffoy J. in *McGrath v. Trintech Technologies Limited* [2005] I.R. 382, adopted these sixteen propositions stating that they are:-

"helpful in the application of legal principle in an area which is characterised by difficulty and complexity, subject, however, to the caveat of Lord Walker in *Barber v. Somerset County Council* case - that one must be mindful that every case will depend on its own facts."

3.14 Furthermore as is clear in this case as the allegations relate to what I have described as corporate bullying in the main and as the history of the case indicates the plaintiff bringing numerous grievances to the attention of the management, the issues of the foreseeability and notification to the employers are of less significance here than in the *Sutton v. Hatton* case (above).

3.15 All in all, I find that the best summary of the questions to be addressed was set out by Clarke J. in *Maier v. Jabil Services Limited* [2005] 16 ELR 233 as follows:-

"(a) had the plaintiff suffered an injury to their health as opposed to ordinary occupational stress;

(b) if so, was that injury attributable to the workplace and;

(c) if so, was the harm suffered to the particular employee reasonably foreseeable in all the circumstances.”

#### **4. The Plaintiff's Work History**

4.1 As stated the plaintiff whose is a married and separated mother commenced employment with the defendants in February 2003 initially as a part-time receptionist. She was at that time working also with the Society of St. Vincent DePaul.

4.2 During her work with the Society of St. Vincent DePaul, the plaintiff complained of bullying and harassment and work stress which was the subject of a separate set of High Court proceedings, heard by me immediately prior to the instant case. In those proceedings, the plaintiff was unsuccessful.

4.3 As some stage in the course of her employment, these defendants became aware of the fact that the plaintiff had suffered alleged stress and had a number of complaints against the Society of St. Vincent DePaul. This awareness culminated in these defendants affording some witnesses to her employers in a case taken by the plaintiff against the Society of St. Vincent DePaul before a Tribunal.

4.4 The plaintiff returned to Ireland from England with her husband whom she had married in 1965. She had three children.

4.5 In 1981 her marriage ended and her ex-husband lived in America and did not provide her with any material support.

4.6 Of relevance in these proceedings, her husband was sentenced to three years imprisonment at Portlaoise Prison for his part in the kidnapping of Mr. Don Tidey in 1983 and on his release in 1987 he immigrated to the United States.

4.7 The plaintiff formed another relationship which lasted for more than 20 years but her partner developed heart disease and died after a debilitating illness in 2008.

4.8 Having commenced work in the reception area, the plaintiff applied for and was given a post in the Record Department commencing in February 2004.

4.9 The plaintiff developed a number of grievances in the course of her work which will be analysed and she sustained the accident discussed above after which she was certified as being sick and subsequently due as she put it to her work stress situation, she again was certified as sick and has not returned to work since 2006.

#### **5. The Plaintiff's Grievances**

##### **(a) The Condition of the Records Department prior to the Plaintiff's Appointment**

5.1 I have considered all the evidence and all the submissions in this case and I have been afforded the assistance of a transcript of the seven day hearing being made available to me (and indeed to the plaintiff) by the good offices of the defendant. I will not attempt to summarise all the evidence but the parts which I believe to be relevant in relation to the plaintiff's main allegations and grievances.

5.2 The plaintiff complains that whereas when she moved to the records department, the atmosphere was reasonable up to and including the time of her accident, that she was not made aware as a fellow employee, H.B. (who moved to the same department at the same time) was aware, that a significant human relations problem had existed in this department prior to the plaintiff joining it and that it was basically unsafe.

5.3 H.B. was indeed give a "letter of comfort" whereby she could use this letter to change back to any other department before she took up the post. This is because H.B. was aware of certain difficulties at the records department and the plaintiff was not so aware.

5.4 I am not persuaded, however, that the failure of the defendants to give a letter of comfort to the plaintiff was an example by them of bullying and harassment. H.B. was aware of problems in the department, which problems persisted and which problems required the defendant's best practice manager, F.G., being placed in charge and remaining in charge as acting manager during the period of the plaintiff's employment.

5.5 However, the fact that F.G. was in charge of the department did place the defendants on notice of what was going on there and gave them an obligation to be particularly stringent in relation to any further bullying.

##### **(b) The hours of the plaintiff's work**

5.6 The plaintiff accepts that her original contract in Reception and indeed when she moved to records was as a temporary part time worker but that it was represented to her that she would in fact get many extra hours and be put in effect in a position as a full time employee.

