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## BULLYING AND STRESS

**This chapter will examine the following areas:**

- **bullying**
- **harassment**
- **sexual harassment**
- **stress.**

For some time now bullying has been recognised, in Ireland as elsewhere, as a significant issue in the workplace. Since the 1990s workplace bullying has been the subject of growing academic and Government interest. There has also been media interest, with some very high-profile cases being reported, a number of which will be examined in this chapter.

In Ireland the importance of addressing workplace bullying has been recognised by the Government with the establishment many years back of the Taskforce on the Prevention of Workplace Bullying in 1999 and the Expert Advisory Group on Workplace Bullying in 2004. Central to the work of these bodies are two commissioned surveys conducted by the Economic and Social Research Institute (ESRI) on the issue of bullying in the workplace, the first of which took place in 2001 and the most recent in 2007.

The 2007 survey was designed to ascertain the incidence, correlates and characteristics of bullying in workplaces in Ireland. The survey provided this definition of *bullying*:

... 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 is not considered to be bullying.

There is no statutory definition of bullying.

The Code of Practice for Employers and Employees on the Prevention and Resolution of Bullying at Work, produced by the Health and Safety Authority

in 2007, sets out a pattern of behaviours that, in its view, constitute bullying, including:

- exclusion with negative consequences
- verbal abuse or insults
- being treated less favourably than colleagues
- intrusion, including pestering, spying or stalking
- menacing behaviour, intimidation and aggression
- undermining behaviour
- excessive monitoring of work
- humiliation
- withholding work-related information
- repeatedly manipulating a person's job content and targets
- scapegoating/blaming for matters beyond one's control.

Taking the ESRI 2007 survey as the most recent exploration of the issue, a number of findings are noteworthy:

- A total of 7.9 per cent of those at work reported that they had experienced bullying in the workplace in the previous six months. This is slightly increased from the 2001 figure of 7 per cent, but remains lower than the European average, which is reported at 9 per cent.
- Women are more at risk of bullying. Less than 6 per cent of men reported bullying in 2007 compared to almost 11 per cent amongst women.
- Those with higher levels of educational attainment are more likely to report experiencing bullying in the workplace.
- The sectors with the highest rates of bullying are Education, Public Administration, Health and Social Work and Transport and Communications, with workers in Education and Public Administration being particularly at risk.
- The incidence rate in the public sector is higher than in the private sector.
- Bullying is not a top-down, employer-on-employee activity. Organisations are more likely to report that bullying by colleagues and by clients is a problem, rather than bullying by a manager. In the public sector, for example:
  - bullying by colleagues – 39 per cent
  - bullying by clients – 35.2 per cent
  - bullying by subordinates – 25.8 per cent
  - bullying by managers – 18.6 per cent.
- Age has no statistically significant effect on the probability of being bullied.
- The larger the organisation, the greater the prevalence of bullying –10.9 per cent occurrence in large organisations compared with 4.5 per cent in very small organisations with fewer than five employees.
- Workers in organisations undergoing change are more likely to experience bullying.
- There is a strong relationship between employment contract and incidence rate, with 7.6 per cent in permanent positions experiencing bullying, 9 per cent on temporary contracts, rising to nearly 14 per cent for those on casual contracts.

- A total of 15 per cent of those who experienced bullying left their jobs as a result.
- Public sector organisations are more likely to have a formal policy on workplace bullying operating in their organisations than those in the private sector, with 81.9 per cent in the public sector reporting having a formal policy, as opposed to 36.9 per cent in the private sector.

Bullying is a health and safety issue.

### • **Legal Situation**

#### ***2007 Code of Practice***

On 1 May 2007 a Code of Practice was introduced into law under section 60 of the Safety, Health and Welfare at Work Act 2005 entitled *Code of Practice for Employers and Employees on the Prevention and Resolution of Workplace Bullying*. This Code of Practice replaces the 2002 Code, which was brought about by the 1989 Act.

It is a Code for both employers and employees and provides practical guidance for employers arising from their ongoing duties under section 8 of the 2005 Act.

Section 8 concerns the employer's duty regarding:

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 and welfare at work of his or her employees at risk.

There is an obligation on every employer to ensure, *insofar as is reasonably practicable*, the safety, health and welfare at work of his/her employees.

