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## Accessing justice in cases of Occupational Bullying in Ireland

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### Abstract:

Our understanding of the nature and effect of bullying behaviour has developed dramatically over the past forty or so years. Despite this however Ireland does not have a dedicated legal remedy for workplace bullying. Soft-law mechanisms such as Codes of Practice and policies, such as Dignity at Work policies, are welcome but legally ineffectual mechanisms for protecting employees from bullying behaviour. In the absence of a dedicated legally enforceable provision affected workers are required to rely on a range of actions, some of which were never designed with bullying in mind. These include constructive dismissals actions, personal injuries actions in negligence pursuant to health and safety legislation, discriminatory harassment actions and reliance on the industrial relations mechanism now operated by the Workplace Relations Commission. This paper argues that the inappropriateness of these provisions creates a lacuna in Irish law and acts as a barrier to access to justice for workers subjected to bullying. It further argues that as bullying undermines a person's right to dignity in the workplace in much the same way as discriminatory harassment, it should be similarly prohibited. It therefore argues that a specific legislative provision should be introduced which mirrors the level of protection offered against discriminatory harassment.<sup>1</sup>

### 1. Nature and effect of bullying:

Prior to the 1980s very few jurisdictions formally recognised the concept of workplace bullying. Yamada notes that it was not until the 1990s that 'bullying' as a term entered legal discourse in the US.<sup>2</sup> This development had itself built on the ground-breaking scholarship of Heinz Leymann dating from the 1980s which describes the behaviour as 'mobbing',<sup>3</sup> a term widely used in Sweden and northern Europe. Despite the relatively recent formal recognition of the concept, bullying, as it is generally referred to in Ireland, is widely recognised as giving rise to significant psychological, health and economic costs.<sup>4</sup> The health

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<sup>1</sup> For arguments in favour of a legislative provision for all mental injuries actions please see: Niall Neligan, 'Jurisdictions and Causes of Action in Bullying, Stress and Harassment Cases Part 1' (2008) 15 Commercial Law Practitioner 3; Niall Neligan, 'Jurisdictions and Causes of Action: Commercial Considerations in Dealing with Bullying, Stress and Harassment Cases - Part II' (2008) 15 Commercial Law Practitioner 3.

<sup>2</sup> David Yamada, 'Emerging American Legal Responses to Workplace Bullying' (2013) 22 Temple Political & Civil Rights Law Review 329.

<sup>3</sup> Heinz Leymann, 'Mobbing and Psychological Terror at Workplaces' (1990) 5 Violence and Victims 119; Heinz Leymann, 'The Content and Development of Mobbing at Work' (1996) 5 European Journal of Work and Organisational Psychology 165.

<sup>4</sup> Ståle Einarsen and others, 'Bullying and Harassment at Work and Their Relationships to Work Environment Quality: An Exploratory Study' (1994) 4 European Work and Organizational Psychologist 381; Annie Hogh and Andrea Dofradottir, 'Coping with Bullying in the Workplace' (2001) 10 European Journal of Work and

and psychological effects were first formally researched by Heinz Leymann when he carried out a study of the effect of bullying on nurses in Sweden.<sup>5</sup> Since then research in both Ireland and elsewhere has demonstrated that bullying leads to negative psychological effects including depression, anxiety, feelings of isolation and powerlessness.<sup>6</sup> The prevalence of bullying in Ireland has also been the subject of attention in recent years. A government 2001 Task Force on the Prevention of Workplace Bullying (2001 Task Force) commissioned a report from The Economic and Social Research Institute (ESRI) on its prevalence in Irish workplaces. The research reported that a total of 7% of those surveyed<sup>7</sup> reported being bullied in the six months preceding the survey. A similar survey was commissioned by the Department of Enterprise, Trade and Employment in 2007 which reported that the percentage of those reporting being bullied had increased to 7.9%.<sup>8</sup> More alarming results have emerged from more targeted surveys. A survey of the prevalence of bullying behavior in the Irish nursing sector for instance disclosed that 38.5% of nurses had experienced bullying in the preceding 6 months, with over 3% reporting being bullied on a weekly basis.<sup>9</sup>

## 2. What is bullying?:

There is little international agreement as to what constitutes bullying. Katherine Lippel has observed that the definitions adopted owe much to the political, cultural and societal influences at play in the different jurisdictions.<sup>10</sup> In this way it is referred to mobbing in the northern European jurisdictions reflecting the work of Leymann as described above, as harassment or moral harassment in the civil law European jurisdictions reflecting their Roman law traditions and more commonly bullying in the common law jurisdictions, including Ireland.<sup>11</sup> In the Irish context while no statutory definition exists there is

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Organizational Psychology 485; Rosario Ortega and others, 'The Emotional Impact of Bullying and Cyberbullying on Victims: A European Cross-National Study' (2012) 38 *Aggressive Behaviour* 342; Rajib Lochan Dhar, 'Why Do They Bully? Bullying Behavior and Its Implication on the Bullied' (2012) 27 *Journal of Workplace Behavioral Health* 79.

<sup>5</sup> Heinz Leymann and others, (translated by Sue Baxter) *Why Nurses Commit Suicide: Mobbing in Healthcare Institutions* (Edwin Mellen Press 2014).

<sup>6</sup> Mona O'Moore and others, 'Victims of Workplace Bullying in Ireland' (1998) 19 *The Irish Journal of Psychology* 345; Dorothy Watson and others, 'Workplace Risks and Worker Outcomes in Ireland from a Comparative Perspective: An Analysis of the European Working Conditions Survey 2005 and 2010' (Economic and Social Research Institute 1 October 2015), Rosario Ortega and others (n4), Rajib Lochan Dhar (n4).

<sup>7</sup> The results were based on a sample of 5,252 workers in paid employment.