5.7 This did not occur and was subject of considerable grievance procedures by the plaintiff but I accept the defendant's contention that at all times, the plaintiff was employed under a contract which provided for a limited number of hours and that she was furnished from time to time with extra hours, and in particular in July 2004, she was granted full time hours by an agreement which specified that this was up to the end of the year. The plaintiff understood that in January 2005 when she went back to part time that she would take up hours of another employee who left.

5.8 In any event, the plaintiff agrees that she was working without difficulty up until sometime after her accident.

##### **(c) The accident and its aftermath**

5.9 The plaintiff suffered the accident as described above on 20th August, 2004. She went home and sent her son with an accident report form to be completed. H.C. who witnessed the accident apparently filled out an incident report form which did not specify any accidents such as that complained of by the plaintiff and then the plaintiff returned to work, she noticed the atmosphere had changed.

5.10 In particular, she says (and there is no evidence to contradict this) and I accept that on 29th September, H.C. scratched the plaintiff with her nails which incident the plaintiff reported to her trade union, SIPTU.

5.11 I accept that because of the difference of views between the plaintiff and H.C. in relation to the plaintiff's accident and in particular H.C. not reporting the incident as an industrial accident (and apparently it was never reported to Health and Safety) and subsequently H.C. not signing the accident report form as it was proffered to her that H.C. who was the plaintiff's superior was hostile to the plaintiff.

5.12 I also accept that the defendants who were aware of difficulties on the personnel side in the records department and who had their best practice manager, F.G., as acting manager therein were aware or ought to have been aware of this hostility and had notice of it and initially took no effective steps to deal with this and as a result of what occurred, the plaintiff suffered stress.

(d) The application for a permanent position

5.13 A permanent position was advertised internally in the hospital and I am persuaded by the evidence of Mr. Casey of SIPTU on behalf of the plaintiff that the proper procedure ought to have involved only internal candidates being selected from current employees of the hospital. In fact, the plaintiff applied for this position but was not appointed and instead external candidates were.

5.14 These appointments were irregular and contrary to agreed procedures between management and unions. I have not been given any justification for this breach of procedure other than the view of the plaintiff, which I accept, that it was because management were in some way of the view that the plaintiff was "trouble" and wished to do her down or not to see her attain a permanent position for which on the face of it she seemed entitled.

5.15 It is fair to say that the procedure that was adopted by the hospital was most unfortunate in that it led to increased tensions in the workplace, and in particular to the start of the plaintiff's complaints of bullying and to most of what followed.

5.16 I have come to the conclusion that this amounted to corporate bullying and harassment and discrimination against the plaintiff and resulted in stress to her.

(e) The complaints against the plaintiff

5.17 In November 2004, complaints were made against the plaintiff by Ms. O.P. and Ms. M.Q. in writing objecting to the conduct of the plaintiff towards these two persons who had applied for and obtained the position which the plaintiff had also applied for alleging, *inter alia*, that the plaintiff was ignoring them and being rude to them and carrying out conversations about them behind their back.

5.18 The plaintiff alleges that these complaints were in effect manufactured or false or were the product of management or in any event were untrue and part of the bullying against her.

5.19 In particular, the plaintiff objected to a reference in the complaints to the plaintiff allegedly talking about a burning of boats incident in Co. Kerry which was allegedly caused by the IRA.

5.20 It is not my function to analyse the strength or the truth otherwise of these complaints against the plaintiff.

5.21 I do, however, find that the complaints were not orchestrated by the management and came to the management in a manner which required the management of the hospital to investigate them.

5.22 The complaints originally were made in handwritten letters which have been opened to me. The complainants then attended management investigation on 14th December, 2004.

5.23 Subsequent to that meeting, a letter was sent to the plaintiff on "6th December, 2004" but which I accept this date is a typographical error and it should be 16th rather than 6th and although the plaintiff insists that the letter was written before the grievance meeting on 14th, I do not accept that as a fact.

5.24 This letter to the plaintiff from S.H. and F.G. states that:-

"I write pursuant to various complaints which have been received from individual staff members within the medical records department. These complaints clearly outline their concerns with regard to inappropriate behaviour, comments allegedly exhibited/made by yourself and also the issues which you have inappropriately raised with regard to internal recruitment process. Having reviewed all the details of the allegations thus far and having deemed the allegation to be severe in nature, we are now formally requesting you to attend an investigation meeting with a representative of your choice....