The Code, introduced under the Act, also concerns the duties of employees, under section 13(1)(e) of the Act, '*not to engage in improper conduct or behaviour that is likely to endanger his or her own safety, health and welfare at work or that of any other person*'.

#### ***Legal Status***

Failing to follow the Code is not an offence in itself, but the Code is admissible in evidence in the event of criminal proceedings under section 61 of the 2005 Act.

S61 (1): Where in proceedings for an offence under this Act relating to an alleged contravention of any requirement or prohibition imposed by or under a relevant statutory provision being a provision for which a code of practice has been published or approved by the Authority under section 60 at the time of

the alleged contravention, subsection (2) shall have effect with respect to that code of practice in relation to those proceedings.

- (2)(a) Where a code of practice referred to in subsection (1) appears to the court to give practical guidance as to the observance of the requirement or prohibition alleged to have been contravened, the code of practice shall be admissible in evidence.
- (b) Where it is proved that any act or omission of the defendant alleged to constitute the contravention:
- (i) is a failure to observe a code of practice referred to in subsection (1), or
  - (ii) is a compliance with that code of practice, then such failure or compliance is admissible in evidence.

The Code is careful to point out that reasonable and essential disciplinary action in the course of work or actions necessary for the safety, health and welfare of employees would not constitute bullying. It is given clearly that bullying constitutes a pattern of behaviour: a once-off incident does not constitute bullying, although it may be an affront to dignity.

### ***Employees' Rights/Duties under the Code***

Section 3.4: addresses the rights and duties of employees. Employees have the right to be treated with dignity and not to have their safety, health or welfare put at risk through bullying by the employer, by fellow employees or by other persons. They have a right of complaint and a right to representation when raising an issue. This section also examines employees' duties. Employees have a duty to respect the rights of the employer and other employees to dignity and respect at work and their right not to have their safety, health and welfare put at risk through bullying.

#### **• Safety Statement**

When preparing a Safety Statement under section 20 of the 2005 Act, the employer is obliged to consider whether bullying is likely to be a hazard in the workplace. If it is likely, what are the risks and what preventive measures are necessary?

### ***Bullying Prevention Policy***

Measures to prevent bullying would include a formal policy on the issue.

Section 4: states that '*Employers should adopt, implement and monitor a comprehensive, effective and accessible policy on bullying at work*'.

The Code advises that any policy should be arrived at through a consultative process with other parties to the employment relationship, i.e. clients, customers,

trade unions or employee representatives, including the Safety Representative or the Safety Committee. The policy document should be written, dated and signed by a person at senior management level. It should be a living document that is updated as appropriate.

The policy should make a clear statement on the employer's commitment to provide a work environment where there is respect, collaboration, openness, safety and equality, where bullying by the employer, employees or non-employees will not be tolerated. It should state that all employees have the right to be treated with respect and dignity at work, while at the same time being obliged to ensure that they themselves refrain from behaviour likely to contribute to bullying. Finally, it should include the proviso that any complaints of bullying will be treated with fairness, sensitivity and in confidence.

Where the alleged bully is concerned, it is important to note that s/he also has certain rights protected by law. S/he must be treated with fairness, sensitivity and the need for confidentiality on behalf of all parties concerned must be respected. It is imperative that natural justice be observed in any investigation of an allegation.

Where there is a finding of bullying after investigation, or where there is a finding that the complaint has been vexatious, the policy should be clear that such findings will be dealt with through a disciplinary procedure. In cases where the bullying is by clients, customers or business contacts, the policy should indicate the likely outcome of termination of contracts, suspension of services or exclusion from a premises or other appropriate sanction.

The Code advises that the policy should describe what is meant by bullying. It should state that protection from bullying extends beyond the place of work to off-site and to work-related social events. The name or job title of the person in the organisation who may be approached by a person wishing to make a complaint should be included in the policy document. That 'contact person' acts as a listener/advisor. S/he would provide the complainant with a copy of the policy and information on steps the complainant may take. The 'contact person' is not an advocate for either side.

### ***Communicating the Policy***

Effective communication is essential for the proper implementation of any policy. All employees should be made aware of the policy and should receive updates as they arise. If training is required in order to comply with the policy, it should be provided, particularly for those individuals who have responsibility for its implementation or for responding to complaints. A summary of the policy should be displayed at locations where members of the public, clients and customers attend.