<sup>8</sup> Philip J. O'Connell and others, 'The Incidence and Correlates of Workplace Bullying in Ireland' (The Economic and Social Research Institute March 2007). The results were based on a sample of 3,579 interviews with those in work or who had been in work in the previous six months. When adjusted to take into account the working population, the survey reported that 159,000 workers across the working population as a whole had experienced bullying in the preceding six months.

<sup>9</sup> Dr Juliet McMahon and others, 'A Report on the Extent of Bullying and Negative Workplace Behaviours Affecting Irish Nurses' (March 2013) 20. The report surveyed 2,929 nurses, with over 1,200 reporting experiencing some form of bullying behavior in the preceding 6 months.

<sup>10</sup> Katherine Lippel, 'The Law of Workplace Bullying: An International Overview' (2010) 32 *Comparative Labour Law and Policy Journal* 1.

<sup>11</sup> Katherine Lippel, 'The Law of Workplace Bullying: An International Overview' (2010) 32 *Comparative Labour Law and Policy Journal* 1; 3-5.

widespread acceptance of the definition provided by the 2001 Task Force. This describes workplace bullying as

.. 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.<sup>12</sup>

This definition has been widely accepted and endorsed. It was adopted by the 2004 Advisory Group on Workplace Bullying,<sup>13</sup> by the Health and Safety Authority 2007 Code of Practice on the Prevention and Resolution of Bullying at Work<sup>14</sup> and by the 2002 Labour Relations Commission (now Workplace Relations Commission) Code of Practice on Procedures for Addressing Workplace Bullying (Labour Relations Commission Code of Practice).<sup>15</sup> The Health and Safety Authority provide some clarity on what form of behaviour or patterns of behaviour could provide examples of bullying, these include: exclusion with negative consequences, verbal abuse or insults, undermining behaviour, excessive monitoring of work, being treated less favourably than colleagues, blame for things beyond the person's control and withholding work-related information.<sup>16</sup> The 2001 Task Force definition has also found judicial acceptance and has been cited in a number of personal injuries bullying actions as the accepted definition of bullying in Ireland.<sup>17</sup> The definition is inclusive and can apply to any behaviour which undermines a person's dignity at work. It applies an objective standard, reflecting the views of a 'reasonable' person. A slight internal contradiction occurs in the definition. Bullying is acknowledged as any behaviour which undermines an individual's right to dignity. A once-off incidence however, although considered 'an affront to dignity' does not amount to bullying. This requirement for repetition of the behaviour can present particular challenges to claimants, as can be seen in the *Ruffley* case,<sup>18</sup> discussed further below.

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<sup>12</sup> Irish Taskforce on the Prevention of Workplace Bullying, *Dignity at Work: The Challenge of workplace bullying: Report of the Taskforce on the Prevention of Workplace Bullying* (Stationary Office 2001).

<sup>13</sup> Expert Advisory Group on Workplace Bullying, *Report of the Expert Advisory Group on Workplace Bullying* (Stationary Office 2005) 11.

<sup>14</sup> Health and Safety Authority, 'Code of Practice for Employers and Employees on the Prevention and Resolution of Bullying at Work' (National Authority for Occupational Health and Safety) 3.1.

<sup>15</sup> 'LRC Code of Practice Detailing Procedures for Addressing Bullying in the Workplace' (Declaratory Order) 2002, 5.

<sup>16</sup> Other examples provided included: intrusion, pestering, spying or stalking, menacing behaviour, intimidation, aggression, undermining behaviour, humiliation and repeatedly manipulating a person's job content and targets; see Health and Safety Authority, 'Code of Practice for Employers and Employees on the Prevention and Resolution of Bullying at Work' (National Authority for Occupational Health and Safety) 5.

<sup>17</sup> See *Quigley v Complex Tooling and Moulding Limited* [2009] IR 349, *Kelly v Bon Secours Health System Limited* [2012] IEHC 21, *Browne v Minister for Justice, Equality and Law Reform and Ors* [2012] IEHC 526, *Ruffley v Board of Management of St Anne's School* [2015] IECA 287 (Court of Appeal)

<sup>18</sup> *Ruffley v Board of Management of St Anne's School* [2015] IECA 287 (Court of Appeal)

### **3. Personal Injuries Actions**

Employees subjected to behaviour at work which falls within the definition of bullying as described above may take an action before the courts. This action is an action for personal injuries arising from a breach by employers of their duty of care to employees.

### *3.1 Procedural Issues*

All occupational injury personal injuries actions must come before the Personal Injuries Assessment Board (Board) in the first instance.<sup>19</sup> This includes personal injuries actions arising from bullying behaviour. The Board receives applications and other evidence including medical evidence in writing and assesses damages on this basis, there is no oral evidence. The process is relatively inexpensive and speedy, the application cost is €45 and the Board reports that in 2014 it dealt with claims within seven months on average.<sup>20</sup> While the Board has jurisdiction to process all employment related personal injuries actions it has discretion to dismiss an application where it “consists wholly or in part of psychological damage the nature or extent of which it would be difficult to determine by means of assessment to which the assessors are limited to employing by this Act.”<sup>21</sup> Bullying actions fall squarely into this category, to our knowledge the Board has never dealt with a psychological injury bullying claim. Where the Board exercises its discretion in this regard the claimant must pursue their case before the courts as a personal injuries action, with the resulting cost, stress and time commitment involved in this type of litigation. This places victims of bullying in a less advantageous position than those who have been solely physically injured at work, with their access to justice limited by the operation and practice of this provision.