This meeting will take place with myself and (F.G.) in the hospital boardroom on Wednesday, 22nd December, 2004 at 11am..."

5.25 The plaintiff very understandably objected and objects to being summonsed to a meeting of complaints against her when the details of these complaints were not given to her.

5.26 Ultimately, the statements of the complainants made to the investigation meeting on 14th December, 2004, were furnished to the plaintiff's representative. However, Mr. Casey sought copies of the original letters of complaint to management by the complainants. There was great confusion throughout the hearing as to what occurred to these letters and management maintained that they were given by the complainants to their trade union (also SIPTU) and were ultimately produced at a hearing.

5.27 If that is the case, the fact that the original complaints were in the hands of a colleague was not advised to Mr. Casey who was representing the plaintiff and I find that odd but in any event, I do not have to decide that issue of fact.

5.28 Ultimately, a meeting was held on 18th January, 2005, but this meeting was to discuss the plaintiff's grievances in relation to her not being appointed to the full time position (though being the only internal candidate for it) and to her claim for loss of earnings as a result.

5.29 At this meeting, the plaintiff read out a prepared statement which was taken down by a note taker on behalf of management.

5.30 This statement was typed out and what purported to be the plaintiff's statement was presented to the plaintiff for signature on 21st January, 2005.

5.31 As far as the plaintiff was concerned the statement she had asked to sign as her own did not reflect what she had said. In a point of fact she indicated that every paragraph in it was inaccurate. She took the advice of her trade union (and Mr. Casey supports her on this) who advised her not to sign the document. She refused to sign the document and in my opinion she was correct in taking that attitude. The statement had originally been presented to the plaintiff for signature on 20th January, 2005 but the plaintiff wanted an opportunity to compare it with her original document which was at home and indicated she would return the following day.

5.32 At the same time, a similar statement was proffered to another employee, H.B. H.B. also refused ultimately to sign her statement as being inaccurate.

5.33 On 21st January, 2005, the plaintiff wrote a letter to B.L. (the assistant hospital accountant/office manager) advising that she had been advised "not to engage in further dialogue" and stating "I believe it (statement) does not reflect accurately and wholly the information I imparted at the meeting held...18th January, 2005...Please contact Mr. Con Casey/SIPTU in order that this matter and correction to same can be facilitated".

5.34 Following that not unreasonable action, the defendants proceeded to a most extraordinary and in my view unwarranted course of events.

5.35 At approximately 4pm on 21st, the plaintiff who was in the file section of the records department was approached by B.L. (the chair of the panel who had held the meeting) who asked the plaintiff why she was advised not to enter into any further dialogue to get the response from the plaintiff that they were to contact her union. The plaintiff was then told by S.H. that as it appeared that she was no longer willing to cooperate with the grievance panel or H.R. in order to have the grievances (which she herself had invoked) investigated that they were "left with no alternative" but to suspend her from active duty with immediate effect.

5.36 The plaintiff then stated and I accept that she was in effect manhandled from the premises by management and barred therefrom.

5.37 The defendants accept that the plaintiff was suspended (though with pay) and denied that she was "barred" but I accept the plaintiff's evidence in this matter that as far as she was concerned her suspension and removal from the premises amounted to a barring therefrom and this was communicated to her. It is illustrative that the plaintiff's fellow employee, H.B., who also declined to sign the grievance procedure statement was not suspended or disciplined or removed from the premises.

5.38 When asked by the court in respect of this discrepancy, the hospital manager, P.G. stated that the plaintiff was the person who was suspended and removed from the premises rather than H.B. because the plaintiff was the one who had raised the grievance!

5.39 I find that the suspension of the plaintiff because she quite properly refused to sign a statement which she found inaccurate and quite properly referred the management to her trade union for clarification and how the matter could be progressed was wrong, a breach of contract and a example of bully and harassment against the plaintiff.

5.40 It is clear and is stated by the manager of the defendant company that the plaintiff was singled out for discriminatory treatment because it was she who had raised the grievance and she who refused to sign.

5.41 The circumstances of the plaintiff's removal from the premises may have constituted an assault though I am not persuaded on the balance of probabilities that a significant assault took place.

5.42 Though the plaintiff continued to work after this incident when her suspension was raised following trade union protest and the threat of industrial action, I do accept that as a result of this incident the plaintiff has suffered an injury and an actionable wrong which may be classified as breach of contract, discrimination and bullying and harassment.