### ***Procedures for Resolving Bullying in the Workplace***

The Code outlines two procedures – one informal, the other formal – to be followed in the event of a complaint of bullying being received. Both procedures should be outlined in the Bullying Prevention Policy.

#### ***Informal Process***

An informal process attempts to resolve the matter informally, with the consent of the parties involved. Ascertaining the facts of the complaint and that they fall within the definition of bullying is the first step. The complaint may be verbal or written, but where verbal a note of the substance of the complaint should be taken by the person designated to deal with it and a copy given to the complainant. The person complained against should have the opportunity to have his/her response established.

The task of resolving the matter should not be taken by the employer or by a person heading up the organisation, but by another senior manager designated to deal with this specific complaint. Training should be in place for those who are engaged with the process at this stage. This person should not be the ‘contact person’, who is the initial facilitator in the process. If necessary, the services of an outside, independent body should be employed, which may include the Mediation Services of the Labour Relations Commission. This process should identify an agreed method to bring the issue to resolution so that both parties can return to a harmonious workplace environment. If the behaviour complained of does not constitute bullying, an alternative approach should be put in place and the rationale recorded. Line managers should be kept informed about the process in train.

Keeping an accurate record of every step in this process is crucial—the facts of the complaint, the first meeting, the action agreed and signed records of the final meeting. Such records are important proof that the issue has been taken seriously by the organisation, has been dealt with appropriately and that there was an attempt at resolution. It also provides evidence that the organisation has acted fairly to both sides in the process. Confidentiality is essential and breaches should be met with sanctions set out in advance.

Where the complaint has been deemed vexatious, the matter should be treated as a disciplinary issue.

#### ***Formal Process***

If the issue cannot be resolved through an informal process, then a formal process should be instigated. This process will include a formal complaint and a formal investigation.

### **The Complaint Stage**

In the formal process the complainant makes a formal complaint, usually in written form, setting out the alleged incidents, the dates on which they occurred and names of witnesses, where possible. This is signed and dated by the complainant. S/he should be assured by the organisation of its support during the course of this process.

The person complained of should receive a written notification that an allegation of bullying has been made against him/her. S/he should be assured of the organisation's presumption of innocence and of its support during the course of the process. Subsequent to this s/he should be given a copy of the complaint in full and any relevant documents, including a copy of the Bullying Prevention Policy. Both parties should be advised of the aims and objectives of the process, the procedures involved, the timeframe and the possible outcomes.

### **The Investigation Stage**

Terms of reference should set out the likely timeframe and scope of the investigation. The investigation should be carried out by a designated member of management or, where there is a possible conflict of interest, by an agreed external third party. As the Code states, the investigation *'should be conducted thoroughly, objectively, with sensitivity, utmost confidentiality, and with due respect for the rights of both the complainant and the person complained of.'*

The person investigating the complaint should meet with the complainant, with the person complained of and with any witnesses and relevant persons on an individual and confidential basis. The two parties at the core of the investigation should be afforded representation, usually by trade union/employee representative or a work colleague.

The investigation should be completed as quickly as possible. On completion, the investigator should provide the employer with a report, including his/her conclusions on the matter. The employer should provide the complainant and the person complained of with a copy of the report at the earliest opportunity and set a deadline within which a response can be made. On the basis of the report and any comments/responses made, the employer should decide on what action, if any, is to be taken. Both parties should be informed in writing of the next steps that will be taken.

Where the complaint is upheld, action should be taken to eliminate the risk of the behaviour continuing. The matter is now also a disciplinary issue and appropriate disciplinary procedures should be followed.

Where the complaint is not upheld the employer has a duty to the person complained against. Communicating the findings to both parties is essential,

and also to anyone else who may have had prior knowledge of the complaint. Where the complaint has been made in good faith and not upheld, considerable sensitivity in the handling of the outcome is required. If the complaint is found to have been without basis and made maliciously, the employer's disciplinary procedures should be followed.

### **Appeals**

An appeals mechanism should be available to both parties and appeals should be heard by a person of at least the same level of seniority as the original investigator, or more senior. For small organisations this may mean going outside the organisation.

Where internal procedures, formal or informal, fail to resolve a complaint of bullying, recourse may be had to the services of a Rights Commissioner at the LRC. Failure to deal adequately with allegations of bullying may result in legal action being taken through the courts. The High Court case of *Allen v Independent Newspapers* [2004] is an example of such an eventuality. Substantial damages were awarded to the plaintiff for personal injuries, loss and inconvenience caused by the alleged negligence of her former employer.