### *3.2 Personal Injuries Actions*

Personal injuries actions arise from a breach of the employer’s duty to provide a safe workplace under the tort of negligence and in breach of an employer’s statutory obligations under health and safety legislation. With respect to the latter, the Safety, Health and Welfare at Work Act 2005 (2005 Act) places obligations on employers to protect against injury at work. Sections 8-13 of the 2005 Act place broad obligations on employers and employees in relation to maintaining a safe workplace including the prevention of any “improper conduct or behavior” which would put health and safety at risk.<sup>22</sup> In addition, section 20 of the 2005 Act requires employers to produce a Safety Statement which identifies workplace risks and steps to be taken to avoid injury arising from identified risks. The Health and Safety Authority (HSA) has advised that employers are under a duty to provide for a procedure to deal with bullying within the company Safety Statement. Nowhere however in the 2005 Act is the term bullying or harassment used, and nor is it defined. This reluctance to give it a statutory footing is peculiar and arguably a missed opportunity, in particular when we consider the repeated claims to a commitment to eradicate it. The standard imposed by the 2005 Act is that of ‘reasonably practicable’<sup>23</sup> arguably a higher standard than that imposed by negligence principles, where the standard

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<sup>19</sup> Personal Injuries Assessment Board Act 2003, s 3(a).

<sup>20</sup> See [www.injuriesboard.ie/statistics/statistics 2014](http://www.injuriesboard.ie/statistics/statistics%202014).

<sup>21</sup> Civil Liability and Courts Act 2004, s 17(1)(ii)(II).

<sup>22</sup> Safety, Health and Welfare at Work Act 2005, 8(2)(b).

<sup>23</sup> Safety, Health and Welfare at Work Act 2005, s 8(1).

is that of a 'reasonable and prudent employer'.<sup>24</sup> However, to date this has not had any significant effect on the manner in which bullying cases have been litigated with the few cases where the 2005 Act was referenced focusing primarily on negligence principles. Litigation under the 2005 Act is dealt with as a personal injuries action, involving the requirement to show that the Act has been breached, and that the breach caused an injury. In seeking a remedy through negligence it similarly falls to litigants to establish a breach of the employer's duty of care, to demonstrate that the breach caused an injury and that the injury is one which the courts will compensate.<sup>25</sup> There must be an injury, evidence that bullying occurred is insufficient to justify compensation. In terms of the quality of the injury in order to qualify for compensation the psychological injury must be 'medically recognised'. It means that no claim can be taken until the employee is so psychologically damaged that a psychiatric injury is suffered. Distress, fear, anxiety, isolation – all potential results of bullying behavior – are insufficient to bring a claim. As stated by Justice Fennelly in one of the earliest Irish bullying cases,

“The plaintiff cannot succeed in his claim unless he also proves that he suffered damage amounting to personal injury as a result of his employer's breach of duty. Where the personal injury is not of a direct physical kind, it must amount to an identifiable psychiatric injury.”<sup>26</sup>

It is clear from this evidential requirement that it is not the bullying behavior itself that is unlawful, as proof of bullying is insufficient to give rise to liability. The particular challenges posted by these evidential burdens are clearly illustrated in the *Quigley* case.<sup>27</sup> Mr Quigley was a factory operative who had worked for the defendant company for twenty years. Following the purchase of the company by an American company a new manager was installed who subjected Mr Quigley to persistent and repeated bullying. Mr Quigley's general practitioner diagnosed depression and Mr Quigley sued his employer on the basis of negligence principles and a breach of the 2005 Act. The offending behavior, which had been witnessed and evidenced by colleagues, had continued for almost one year and included “persistent watching, constant niggling criticism, failure to respond or communicate and inconsistency”.<sup>28</sup> Mr Quigley's action was complicated by the fact that prior to taking the case for bullying he had brought a successful unfair dismissals action against his employer. In the High Court (HC) action, Mr Quigley was successful,<sup>29</sup> a finding which was appealed to the Supreme Court (SC) by his employer. The principal ground of appeal was that the depression suffered by Mr Quigley was caused not by the bullying, but rather by the effects

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<sup>24</sup> *Barclay v An Post* (1998) 2 ILRM 385 (High Court).

<sup>25</sup> Bryan McMahon and William Binchy, *Law of Torts* (4th edn, Bloomsbury 2013) para 5.02.

<sup>26</sup> *Quigley v Complex Tooling and Moulding* (2008) IESC (Supreme Court) [17].

<sup>27</sup> *Quigley v Complex Tooling and Moulding* (2008) IESC (Supreme Court).

<sup>28</sup> *Quigley v Complex Tooling and Moulding* (2008) IESC (Supreme Court) [10].

<sup>29</sup> *Quigley v Complex Tooling and Moulding* (2005) IEHC (High Court).

of the unfair dismissal action. In the SC Justice Fennelly adopted the definition of bullying as set out in the Labour Relations Commission Code of Practice and added that,

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

- repeated;
- inappropriate;
- undermining of the dignity of the employee at work.”<sup>30</sup>

The court accepted and it was not contested by the employers in their appeal that Mr Quigley had been bullied. The SC however, allowed the appeal and found that it had been the unfair dismissals litigation and not the bullying which had caused Mr Quigley’s depression. Mr Quigley was in the unusual situation of being able to clearly demonstrate that he had been subjected to bullying by a manager over a period of approximately one year but the requirement to demonstrate a medically recognised psychiatric illness causatively linked to the employer’s breach arguably denied him access to justice in his case.

It is clear that cases where the standard can be met are rare.<sup>31</sup> One of those successful actions is the HC case of *Browne v Minister for Justice, Equality & Law Reform and Ors.*<sup>32</sup> Confirming that there was “no separate or distinct tort of bullying and harassment”<sup>33</sup> the court held that the treatment of Mr Browne fell within the definition of bullying as set out in the *Quigley* case. Mr Browne, a guard, had been subjected to a range of abusive behaviours at the hand of his employers, including having his firearm removed, revocation of his right to drive a car at work, and a number of investigations into the plaintiff’s work which were based on frivolous grounds. His diagnosis of depression and an adjustment disorder by his doctor and a consultant psychiatrist were found to be causatively linked to the bullying behaviour. The bullying behaviour was carried out either by management or with their full knowledge, which Justice Cross referred to as a form of ‘corporate bullying’.<sup>34</sup> In cases of ‘corporate bullying’ Justice Cross stated that the issue of ‘knowledge of employers’ of the bullying behaviour does not arise.<sup>35</sup> On the question of injury the court held that the applicable principles could be described as follows:

“(a) had the plaintiff suffered an injury to their health as opposed to ordinary

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<sup>30</sup> *Quigley v Complex Tooling and Moulding* (2008) IESC (Supreme Court) [12].