5.43 Given my other findings of fact, I do not see the suspension of the plaintiff in the manner that it was done and for the reasons that have been stated on behalf of the defendant can be justified as not being bullying due to it being just one single isolated incident.

#### (f) Post Suspension Grievance Procedures

5.44 The plaintiff finds great fault with almost each of the procedures the defendant's sought to put in place to resolve her subsequent grievances.

5.45 With regard to most of the matters raised, I do not accept the plaintiff's contention. I do accept, however, that the defendants were at this stage looking at the plaintiff as being a "trouble maker" and acted in a number of ways unfairly towards her.

5.46 Subsequent to her suspension and then her reinstatement after trade union agitation, the defendants did put in place a number of efforts at investigation and also potentially mediation but these ultimately came to nothing.

5.47 The plaintiff's trade union representative, Mr. Casey gave opinion that the plaintiff was targeted because of her membership of SIPTU, I do not accept that as being correct and indeed apart from Mr. Casey's opinion to that effect (which at best of doubtful evidentially) there is no evidence to support the allegation. Indeed there is every reason to suppose that the defendants were well aware that their hospital in Tralee was a trade union employer and they dealt with and liaised with the SIPTU representatives on numerous occasions.

#### (g) The Rights Commissioner

5.48 The plaintiff's grievances were referred to the Rights Commissioner pursuant to the Labour Relations Commission and he reported July 2005 in relation to the appointment of five candidates and in relation to the plaintiff's grievances as to her hours of work.

5.49 The Rights Commissioner recommended that the plaintiff's contract be extended to 20 hours per week with additional hours to be made available to her and further that the defendants set out in writing a recruitment policy which would be followed for future.

5.50 The plaintiff then appealed the recommendations to the Labour Court in relation to her number of hours. This appeal went

against the plaintiff.

(h) The Investigation by Mr. Tom Wall of the Plaintiff's Bullying Complaints

5.51 It was agreed that the plaintiff's complaint of bullying be referred to Mr. Tom Wall and he investigated and did not uphold the plaintiff's grievances except in relation to the allegation that the plaintiff was wrongly suspended and the manner of the suspension.

5.52 Mr. Wall, however, viewed that incident as being an isolated one and that accordingly he did not fulfil the definitions of bullying.

5.53 The report of Mr. Wall was then appealed by the plaintiff to the Rights Commissioner under the Industrial Relations Act. The plaintiff complained that Mr. Wall did not hear evidence from a number of witnesses that she had available to her but rather took evidence on behalf of the plaintiff from herself only.

5.54 The Rights Commissioner decided that Mr. Wall should reconvene his hearing to deal with the issue of the witnesses but there was apparently no change of mind from Mr. Wall.

5.55 After this impasse the issue of the plaintiff's bullying complaints was by agreement of the parties then referred to another independent third party "Polaris Human Resources" (Polaris) and it was agreed between the parties that Polaris were to investigate without any sight of any previous decisions on this matter.

5.56 Before the Polaris investigation could proceed, J.K. (who had been appointed Human Relations Manager with the defendant in March 2006) wrote to Polaris by email with a copy to a representative of IBEC advising Polaris that "the hospital this morning received correspondence from Patrick Mann and Company solicitors informing us that they are now issuing a High Court personal injuries summons on behalf of Ms. Margaret Kelly." The plaintiff took the view that that email breached the agreement that Polaris should enter into its investigations without any knowledge of previous developments.

5.57 J.K. in his evidence indicated that he was under the impression that everything should be held in abeyance until Polaris had conducted its investigation and he was prepared to accept this but that he found the proceedings were being initiated and he was concerned that the plaintiff's issues were being carried on in two different directions at the same time. He stated it was unfair to the hospital that they would have to defend the issue in the High Court at the time when the third recommend that they carry out an investigation.

5.58 In response to questions from the court, J.K. was asked why he wrote to Polaris rather than to the plaintiff or to her union representative or caused a letter to be written to her solicitor if he was annoyed with the plaintiff initiating High Court proceedings. J.K. denied that he was telling Polaris that they were to cease their investigations. He denied that he intended to influence Polaris in their investigations.

5.59 The personal injuries summons dated 28th July, 2006, and I believe it was prudently issued at the time in order to prevent any question of the statute of limitations arising as her grievances commenced in August 2004 with her accident.