### **Corporate Bullying**

In the 2012 case *Kelly v Bon Secours Health System Ltd* IEHC 21 the plaintiff who was in the employment of the defendant brought a claim for damages for injury, loss and damage caused by a workplace accident and also alleged harassment, bullying, intimidation and discrimination.

The facts of the case are that the plaintiff commenced employment with the defendant hospital in 2003 as a part-time receptionist. In 2004 she applied for and was given a post in the records department. It was noted in the case that there was a human relations problem in the department prior to the plaintiff joining it. A number of months into her working in this department she suffered an accident when she injured her back as a result of repetitive lifting and turning. The plaintiff had collected charts from a ward, brought them to the records department, logged them and returned them to a trolley. In the course of this she injured the lower part of her back. She had never been given manual handling training before the accident but did receive this training subsequently. The accident was witnessed by her line manager.

Cross J. commented that the best summary of the questions to be addressed in the case were set out by Clarke J in *Maher v Jabil Services Ltd* [2005] 16 ELR 233 and are 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?
- (c) If so, was the harm suffered to the particular employee reasonably foreseeable in all the circumstances?

The original employment contract the plaintiff worked under was as a temporary part-time worker but it was represented to her that her hours would increase up to full-time hours. When a permanent position was advertised the plaintiff applied but was not appointed and instead external candidates were. The appointments were contrary to agreed procedures between management and unions under which internal candidates were to be selected from current employees of the hospital. Cross J noted:

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.

On the issue of the back injury the Court held that there was negligence and a statutory breach on the part of the defendants not to give the plaintiff the necessary training and that this negligence was the principal cause of the accident and the injuries sustained. She was awarded the amount of €30,000.

On the question of bullying the Court found that though the plaintiff had come to the view, wrongly, that all the actions of the defendants were motivated by some malice against her it was clear that:

the defendants, at management level, were motivated by hostility to the plaintiff stemming initially from the time of her accident ... (This) may have been due to exasperation which was understandable but was not justified.

The court awarded €60,000 for the severe distress and insult she suffered. It is worth nothing that damages were awarded not for any recognisable psychiatric illness resulting from the occupational stress but for the severe distress and insult itself.

### **Vicarious Liability**

An employer may be vicariously liable for the acts of bullying, harassment or sexual harassment against an employee carried out by a fellow employee or others s/he may deal with in the course of daily business.

In *Lister & Others v Hesley Hall Ltd* [2001] ALL E.R. 767 the English House of Lords held the defendant school liable for the acts of an employee who sexually assaulted pupils in his care. The employee in question was employed as a warden who was responsible for waking up for class and putting to bed the boys in his charge. He was also responsible for enforcing discipline.

Lord Clyde stated as follows:

It appears that the care and safekeeping of the boys had been entrusted to the respondents and they in turn had entrusted their care and safekeeping so far as the running of the boarding school was concerned to the warden... That function was one which the respondents had delegated to him. That he performed that function in a way which was an abuse of his position and abnegation of his duty does not sever the connection with his employment. The particular acts which he carried out upon the boys have been viewed not in isolation but in the context and the circumstances in which they occurred. Given that he had a general authority in the management of the house and in the care and supervision of the boys in it, the employers should be liable for the way in which he behaved towards them in his capacity as warden of the house. The respondents should then be vicariously liable to the appellants for the injury and damage which they suffered at the hands of the warden.

The fact that the school had carried out background checks did not mitigate liability.

The close connection test developed in this case was later affirmed in an Irish case in 2011: *Lynch v Binnacle Ltd Trading as Cavan Co-op Mart* [2011] IESC8. This case is examined in Chapter 4.

An important Irish case was *Shanley v Sligo County Council* [2001], which concerned a fireman who had been subjected to persistent bullying by a superior over a period of eight years. There was a catalogue of incidents, ranging from goading, spreading rumours and excessive criticism to using obscenities, threatening behaviour and aggression. An investigation had been undertaken by an independent body and its finding was that there was excessive bullying. It was also found that senior management were aware of the situation, but had not intervened. The plaintiff had suffered serious injury to his health as a result of the bullying. The Council admitted liability and was ordered to pay substantial costs to the plaintiff.