<sup>31</sup> See *Browne v Minister for Justice, Equality and Law Reform and Commissioner of an Garda Síochána* [2012] IEHC 526 (High Court); *Kelly v Bon Secours Health System Limited* [2012] IEHC 21 (High Court) for examples of successful actions.

<sup>32</sup> [2012] IEHC 526.

<sup>33</sup> *Browne v Minister for Justice, Equality and Law Reform and Commissioner of an Garda Síochána* [2012] IEHC 526 (High Court) [25].

<sup>34</sup> *Browne v Minister for Justice, Equality and Law Reform and Commissioner of an Garda Síochána* [2012] IEHC 526 (High Court) [22]. See also *Kelly v Bon Secours Health System Limited* [2012] IEHC 21 [3.5] (Cross J).

<sup>35</sup> *Browne v Minister for Justice, Equality and Law Reform and Commissioner of an Garda Síochána* [2012] IEHC 526 (High Court) [23].



- 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.”<sup>36</sup>

This is the standard used in cases of psychological injury arising from workplace stress,<sup>37</sup> which demonstrates a degree of overlap between how these cases are determined. As these conditions had been satisfied by the plaintiff liability was imposed.

In one of the most recent decisions and one of the few decisions from that court, the Court of Appeal recently overturned a finding in favour of a complainant. In the case of *Una Ruffley v Board of Management of St Anne’s School*<sup>38</sup> the defendants appealed a High Court finding that they had subjected the plaintiff to bullying at work. The plaintiff, a primary school teacher, had successfully argued a breach of the employer’s duty of care in negligence and statutory duties under the 2005 Act.<sup>39</sup> The appeal was based on an argument that the behaviour of the school did not amount to bullying, as the employer “had [not] been motivated “to humiliate and belittle the victim”.”<sup>40</sup> It was also argued that there was no evidence to show a causal connection between the behaviour and her injury. This ground was rejected on appeal in light of the weight of medical evidence.<sup>41</sup> She had suffered an anxiety and depressive disorder which was diagnosed by her doctor and by a consultant psychiatrist who attested that it was attributable to her experiences at work. However, a majority of the court accepted the arguments made by her employer that a case of bullying had not been established.<sup>42</sup> The plaintiff’s case arose from a number of incidences of a disciplinary nature which occurred over the course of a year and had as their starting point the locking of a classroom door by the complainant. The locking of the door it appears was a common practice but an incorrect one. The second incidence was a mistake by the complainant in reporting on progress by a pupil. Arising from these incidents a number of events occurred which the plaintiff interpreted as bullying. Justice Ryan accepted that over the course of at least six months, involving at least five separate incidents that “the Principal and the Board overreacted and denied due process in a matter of legitimate concern without verifying the defence that the plaintiff put forward”.<sup>43</sup> However, he rejected that this amounted to bullying in that the incidences were not ‘repeated’, ‘inappropriate’ and undermining of her right to “dignity at work”.<sup>44</sup> Justice Ryan appeared to reject any imposition of a disciplinary procedure as inappropriate, even where it is unfairly applied.<sup>45</sup>

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<sup>36</sup> *Browne v Minister for Justice, Equality and Law Reform and Commissioner of an Garda Síochána* [2012] IEHC 526 (High Court) [28].

<sup>37</sup> *Maher v Jabil Services Limited* (2005) 16 ELR 233 (High Court).

<sup>38</sup> *Una Ruffley v Board of Management of St Anne’s School* [2015] IECA 287 (Court of Civil Appeal).

<sup>39</sup> *Una Ruffley v Board of Management of St Anne’s School* [2014] IEHC 235 (O’Neill J)

<sup>40</sup> *ibid* [20]

<sup>41</sup> *Una Ruffley v Board of Management of St Anne’s School* [2014] IEHC 235 [40] (O’Neill J), [34] (Irvine J),

<sup>42</sup> Justices Ryan (P) and Irvine, with Justice Finlay-Geoghegan dissenting.

<sup>43</sup> *Una Ruffley v Board of Management of St Anne’s School* [2015] IECA 287 (Court of Civil Appeal) [64].

<sup>44</sup> *ibid* [67].

<sup>45</sup> *Una Ruffley v Board of Management of St Anne’s School* [2015] IECA 287 (Court of Civil Appeal) [66].

He also rejected that it could be considered 'repeated behaviour' stating that "a continuing process of discipline in pursuit of legitimate concerns, even if actually mistaken or unfair" could not constitute repeated behaviour for the purposes of bullying.<sup>46</sup> Finally he rejected that her dignity at work had been undermined, although he conceded that her right to work or her work had been undermined. It is respectfully argued that Justice Ryan took a somewhat narrow view of what could constitute bullying behaviour. He referenced name-calling or practical jokes as something that could amount to bullying but the HSA Code goes much further and includes some of the very things complained of by Ms Ruffley, including 'excessive monitoring', 'blame for actions beyond the workers control', 'undermining behaviour' and 'being treated less favourably than colleagues'.<sup>47</sup> The fact that Ms Ruffley had faced a flawed disciplinary process for transgressions which had been carried out without discipline by other colleagues could certainly be considered as satisfying a number of these descriptions. Justice Irvine concurred with Justice Ryan, and similarly found that the behaviour of the Board of Management and Ms Dempsey as principal did not amount to bullying. She drew a distinction between behaviour which is "inappropriate, as opposed to wrong, harsh, insensitive or misguided"<sup>48</sup> but provided little guidance as to the standard to be met for behaviour to be classed as inappropriate. She did however, state that the standard was an "objective one" which meant that any knowledge the school had as to the effect of the disciplinary process on the plaintiff, was irrelevant to the question of the appropriateness of the school's behaviour.<sup>49</sup> Ultimately, she concluded that while the plaintiff had a strong case for a breach of her right to natural justice, she had not been pebullied, and allowed the appeal.<sup>50</sup> The finding in this case, as with the earlier decisions, highlights the significant hurdles to be overcome by litigants arguing bullying actions.