5.60 I hold that the sending of an email to Polaris at the time that Polaris would conduct an investigation while not technically a breach of any agreement was clearly intended to be prejudicial against the plaintiff and it was an example of the defendants through J.K. taking a bullying attitude to the plaintiff and it contributed to the stress the plaintiff was suffering.

(i) Mediation

5.61 After J.K.'s appointment, I accept his evidence that he came to consider the issue of mediation between the parties. I have had the benefit of observing J.K. giving his evidence and I think that he was a "no nonsense" type of individual. There was a conciliation meeting between the parties organised by the LRC shortly after taking up his position and while new to his job and still on probation as he indicated it was alleged by the plaintiff and her trade union representative, Mr. Casey and also by another employee, E.C., who was a shop steward on behalf of SIPTU that at this meeting J.K. made what were described as threatening gestures towards the plaintiff (and the others on the side of the trade union) by way of pointing his finger in a gun like manner and saying words to the effect that he was the new sheriff in town to clean it out. J.K. agrees that he may have said something about cowboys or Indians but denies strongly that he made any threatening gestures or used his fingers to mimic gun shots.

5.62 I accept J.K.'s denial though the witnesses from the plaintiff's side of the meeting did criticise him for being aggressive. I think that that was probably a conclusion brought about by the tensions between the parties and that J.K. was in fact trying to be light hearted when referring to himself as the "new sheriff in town" or words to that effect. I do not think that constitutes bullying or harassment.

5.63 I do not believe that J.K. when he was still on "probation" would have endangered his position with his employers by aggressively attempting to shoot the plaintiff.

5.64 The plaintiff was, as I see it, concerned that references to guns being pointed were particularly directed against her given her ex-husband's conviction for terrorism related charges. J.K. may have been aware of this at the time (though he does not believe he was) but I do not accept that his comments or attitude was at this stage motivated by a wish to intimidate the plaintiff by even obliquely referring to her husband's activities.

(j) A Meeting in the Brandon Hotel

5.65 As part of his mediation attempts, J.K. ultimately met with the plaintiff in the Brandon Hotel in December 2006.

5.66 The plaintiff had gone on sick leave in September 2006 (from which she has not yet returned).

5.67 J.K. states that he was attempting by this meeting to provide "reasonable support" in helping the plaintiff get back to work and trying to resolve the problems and ascertaining what the plaintiff's concerns were at this stage.

5.68 J.K. identified the plaintiff's concerns as being her good name in relation to the allegations made against her, a transfer from medical records where she felt that the atmosphere was hostile to her, an opportunity to come back to work at reasonable hours.

5.69 There is a dispute as to where they met on the hotel premises. I accept the plaintiff's recollection on this matter which is indeed

supported by the contemporaneous notes from J.K.

5.70 I do not, however, believe much turns upon that discrepancy.

5.71 Further disputes have arisen between the parties as to what was or was not said in relation to the plaintiff being afforded the service or support of a counsellor. At that stage, the plaintiff was engaging with a counsellor for her stress but it is clear that that counsellor was not known to J.K. who recommended an alternative one.

5.72 Further at the meeting, the plaintiff referred to one of her grievances in relation to her situation in medical records that she did not feel safe there as she believed that bullets had been delivered to the unit in an envelope. The plaintiff contends that J.K. indicated that he had seen these bullets and these were the size of a top of a biro. J.K. indicated, however, that he did not say that he had seen any bullets (because he had not seen any) but may well have said that what he had seen was (as he believes to be the case) the top of a biro in an envelope.

5.73 Whether bullets were or were not delivered to the unit is not necessarily an issue that I have to resolve but the plaintiff and Mr. Casey both believed that management agreed that such bullets were delivered. On balance, I do not believe that real bullets were actually delivered to the hospital in an envelope as a much greater fuss would have had to have been made of the affair including presumably the immediate involvement of the Garda Síochána.

5.74 I think what is important from the plaintiff's point of view, and which I accept, that she was advised by fellow employees that bullets had been delivered to the department and that either it was being suggested that she was responsible for sending them (with reference to possible connections with the IRA) or that generally the workplace was unsafe.

5.75 I hold that persons in the Record Departments were making reference to bullets in a jocular way which did not amount to bullying and though the plaintiff was upset by this, I view the incident as workplace banter rather than bullying.