### • Harassment

Harassment and sexual harassment are defined in law. Section 8 of the Equality Act 2004, amending section 14 of the Employment Equality Act 1998, provides that:

- (1) For the purposes of this Act, where –
  - (a) an employee (in this section referred to as ‘the victim’) is harassed or sexually harassed either at a place where

the employee is employed (in this section referred to as 'the workplace') or otherwise in the course of his or her employment by a person who is –

- (i) employed at that place or by the same employer,
- (ii) the victim's employer, or
- (iii) a client, customer or other business contact of the victim's employer and the circumstances of the harassment are such that the employer ought reasonably to have taken steps to prevent it,

or

- (b) without prejudice to the generality of paragraph (a) –
  - (i) such harassment has occurred, and
  - (ii) either –
    - (I) the victim is treated differently in the workplace or otherwise in the course of his or her employment by reason of rejecting or accepting the harassment, or
    - (II) it could reasonably be anticipated that he or she would be so treated,

the harassment or sexual harassment constitutes discrimination by the victim's employer in relation to the victim's conditions of employment.

Section 8(7): defines *harassment* in line with the Equality Directives and provides that:

- (a) (i) references to harassment are to any form of unwanted conduct related to any of the discriminatory grounds, and
- (ii) references to sexual harassment are to any form of unwanted verbal, non-verbal or physical conduct of a sexual nature, being conduct which in either case has the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person.
- (b) Without prejudice to the generality of paragraph (a), such unwanted conduct may consist of acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material.

The conduct must be unwelcome and must be regarded as offensive, degrading or intimidating. The test is a subjective one, in that it is the victim who decides what is unwanted and whether or not it violates his/her dignity.

The *Code of Practice on Sexual Harassment and Harassment at Work 2002*, produced by the Equality Authority, was replaced by a new code in 2012, namely the Employment Equality Act 1998 (Code of Practice) (Harassment) Order 2012 S.I. No. 208/2012. The Code was prepared by the Equality Authority in consultation with IBEC, ICTU and other organisations representing equality interests. The purpose of the Code is to give guidance to relevant parties on what is meant by harassment and sexual harassment in the workplace, how it may be prevented and what the necessary processes are to deal with an issue when it arises and how to prevent a recurrence.

The Code does not create legal obligations, however: its provisions may be taken into account in legal proceedings under Part VII of the Employment Equality Act. The Code is intended to apply to all employments, employment agencies, trade unions, employer bodies and professional bodies that are covered by the Employment Equality Act.

According to the Code an employer is legally responsible for the sexual harassment and harassment suffered by employees in the course of their work unless the employer took reasonably practicable steps to prevent the harassment and sexual harassment from occurring, to reverse the effects of it and to prevent its recurrence. In order to discharge this obligation an employer must have effective policies and procedures in place to deal with harassment and sexual harassment.

The Code categorises sexual harassment as:

- physical conduct of a sexual nature, e.g. unwanted conduct such as unnecessary touching, patting, pinching, assault
- verbal conduct of a sexual nature, e.g. propositions, unwanted or offensive flirtations, suggestive remarks, lewd comments
- non-verbal conduct of a sexual nature, e.g. displaying pornographic pictures, emails, text messages, leering, sexually suggestive gestures
- sex-based conduct, e.g. derogatory or degrading abuse or insults that are gender-based.

Harassment concerns similar behaviour, but without the sexual element.

*Workplace* has a broad definition and may extend to a place of work-related socialising, including, for example, the office party, business functions, conferences, or social events where employees meet. (See the *Maguire* case in Chapter 7.)

Section 15: provides that the employer will be liable for any harassment of its employees. An employer may avail of the defence that such steps were taken as were reasonably practicable to prevent the employee's harassment. In this instance, the first line of defence would be to have a clear policy in place.

In *Atkinson v Carthy and Others* [2005] ELR 1 an employee had been subjected to sexual harassment by the employer's accountant over a long period of time. She did not make a formal complaint and argued that there was no complaints procedure in place to allow her to make such a complaint. The employer argued that he had an open-door policy regarding employee complaints.

The Circuit Court held that:

The failure of the defendants to have in place adequate procedures renders them liable and by reason of their failure to fulfil their statutory obligations they are responsible and cannot plead immunity from same simply because the plaintiff failed to make a complaint.