#### **4. Discriminatory Harassment and Constructive Dismissal**

Victims of bullying behaviour who wish to avoid the limitations of a personal injuries action can attempt to rely on an action for discriminatory harassment or constructive dismissal. The former requires a claimant to bring themselves within at least one of the discriminatory grounds protected by equality legislation.<sup>51</sup> The latter forces an employee to leave their place of work and hope that their arguments of being constructively dismissed are accepted. As neither action has been designed to directly address bullying behaviour litigants are in effect shoehorning their case to fit existing legal remedies. This part of the article will address these two statutory remedies as used in the context of bullying cases.

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<sup>46</sup> *Una Ruffley v Board of Management of St Anne's School* [2015] IECA 287 (Court of Civil Appeal) [66].

<sup>47</sup> Health and Safety Authority, 'Code of Practice for Employers and Employees on the Prevention and Resolution of Bullying at Work' (National Authority for Occupational Health and Safety) 5.

<sup>48</sup> *Una Ruffley v Board of Management of St Anne's School* [2015] IECA 287 (Court of Civil Appeal) [42].

<sup>49</sup> *Una Ruffley v Board of Management of St Anne's School* [2015] IECA 287 (Court of Civil Appeal) [89].

<sup>50</sup> *Una Ruffley v Board of Management of St Anne's School* [2015] IECA 287 (Court of Civil Appeal) [93].

<sup>51</sup> Section 6 Employment Equality Acts 1998-2015.

#### 4.1 Discriminatory Harassment

It is possible that some bullying cases may be captured by the use of the prohibition on discriminatory harassment and sexual harassment under the Employment Equality Acts 1998-2015.<sup>52</sup> The primary benefit of taking a harassment or sexual harassment action is that it permits the applicant to “bypass those often insurmountable practical difficulties”<sup>53</sup> of taking a personal injuries case and it permits the victim of such conduct to pursue a statutory remedy, if there is a discriminatory element to the inappropriate behaviour.

Section 14A of the Employment Equality Acts 1998-2015 prohibits sexual harassment and discriminatory harassment. Discriminatory harassment is harassment based on one of the protected grounds within the Acts. Section 2 of the Employment Equality Acts 1998-2015 sets out the nine protected grounds which are: gender, civil status, family status, sexual orientation, religious belief, age, disability, race and membership of the traveller community. Discriminatory harassment is defined as “any form of unwanted conduct related to any of the discriminatory grounds.”<sup>54</sup> Unwanted conduct may include “acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material,”<sup>55</sup> that has the purpose or the effect of violating “a person’s dignity creating an intimidating, hostile, degrading, humiliating or offensive environment for the person.”<sup>56</sup> Behaviour that can amount to harassment has been held to include isolation<sup>57</sup> verbal abuse and insults, and less favourable treatment.<sup>58</sup> The overlap with the Health and Safety Authorities definition of bullying is evident. Sexual harassment in contrast prohibits unwanted “verbal, non-verbal or physical conduct of a sexual nature.”<sup>59</sup> Both discriminatory harassment and sexual harassment can occur at the place of employment or otherwise in the course of employment.<sup>60</sup> The Acts prohibit harassment by an employer, colleague, client customer or other business contact of the employer,<sup>61</sup> and it is the employer who will be liable for such harassment.<sup>62</sup> There is a statutory defence available to employers and that is that he or she took such steps as are reasonably practicable to prevent the harassment in question, or the person being treated differently as a result of harassment. It appears from case law that in order for an employer to avail of the statutory defence, they must have a harassment/sexual harassment policy in place.<sup>63</sup>

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<sup>52</sup> See *Kazolailis v Winegate Haulage Ltd* [DEC-E2010–164]; and *Chasi v J & I Security* [DEC-E2011–16] this case is discussed in more detail below. See generally Marguerite Bolger and others, *Employment Equality Law* (Round Hall Ltd 2012) 545–47 for a discussion of this point.

<sup>53</sup> Marguerite Bolger and others, *Employment Equality Law* (Round Hall Ltd 2012) 546.

<sup>54</sup> Section 14A(7)(a) Employment Equality Acts 1998-2015.

<sup>55</sup> Section 14A(7)(b) Employment Equality Acts 1998-2015.

<sup>56</sup> Section 14A(7)(a) Employment Equality Acts 1998-2015.

<sup>57</sup> *McCarthy v Dublin City Council* [2001] ELR 255.

<sup>58</sup> *Chasi v J & I Security* [DEC-E2011–16].

<sup>59</sup> Section 14A(7)(a)(i) Employment Equality Acts 1998-2015.

<sup>60</sup> Section 14(1)(a) Employment Equality Acts 1998-2015.

<sup>61</sup> Section 14A(1)(iii) Employment Equality Acts 1998-2015.

<sup>62</sup> Section 15 Employment Equality Acts 1998-2015.

<sup>63</sup> See for example *Ms Z v A Hotel* [DEC-E2007–14]; *A Construction Worker v A Construction Company* [DEC-E2008–48].