5.76 In any event, the meeting at the Brandon Hotel at Christmas 2006, ended with J.K. indicating that he would try to get resolution of the plaintiff's request to transfer from the Record Department and deal with the other matters. Suffice to say that the plaintiff was very annoyed that J.K. did not respond to her by the first week in January and that further deterioration in the relationship between the parties occurred. I accept, however, that the plaintiff misunderstood what J.K. had said and that what he conveyed was that he would get back to the plaintiff on his return to work sometime in January rather than in the first week thereof.

5.77 I do not believe that the defendants have anything to answer in relation to that meeting.

#### (k) The Issue of the Plaintiff Allegedly Forcibly Detained in the Hospital

5.78 The plaintiff alleges that F.G., the best practice manager of the hospital, forcibly prevented the plaintiff from leaving the hospital on 23rd January, 2006.

5.79 I have no doubt that the plaintiff believes now that this is the case but I think that her recollection is incorrect.

5.80 F.G. states that on that day, he had a meeting with the plaintiff and O.P. and after the meeting they went to the medical records department and that F.G. asked that plaintiff to clarify a few points from the meeting and that the plaintiff did not want to stay but wanted to go for her lunch and she was asked again would she clarify some points and then "out of the blue" the plaintiff made an allegation that she was being held against her will and that she rang Mr. Casey, her trade union representative and made the same allegation and would not withdraw it even though F.G. denied it and asked her to do so.

5.81 I have been advised by the witnesses as to the layout of the area where the plaintiff alleges that this incident occurred and have no doubt but that the plaintiff is mistaken in her recollection and she was not psychically restrained from leaving on that occasion.

### **6. The General Position**

6.1 I have come to the conclusion that the defendant's conduct is to be strongly criticised on a number of matters i.e. the behaviour of H.C. towards the plaintiff immediately after the accident, the alteration of normal work practices to open the permanent position to "outside candidates" to the detriment of the plaintiff, the suspension and manhandling the plaintiff out of the hospital after the refusal to sign the statement the interference with the mediation procedures of Polaris, by the defendant.

6.2 I have also come to the conclusion that the plaintiff believes that virtually every step taken by the defendants was an attempt to bully, harass and intimidate her. I have not found that that is the case.

6.3 I believe that the plaintiff's view is coloured by her personality and the fact that she was clearly a person subject to stress but the defendants were or are ought to have been aware of this fact from a very early stage as they knew her history with St. Vincent DePaul and they knew also of her husband's career. I believe that accordingly, the defendants must, subject to any defences that they have, be *prima facie* liable for the above mentioned bullying and harassment of the plaintiff insofar as the plaintiff has suffered an actionable injury as a result.

### **7. The Defendant's Defences**

7.1 The defendants have in their full defence pleaded contributory negligence against the plaintiff and in particular have criticised her for failing to involve herself in the defendant's grievance procedure and to engage with them.

7.2 I do not believe that the plaintiff failed to engage in the grievance procedures. The plaintiff clearly did engage with the grievance procedure. She did not accept the results of a number of the hearings/inquiries as she was entitled not to accept but her engagement was at a very high level indeed.

7.3 The fact that the defendants may or may not have good reason to be critical of the plaintiff for not accepting various results is not in my view a sustainable allegation of contributory negligence against the plaintiff. Contributory negligence is to be assessed in degrees of fault for the harm that is occurred under the Civil Liability Act and I do not believe that the defendant has made out a case in those terms.

7.4 The plaintiff is also criticised for failing to respond to the defendant's offer to transfer and failing to mitigate her loss. I believe that at the time the transfer offer was made, after the Brandon Hotel meeting before Christmas 2006, that the relationship between

the parties had entirely broken down and I do not believe the plaintiff should be criticised by way of contributory negligence for that or indeed for failing to mitigate her loss as she was already engaged in counselling at the time.

7.5 The defendant's contend that the plaintiff cannot proceed with a number of the grievances due to findings made by the LRC and others. It was submitted by Ms. Bolger, on behalf of the defendants that the court not in effect interfere with the various decisions of the LRC and of Mr. Wall and should take judicial notice or indeed was estopped because of them.

7.6 I do not think that such a contention is valid.

7.7 The LRC is a body with a mandate to inquire into various industrial disputes and can make findings in accordance with its limited functions only.

7.8 This is a civil case claiming damages for bullying and harassment, which the LRC was not inquiring into at the time. There is no question of estoppel or *res judicata* arising.

7.9 Similarly the finding of Mr. Wall which decided that the suspension of the plaintiff though regrettable did not amount to bullying because it was one single instant and did not meet the definition thereof, is in no way binding upon this Court.