### • **Stress**

In terms of labour law, stress is a relatively recent phenomenon but it is an area that has witnessed a significant increase in the amount of litigation it has attracted in recent years. In terms of the workplace, stress may result from harassment, bullying, victimisation, injury, pressure of work or overwork. The EU Framework Agreement on Work-Related Stress 2004 describes *stress* as being:

... a state, which is accompanied by physical, psychological or social complaints or dysfunctions which results from individuals feeling unable to bridge a gap with the requirements or expectations placed on them.

Cases where stress has featured have been taken under health and safety legislation, as well as under common law principles.

An important Irish case in this area is *Berber v Dunnes Stores Ltd* [2006] HC. Here, the plaintiff commenced working with the defendant as a trainee manager in 1980 and until 1988 was employed as a store manager in various locations. In 1988 he moved to buying, where he remained until 2000, gradually moving up the ladder to men's 'ready-mades' buyer. During 2000 the situation changed considerably in that, unlike previous years, where as many as fifty days were spent abroad sourcing and buying merchandise, only one trip was taken, to a clothing show in Germany. There also appeared to be a new interest in his health, which was given as a reason for not sending him on a buying trip to the Far East. The plaintiff had suffered from Crohn's disease since his late teens and he was also colour-blind. In August the plaintiff was requested to report to the human resources department on his medical condition. In late 2000 he was requested by management to move from buying back to store management, which he viewed as a demotion. Based on assurances from the managing director that he would be fast-tracked to store manager or regional manager within six to twelve months,

he agreed to return to store management, starting in the flagship Blanchardstown store, in ladies' wear. On arrival at the defendant's head office on 27 November, he discovered that he was being directed to homewares. He did not go to Blanchardstown. After three meetings with the director of stores' operations he was suspended from work, with pay.

In a review with his medical consultant on 13 December it was recorded that the plaintiff had been through an excessive amount of stress with his job and that this had not contributed to his well-being. He was certified as being unfit for work until 28 December. The plaintiff reported for work on 28 December, but only worked for four days before ceasing to work because of ill health. In relation to the subsequent exchange of solicitors' correspondence, the fact that the defendant sent responses directly to the plaintiff's house rather than to his solicitor served, Laffoy J. noted, to *'heighten the distrust of the plaintiff and increased the stress he was under'*.

Laffoy J. also stated that *'while some of his behaviour might be characterized as unreasonable it was attributable to the fact that his trust in the defendant's senior management and executives had been shattered'*.

The contention between the parties continued after the plaintiff returned to work in the Blanchardstown store at the end of April. The plaintiff's final day at work with the defendant was 15 May 2001, during which a heated argument developed that resulted in an alleged abusive verbal attack on the plaintiff within the hearing of other management staff.

In a letter to the managing director, dated 30 May, the plaintiff stated that he had been advised that the conduct of the defendant towards him amounted to a repudiation by the defendant of its obligations to him and that his contract of employment had therefore come to an end. He also referred to the fact that his consultant had advised him that in the interests of his health, he must cease working in the environment immediately.

The plaintiff's claim fell under two main headings:

1. For breach of contract in that he was constructively and wrongfully dismissed.
2. For personal injuries formulated both in contract and in tort.

On the plaintiff's submission that there was a series of breaches of contract amounting to repudiation, Laffoy J. did not agree:

The correct interpretation of what happened is that the manner in which the defendant dealt with the plaintiff in the knowledge

of the precarious nature of his physical and psychological health viewed objectively amounted to oppressive conduct. It was likely to seriously damage their employer/employee relationship and it did so. Accordingly, the defendant breached its obligation to maintain the plaintiff's trust and confidence ... A breach by an employer of its implied obligation to maintain trust and confidence of an employee is a breach which goes to the root of the contract.

It was decided that the defendant had indeed unlawfully repudiated the contract of employment.

On the personal injuries claim, Laffoy J. did not consider it necessary to distinguish between the two causes of action in contract and in tort and made reference to the English High Court case of *Walker v Northumberland* [1995] 1 ALL E.R. 737 at 759, where Colman J. had pointed out that:

the scope of the duty of care owed to an employee to take reasonable care to provide a safe system of work is co-extensive with the implied term as to the employee's safety in the contract of employment.

This statement was later approved by the Court of Appeal in *Gogay v Hertfordshire County Council* [2000] IRLR 703.