It is possible that cases of bullying could be litigated using the Employment Equality Acts 1998-2015 as is evident from the case of *Chasi v J & I Security*.<sup>64</sup> In this action the complainant a black Zimbabwean man successfully claimed he was subject to discriminatory race harassment in the course of his employment. The evidence of harassment included being assigned unfavourable night shifts, unfavourable pay rates as compared to his Irish colleagues and a failure to pay the complainant holiday pay, or overtime. When the complainant raised any of his concerns with his employer the employer used 'foul and abusive' language and threatened him with dismissal. In addition after raising the matter with his employer he was assigned only two thirds of his normal shifts the following week.<sup>65</sup> It is evident that much of this behaviour amounts to bullying behaviour according to the definition used by the Health and Safety Authority. He was treated less favourably than colleagues in that he could show that some of his Irish colleagues were paid holiday pay and he was not, he was subjected to verbal abuse, he was threatened and that behaviour was repeated, inappropriate and it undermined his dignity at work.<sup>66</sup> This applicant was permitted a remedy because in addition to the above behaviour there was the added racial element to the unacceptable behaviour. In evidence it was stated that his employer texted a colleague to the effect: 'Remember you are working with a black guy, you will have to watch him.'<sup>67</sup> Additionally there were racial slurs used when he was subjected to the 'foul and abusive' language, thus ensuring that this case was a case of racial harassment. The applicant was awarded €25,000 compensation for the distress suffered by him as a result of this discriminatory harassment. What arguably differentiates this case from a more general bullying case was the additional race discrimination element to this set of facts. It is undoubted that race discrimination is both offensive and inappropriate, but arguably so was all the other behaviour. The recognition in this instance of the statutory wrong for which there is a statutory remedy allowed this applicant a legal remedy. Where a complainant is subjected to this form of behaviour and the added element of race discrimination, or discrimination on the other protected grounds is not present, then an applicant wishing to take a bullying action must attempt to pursue the much more onerous personal injuries claim as discussed above, or the high risk strategy of taking a constructive dismissal case, described below.

#### **4.2 Constructive Dismissal**

Constructive dismissal actions are actions where either the behaviour of the employer constitutes constructive dismissal of the employee or it is otherwise reasonable for the employee to terminate the employment without notice. Using constructive dismissal actions for bullying actions is a high-risk strategy which, if it fails could result in the employee being

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<sup>64</sup> *Chasi v J & I Security* [DEC-E2011-16].

<sup>65</sup> *Chasi v J & I Security* [DEC-E2011-16] [3.1-3.4].

<sup>66</sup> Health and Safety Authority, 'Code of Practice for Employers and Employees on the Prevention and Resolution of Bullying at Work' (Health and Safety Authority 2007).

<sup>67</sup> *Chasi v J & I Security* [DEC-E2011-16] [3.4].

without employment and with legal costs. The Unfair Dismissals Acts 1977-2005 prohibit constructive dismissal and it is also possible to take a constructive dismissal under the Employment Equality Acts 1998-2015. Constructive dismissal is defined in the Unfair Dismissals Acts as:

“(b) the termination by the employee of his contract of employment with his employer, whether prior notice of the termination was or was not given to the employer, in circumstances in which, because of the conduct of the employer the employee was or would have been entitled, or it was or would have been reasonable for the employee, to terminate the contract of employment without giving prior notice of the termination to the employer ...”<sup>68</sup>

The Labour Court has noted that the definition used in the Employment Equality Acts “is practically the same as that contained at section 1 of the Unfair Dismissals Acts 1977-2001 and the authorities on its application in cases under that Act are apposite in the instant case.”<sup>69</sup> Constructive dismissal cases fall into two broad categories, the first are those that come under the contract test, the others come under the reasonableness test.

The contract test is where the employee, ‘because of the conduct of the employer’ is ‘entitled to terminate’ their employment contract. In this instance the employee argues that he or she was entitled to terminate the contract as the employer has breached a fundamental condition that goes to the heart of that contract.<sup>70</sup> Unilateral changes to the employee’s contract, failure to pay agreed wages,<sup>71</sup> reduction in an employee’s pay,<sup>72</sup> or agreed benefits, demotion,<sup>73</sup> changes in location of work<sup>74</sup> and bullying<sup>75</sup> have all given rise to successful invocations of the contract test. In order to raise this test the employer must commit a repudiatory breach of the employment contract. This is a demanding test, which is often difficult to raise successfully.

In *McKenna v Pizza Express*<sup>76</sup> the complainant worked for the company for in a number of capacities, she had started work as a part-time waitress and over time moved into a

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<sup>68</sup> Section 1 Unfair Dismissals Acts 1977-2001 (Ireland|IE).

<sup>69</sup> *An Employer v A Worker* [DET No EED053] Labour Court; Section 2 Employment Equality Acts 1998-2015 defines ‘dismissal’ as: ‘includes the termination of a contract of employment by the employee (whether prior notice of termination was or was not given to the employer) in circumstances in which, because of the conduct of the employer, the employee was or would have been entitled to terminate the contract without giving such notice, or it was or would have been reasonable for the employee to do so, and ‘dismissed’ shall be construed accordingly.”

<sup>70</sup> This test was established by Lord Denning Mr in *Western Excavating (ECC) Ltd v Sharp* [1978] (United Kingdom|GB, 1978) 332.

<sup>71</sup> *Byrne v Furniturelink International Limited* [UD70/2007].

<sup>72</sup> *Cantor Fitzgerald International v Callaghan* [1999] ICR 639.

<sup>73</sup> *Gibbons v W F Rational Built-in Kitchens Ltd* [UD406/87].

<sup>74</sup> *Nolan v Hermans Limited* [UD43/87].

<sup>75</sup> *McKenna v Pizza Express Restaurants* [UD1062/06].