7.10 The finding of Mr. Wall does not meet any of the definitions of *res judicata*, it is not indeed a final determination because the parties agreed that his determination should be set aside in a subsequent investigation being undertaken by Polaris and second of all, it is not suggested when the parties referred the matter to him that Mr. Wall in any way should be able to make a finding which would prevent the parties having access to the High Court.

7.11 Furthermore, the issue of *res judicata* is not raised in the defendant's comprehensive defence and the defendants cannot succeed in answering the plaintiff's claim by raising that issue now.

## **8. Conclusion on Liability**

8.1 In my view, the plaintiff is entitled to succeed in the claim for bullying and harassment and breach of contract for other reasons and on the basis that I have described above.

## **9. Quantum**

### **(a) The Back Issue**

9.1 I am briefed with the report from the plaintiff's G.P., Dr. Brian Kelly and also the reports supplied by the defendants from Dr. Michael Pegum who gave evidence and Mr. Gardezi.

9.2 Dr. Kelly indicated that the plaintiff suffered an injury and in August 2004 and remained symptomatic for some four weeks despite treatment for analgesia for physiotherapy and was certified as unfit up to 15th September, 2004. She was again seen with a "further" back injury and was advised to refrain from further work for one week. This is clarified by the evidence of the plaintiff and indeed by Dr. Pegum which I accept as not being a separate incident but rather of a pre-existing accident related injury. The plaintiff had suffered an injury to her back in 1998 which the plaintiff says and I accept lasted for a few weeks only and subsequently thereto she had made a full recovery. On that occasion, Mr. Gardezi found spasm in her muscles.

9.3 Up to the accident in August 2004, the plaintiff was and I accept a very active person who went swimming everyday and dancing once a fortnight and did gardening and generally fully participated in any physical work. She was given an injection of medication by Dr. Kelly and had to take off some further time later. She had some benefit from physiotherapy.

9.4 On examination by Dr. Pegum in May 2011 (six years and nine months post accident), the plaintiff complained of pain spreading from her left buttock to her outer side of her thigh and lower leg which comes from stooping or lifting which she tries to avoid and is brought on by driving or walking for ten minutes or indeed by crossing her left leg over her right when sitting.

9.5 Dr. Pegum was of the view that the plaintiff had a pre-accident degenerative disease consistent with her age which she accepts were made rendered symptomatic prematurely. Dr. Pegum is of the view that were it not for this accident these symptoms would likely to have arisen spontaneously within a number of years.

9.6 I came to the view that the plaintiff was able to carry out a very active life from 1998 when she first had back pain up to the accident and were it not for this accident, she is likely to have been able to work and carry on a normal lifestyle certainly up to retirement stage. Dr. Pegum is of the opinion that the plaintiff could have continued working as long as she did not undertake any heavy lifting or prolonged stooping of the back was the only problem.

9.7 It is certainly true that the plaintiff, the absence of her work has been certified in relation to stress in recent times rather than her back. I think, however, that the nature of the plaintiff's work in the records department was such that it involved standing around for long periods of time and lifting and manoeuvring and shifting files from one place to another and this regime was not very conducive to her back condition and indeed was the source of many of her requests to change work to another station.

9.8 I hold that the plaintiff is likely to go through the rest of her life with the knowledge of a back is less than perfect and which will come against her. It is quite possible were it not for this accident that she would have had some flare up of symptoms at some stage and in those circumstances doing the best that I can I would assess in respect of the plaintiff's back complaint, damages to include some damages for limitation for work availability at a modest level in the sum of €30,000.

### **(b) The Bullying Issue**

9.9 The plaintiff has an actionable case for damages for bullying, harassment and discrimination arising out of some but by no means all of her complaints. She has sustained an injury rather than acceptable stress to meet the test of Clarke J. in *Maher v. Jabil* (above).

9.10 I have been furnished with the medical report of Dr. Brian Kelly dated 11th November, 2005, the psychological report of Dr. Jean Lynch of the Anti-Bullying and Research Resource Centre of Trinity College Dublin, Dr. Aidan O'Gara and John Casey, Occupational Health officers on behalf of the defendant, Dr. John Gallagher, Consultant Occupational Physician who supplied a number of reports on behalf of the defendants and Dr. Paul O'Connell, Consultant Forensic Psychiatrist who reported on 11th April, 2007 and also gave evidence on behalf of the defendants.