On the question of liability, Laffoy J. held that the questions identified by Clarke J. in *Maher v Jabil Global Services Limited* [2005] 16 ELR 233 constituted the relevant questions and the proper approach:

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

In the end, the plaintiff was awarded €72,622: €40,000 in general damages and €32,622 in special damages/damages for breach of contract. In an appeal to the Supreme Court in 2009, *Berber v Dunnes Stores Ltd* 464/2006, the decision of the High Court was overturned.

The Court dealt with the contract and personal injury issues separately. It was noted that when the employee refused to follow the 'lawful and reasonable orders of his employer' the employer did not dismiss him but took the more benign

approach of suspending him with pay. The employer had given an unequivocal assurance that should he return to work as soon as certified fit to so do by his doctor that his actions would be overlooked.

A dress code request was viewed as being reasonable. On the issue of a duty roster describing the employee as a 'new trainee', it was promptly acknowledged as a mistake. It was held that the effect on the employee could not reasonably have been anticipated. Reference was made to the employee's insistence that all written communications should come through his solicitor. It was held that this was unreasonable and was damaging to the employment relationship. Finnegan J. stated as follows:

There is implied in a contract of employment a mutual obligation that the employer and the employee will not without reasonable and proper cause conduct themselves in a manner likely to destroy or seriously damage the relationship of confidence and trust between them. The term is implied by law and is incident to all contracts of employment unless expressly excluded.

The Court held that the conduct of the employer did not amount to a repudiation of the contract and so the employee's claim for wrongful dismissal failed.

The second issue concerned the issue of whether the employer breached its duty of care to Mr Berber causing him to suffer injury. The Court was satisfied that the employee's injuries were caused by workplace stress; causation therefore was not an issue.

The Supreme Court did not agree with the High Court's decision that the employer was liable for the work related stress. It concluded that the employee's injury was unforeseeable and that the employer had taken reasonable steps to deal with the employee's health issues. The Court appeared to be of the view that even if stress was foreseeable if the employer had taken reasonable care then injury may not be foreseeable.

In the UK one of the most important cases in the area of work-related stress was the *Hatton* case. *Sutherland v Hatton* [2002] 2 ALL ER 1 concerned four conjoined appeals in which the employer was appealing against the finding of liability for the employee's psychiatric injury. Two of the plaintiffs were teachers in a comprehensive school, the third person was an administrative assistant at a local authority training centre, and the fourth person was a raw material operative in a factory. In this case Hale L.J. set down the tests to be applied in determining an employer's liability for stress-related psychiatric injury. The so-called *practical propositions* were identified as follows:

- (1) There are no special control mechanisms applying to claims for psychiatric (or physical) illness or injury arising from the stress of doing the work the employee is required to do. The ordinary principles of employer's liability apply.
- (2) The threshold question is whether this kind of harm to this particular employee was reasonably foreseeable: this has two components (a) an injury to health (as distinct from occupational stress) which (b) is attributable to stress at work (as distinct from other factors).
- (3) Foreseeability depends upon what the employer knows (or ought reasonably to know) about the individual employee. Because of the nature of mental disorder, it is harder to foresee than physical injury, but may be easier to foresee in a known individual than in the population at large. An employer is usually entitled to assume that the employee can withstand the normal pressures of the job unless he knows of some particular problem or vulnerability.
- (4) The test is the same whatever the employment: there are no occupations which should be regarded as intrinsically dangerous to mental health.
- (5) Factors likely to be relevant in answering the threshold question include:
  - (a) The nature and extent of the work done by the employee. Is the workload much more than is normal for the particular job? Is the work particularly intellectually or emotionally demanding for this employee? Are demands being made of this employee unreasonable when compared with the demands made of others in the same or comparable jobs? Or are there signs that others doing this job are suffering harmful levels of stress? Is there an abnormal level of sickness or absenteeism in the same job or the same department?
  - (b) Signs from the employee of impending harm to health. Has he a particular problem or vulnerability? Has he already suffered from illness attributable to stress at work? Have there recently been frequent or prolonged absences which are uncharacteristic of him? Is there reason to think that these are attributable to stress at work, for example because of complaints or warnings from him or others?
- (6) The employer is generally entitled to take what he is told by his employee at face value, unless he has good reason to think to the contrary. He does not generally have to make searching enquiries of the employee or seek permission to make further enquiries of his medical advisers.