<sup>76</sup> [UD1062/06].

management role. She began to experience difficulties on her return from maternity leave. She noted that there was an increase in her workload, and more pressure to meet targets. While on parental leave she was moved to another branch which she considered a demotion. An incidence arose where a couple in the restaurant complained that there was a hair in a pizza. Ms McKenna deducted the price of the pizza from the bill and told them if they were not satisfied to just pay for the drinks, which they did, she amended the bill accordingly. Shortly after there was a financial audit and the employee felt she was under suspicion in relation to this complimentary bill and that her integrity was being called into question. The employer suspended her and escorted her off the premises, and then scheduled a disciplinary hearing. She became unwell and could not attend the scheduled date and felt her employer unreasonably refused to reschedule the hearing during a difficult pregnancy. The court accepted that she had been constructively dismissed and described her employer's conduct as inappropriate and disproportionate and that she was humiliated by their behaviour. Ms McKenna was awarded over €60,000 for the constructive dismissal. Again, much of the content of the action could equally be described as bullying of Ms McKenna, however, by litigating as a constructive dismissal action she was able to obtain a remedy without the burdens of a personal injuries action.

The second test for constructive dismissal is the reasonableness test which may be used as an alternative or in conjunction with the contract test. The Labour Court defined the reasonableness test as follows:

“This test asks whether the employer conducts his or her affairs in relation to the employee so unreasonably that the employee cannot fairly be expected to put up with it any longer. Thus, an employer's conduct may not amount to a breach going to the root of the contract but could, nonetheless, be regarded as so unreasonable as to justify the employee in leaving.”<sup>77</sup>

In this scenario the employee alleges that the employer's actions or conduct are so serious or so unreasonable as to effectively force the employee to leave. In effect the unreasonable or inappropriate behaviour of the employer makes it impossible for the employee to remain in employment. In *Kukstaite v Shedan Ltd*<sup>78</sup> the Equality Officer noted that the employee had raised a concern about discriminatory treatment, one she was entitled to raise but one which had resulted in a fundamental change to her employment. She was moved to a different work location, into a different work environment and into a different job. The Equality Officer held that these actions ensured that it was reasonable for the complainant to resign.

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<sup>77</sup> *An Employer v A Worker* [DET No EED053] Labour Court.

<sup>78</sup> *Kukstaite v Shedan Limited* [DEC-E2013-193].

Arguably the most successful and high profile action for constructive dismissal arising from bullying behaviour is that of *Allen v Independent Newspapers*.<sup>79</sup> In this case Liz Allen, the former crime writer with the Sunday Independent brought a case before the Employment Appeals Tribunal arguing that the bullying she had been subjected to amounted to grounds for constructive dismissal. She contended during the case that both the editor and the assistant editor had bullied her. During the case she claimed that she was ignored in meetings and that one colleague refused to communicate with her. Moreover she was hired as a crime correspondent and in August 1999 she was asked to write the 'Keane Edge' which she contended would amount to a change in the nature of her employment. Her refusal to write the 'Keane Edge' resulted in her being summoned to a meeting and she was required to be in attendance in the office from 10am daily, thus further impacting her role as crime correspondent. She also felt that her role as crime reporter had been undermined as a new reporter had been hired to also deal with criminal matters. She had repeatedly tried to raise the issues with her superiors with little success. She contended that the conduct of Independent Newspapers undermined her confidence and health. It was held that it was reasonable in all the circumstances of the case for Ms Allen to terminate her employment. In this case Ms Allen was awarded 78 weeks pay as compensation.<sup>80</sup>

Despite the successes in actions of this kind the risk taken by the employee in relying on them is high, and even more so when we consider the burden of proof in constructive dismissal cases. Employees must not only prove the facts of the case but also justify her/his decision to resign. It seems from the case law that employees should at first instance use the appropriate internal grievance procedures,<sup>81</sup> and it is only when there is no appropriate result from this, should the employee consider resignation. While it is important that this remedy is available to an applicant it is clear it is a high risk strategy and one that should only be considered when all else fails.

## 5. Soft Law Mechanisms

In addition to the potential to take legal action as described above, employees can seek to rely on Codes of Practice either in resolving bullying actions without taking legal action, or in evidence should legal action be taken. As a mechanism for accessing justice, Codes of Practice are very useful in providing a standard for employers to adhere to and can be used in evidence should a case be taken. Their principal weaknesses however, are their voluntary nature and the fact that they do not confer any legally enforceable rights. As discussed above, Ireland has two Codes of Practice that deal specifically with workplace bullying, one published by the Health and Safety Authority in 2007 (HSA Code) and one by the Labour Relations Commission in 2002 (LRC Code). Their provisions follow a pattern of escalating formality and broadly offering the same three stages for resolving bullying disputes: an

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<sup>79</sup> *Allen v Independent Newspapers* [UD641/00].

<sup>80</sup> See also Farrell Wesley, 'The Law of Workplace Stress, Bullying and Harassment: Part 1' (2002) 7 *The Bar Review*.

<sup>81</sup> *Keogh v Green Isle Foods* [UD516/07].

informal process, a formal process and where necessary, an investigation. The HSA Code is by far the more comprehensive offering a detailed explanation of the procedure at each stage. A weakness however, in the case of the bullying Codes is their lack of congruence which creates an unnecessary layer of incoherence in attempting to navigate bullying claims. For instance in both Codes the starting point is the nomination of a 'contact person' but their roles in both Codes are not the same. In the HSA Code this person has a listening and advisory role but is explicitly not permitted to act as an advocate for either party.<sup>82</sup> The LRC Code has a similar starting point in the nomination of a 'contact person'. However, in the LRC Code the 'contact person' is responsible for the first-step Informal Process in attempting to informally resolve the issue between the parties. It is unclear why two Codes of Practice are necessary and duplication and confused language in this area does little to strengthen the position or access to justice for either the complainant or the alleged bully. Where legal action is taken and Codes are used to support the action of the litigant or indeed the defendant, the discussion of personal injuries action above demonstrates that courts rely almost exclusively on the LRC Code in their interpretation of the nature of bullying without recourse to the greater detail afforded by the HSA Code. This operates to the detriment of claimants as was seen in the *Ruffley* case, where a narrow interpretation of bullying was applied.