9.11 I found all of the above very helpful and of great assistance. In particular, I found of assistance the evidence of Dr. O'Connell in relation to the personality of the plaintiff. I make this point notwithstanding the forensic cross examination of Dr. O'Connell by the plaintiff which would have done justice to the most proficient practitioner in the round hall! The plaintiff indeed got a number of admissions from Dr. O'Connell that a number of his conclusions were based upon false assumptions and in particular Dr. O'Connell's conclusions that the plaintiff would have lived in the United Kingdom in the 1970s with her politically active husband which experience would have been stressful and which she survived, was based upon a false assumption.

9.12 Dr. O'Connell was also incorrect in the date of the plaintiff's marriage and the number of her children.

9.13 However, Dr. O'Connell does state and I accept:-

"It is possible that Ms. Kelly has a paranoid personality which would confer an increased liability to misconstrue a hostile intent to the comment, behaviour or attitudes of others. It would be useful to have access to independent corroborating information such as her primary care records..."

9.14 I believe that any assessment of the plaintiff must conclude that the plaintiff has indeed come to the view wrongly, that all the actions of the defendants were motivated by some malice against her.

9.15 Notwithstanding that view, however, given the findings I have made previously, it is clear that the defendants, at management level were motivated by hostility to the plaintiff stemming initially from the time of her accident.

9.16 This motivation continued until the plaintiff was frogmarched off the premises which was by any scale of thing an extraordinary insult to her.

9.17 The attitude of the defendants may have been due to exasperation which was understandable but was not (in the manner that I have found above) justified.

9.18 It is correct that the plaintiff did work on after being suspended and removed from the defendant's premises.

9.19 In his examination of the plaintiff, Dr. O'Connell was impressed by how depressed the plaintiff was and indicated that as far as he was concerned, the treatment she was undertaking was not suitable and she was not being given proper antidepressants.

9.20 In his evidence, Dr. O'Connell indicated that having observed the plaintiff conducting her case, he saw somebody who did not appear to be depressed and indicated that it was possible that the adrenaline of the court proceedings carried her on but in any event her examination in November and her upset arose after a number of very stressful instances in her life including the death after illness of her partner and the death of a number of close members of her family.

9.21 In all the circumstances, it is difficult to untangle the different cause of factors in the plaintiff's present make up. The defendants must indeed take the plaintiff as they find her but they are not responsible for an underlying condition which they did not cause. They are, of course, responsible for the consequences of their actions which may well have had an effect upon the plaintiff which was greater than it would have been on somebody else.

9.22 In addition, of course, the depressive nature of the deaths in the plaintiff's family and her partner must be extracted from the equation.

9.23 Mr. O'Connell in his conclusions states:-

"In my opinion, the symptoms which Ms. Kelly complains of are essentially depressive in character and grounded in multiple bereavement. There are a number of alternative causes for these symptoms that are independent of the alleged harassment and bullying at work. It is a matter for the court to determine the facts of the allegations. If the allegations are viewed as wholly or partly true there may have been a synergistic effect leading to a worsening of her condition. In addition there may have a complex interaction between Ms. Kelly, her depression, her behaviour and her perception of the behaviour of others that led to a mutually reinforcing negative cycle that corroded workplace relationships..."

9.24 I accept that analysis.

9.25 Bearing in mind Dr. O'Connell's professional criticism of his colleagues in the psychological profession, I also accept the conclusion of Dr. Jean Lynch from Trinity when she states:-

"The physiological, psychological and behavioural problems that Ms. Kelly suffers are consistent with those well documented in the literature on stress. This has resulted in heightened levels of anger and anxiety, moderate self esteem, extremely severe levels of somatic symptoms, insomnia/anxiety and social dysfunction, mild depressive symptoms and severe levels of intrusive thoughts in behaviours."

9.26 Accordingly, I have come to the view that the plaintiff's acute depressive symptoms are not related to the bullying but the other symptoms are related. I believe that as the trust between the plaintiff and the defendants, has in my view irretrievably broken down, that the plaintiff will not be likely to return to work and that fair award of damages for the severe distress and insult she has suffered to the wrongs attributed to the defendant would be to include past and future general damages to a sum of €60,000.

## **10. Conclusion**

10.1 From the foregoing it follows that the appropriate order to make is a decree in the sum of €90,000 to which the plaintiff would be entitled, on the face of it, to her expenses and outlay.