- (7) To trigger a duty to take steps, the indications of impending harm to health arising from stress at work must be plain enough for any reasonable employer to realise that he should do something about it.
- (8) The employer is only in breach of duty if he has failed to take the 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, the costs and practicability of preventing it, and the justifications for running the risk.
- (9) The size and scope of the employer's operation, its resources and the demands it faces are relevant in deciding what is reasonable; these include the interests of other employees and the need to treat them fairly, for example, in any redistribution of duties.
- (10) An employer can only reasonably be expected to take steps which are likely to do some good: the court is likely to need expert evidence on this.
- (11) An employer who offers a confidential advice service, with referral to appropriate counselling or treatment services, is unlikely to be found in breach of duty.
- (12) If the only reasonable and effective step would have been to dismiss or demote the employee, the employer will not be in breach of duty in allowing a willing employee to continue in the job.
- (13) In all cases, therefore, it is necessary to identify the steps which the employer both could and should have taken before finding him in breach of his duty of care.
- (14) The claimant must show that that breach of duty has caused or materially contributed to the harm suffered. It is not enough to show that occupational stress has caused the harm.
- (15) Where the harm suffered has more than one cause, the employer should only pay for that proportion of the harm suffered which is attributable to his wrongdoing, unless the harm is truly indivisible. It is for the defendant to raise the question of apportionment.
- (16) The assessment of damages will take account of any pre-existing disorder or vulnerability and of the chance that the claimant would have succumbed to a stress-related disorder in any event.

In the case of *McGrath v Trintech Technologies Ltd* [2005] 4 IR 382, Laffoy J. concluded that the propositions endorsed in the Sutherland case in respect of

liability for physical and psychological injury under the heading of employer's liability should be adopted in Ireland. Foreseeability of risk was of paramount importance.

In *Quigley v Complex Tooling and Moulding Ltd* [2008] ELR 297 the Supreme Court overturned a decision of the High Court. In this case the defendant appealed against an Order of the High Court, which had awarded damages in the total sum of €75,773.94 to the plaintiff for psychiatric injury in the form of depression caused by bullying or harassment in the workplace. The plaintiff was successful in his claim for unfair dismissal before the Employment Appeals Tribunal. The High Court accepted that the plaintiff had been subjected to bullying and that he had suffered depression. The decision was appealed to the Supreme Court. The decision of the Supreme Court was that he had been subjected to bullying as set out in the Code of Practice Detailing Procedures for Addressing Bullying in the Workplace. However, the Court held that the plaintiff had failed to discharge the burden of proving that his depression was caused by his treatment during his employment. It allowed the appeal and set aside the Order of the High Court.

The medical evidence presented, however, demonstrated that the plaintiff's depression was caused by his dismissal and the subsequent unfair dismissal proceedings rather than his treatment in the course of his employment. There was no medical evidence of a link with the harassment in the course of his employment. The plaintiff had attested to this fact during the proceeding.

In *Murtagh v Minister for Defence & Ors* [2008] IEHC 292 the High Court addressed the issue of post-traumatic stress disorder (PTSD). The case concerned a soldier who had served in Lebanon for a six-month tour of duty and while there had been hospitalised on a number of occasions suffering from incapacity, acute anxiety states and loss of consciousness. In the course of his tour of duty two colleagues were killed in action, one of whom had been the plaintiff's friend and mentor.

In his decision Budd J. noted:

The defendants' doctors failed to diagnose PTSD in an immature and vulnerable 21-year-old who was exhibiting numerous symptoms of acute anxiety states, and had been exposed, like many of his NCOs and colleagues, to life-threatening experiences.

Prior to going to the Lebanon the plaintiff's medical record was in the AI category of nil or minimal sick leave. On returning from the tour of duty the plaintiff over a period of seven years was treated for depression, suicide tendencies, alcohol abuse, anxiety and sleep disorder.

Budd J. went on to state that:

Army doctors in 1986/7 should have recognised the symptoms of PTS and PTSD and that if appropriate counselling had been given the plaintiff would have been likely to have been cured and rehabilitated or at least the length and ghastrliness of his suffering of the cluster of symptoms of PTSD would almost certainly have been greatly reduced.

In finding for the plaintiff, the Court made an award of €305,513 in damages.