## 6. Conclusion

The myriad avenues for taking a bullying action and their restrictions in defending the rights of employees has left Irish law in a very unsatisfactory position with respect to bullying claims. Personal injuries actions place high burdens in terms of demonstrating a medically recognised psychiatric illness, causatively linked to the bullying behaviour. Discriminatory harassment provisions require a link with a discriminatory ground that may not always be possible to establish. Constructive dismissal actions require workers to walk out of their jobs and gamble that they fit within the provisions of that action. Other soft-law measures are legally unenforceable. That there is no legally binding provision is perhaps not surprising. The 2001 Task Force Report did not support the introduction of a legislative provision.<sup>83</sup> It is clear also that the employers' unions are hostile to any development in this direction. The 2005 Task Force Report noted that the Irish Business and Employers' Confederation opposed the much more minor recommendation of that body to have bullying included as a risk within employers' workplace Safety Statements.<sup>84</sup> It is likely that there would be trenchant opposition from this direction to have any more legally binding provision introduced. However, despite this the 2005 Task Force Report in acknowledging the unsatisfactory position of Irish law advised in favour of the introduction of greater guidelines for employers. The resulting Code of Practice gives detailed guidance in relation

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<sup>82</sup> Health and Safety Authority, 'Code of Practice for Employers and Employees on the Prevention and Resolution of Bullying at Work' (National Authority for Occupational Health and Safety), 5.3.

<sup>83</sup> 2001 Report of the Task Force Report on the Prevention of Workplace Bullying.

<sup>84</sup> 2005 Report of the Expert Advisory Group on Workplace Bullying, 6.



to the treatment of bullying complaints.<sup>85</sup> However this Code as with all Codes of Practice is not legally binding and it is questionable to what extent it guides the courts in the determination of personal injury bullying claims.<sup>86</sup>

The 2005 Task Force Report also detailed a mechanism to deal with bullying actions, with the Labour Relations Commission (now the Workplace Relations Commission) as the central body to deal with claims.<sup>87</sup> The proposed process emphasised mediation with recourse to the services of a Rights Commissioner only where mediation clearly failed. The proposal envisaged an attempt at internal mediation as a first stage, with recourse to the internal dispute resolution mechanisms in the event that mediation failed. In the event that this was unsuccessful the matter should be taken externally, to the Labour Relations Commission, now the Workplace Relations Commission. In the event that mediation failed at that level the case would be referred to a Rights Commission for determination and from there if necessary to an appeal process. The process has been criticised for being excessively lengthy, involving too many stages and lacking in clarity as to the final outcome of the process.<sup>88</sup> If adopted in its proposed form it would certainly have the distinction of being a process without a legislative underpinning.

A more coherent approach, it is argued, would be to take as a starting point the acceptance that bullying is an attack on a workers' right to dignity in the workplace and to legislate on that basis. The underlying principle would be that bullying behaviour as an undermining of an employee's dignity at work is unlawful and that employees subjected to it should be entitled to a remedy. It is proposed that the model used for discriminatory harassment could be used as a template for how an action for bullying could be framed. The current definition in the LRC Code given its broad acceptance could be used as a definition for bullying, with the language of the HSA Code used to augment the definition for purposes of clarity and to guide the adjudicating body. As with legislation that has been introduced in other common law jurisdictions, the provision could make it clear that the exercise of reasonable management functions does not constitute bullying.<sup>89</sup> As with discriminatory harassment provisions and with constructive dismissal actions employees should not be required to show a medically recognised psychiatric injury in order to bring a claim. This requirement as is evidenced in the personal injuries action discussed above, places too high a burden on employees and provides scant regard for dignity at work if that dignity is protected only in the event of a resulting medically recognised psychiatric illness. Reflecting the harassment provisions, bullying behaviour should be prohibited where it occurs at work or in the course of the employee's employment. A feature of harassment legislation in terms

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<sup>85</sup> Health and Safety Authority Code of Practice on the Prevention and Resolution of Bullying at Work 2007.

<sup>86</sup> See *Una Ruffley v Board of Management of St Annes School* [2015] IECA (Court of Appeal) discussed above.

<sup>87</sup> 2005 Report of the Expert Advisory Group on Workplace Bullying, 20-22.

<sup>88</sup> Niall Neligan, 'Jurisdictions and Causes of Action in Bullying, Stress and Harassment Cases – Part 2'

Commercial Law Practitioner [2008] 15 3, 12

<sup>89</sup> See for example the Australian Fair Work Act 2009 (Cth) sections 789FA – 789FI

of a remedy is the ability to award compensation and to recommend action on the part of employers. Given the similarity of the nature of harassment and the nature of bullying this would also be a worthwhile inclusion in bullying legislation, where the adjudicating body, could where appropriate, require training, awareness raising or the development of appropriate tools within the workplace to address a bullying culture or bullying behaviour. Limitation periods, dating from the last incidence of bullying, could be similar, currently standing at six months from the date of the last incidence with provision to extend for another six months with 'reasonable cause'. It is proposed that the Workplace Relations Commission and not the courts act as the adjudicating body for claims. It is hoped that this would allow for a less adversarial, less costly and speedier resolution of disputes. The development of a distinct legislative provision is a long overdue development in addressing workplace bullying. It falls to the legislature to take action in introducing such a measure, both to address the failings of the current system and to provide victims of workplace bullying with an effective mechanism to access justice.