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Jurisdictions and Causes of Action in Bullying Stress and Harassment cases Part 1

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Jurisdictions and causes of action: Commercial considerations in dealing with bullying, stress and harassment cases—Part I

Niall Neligan □B.L.

This is the first of a two part article in which the author will critically evaluate the different causes of action and myriad of jurisdictions for bringing a claim in the inter-related fields of bullying, stress and harassment in the workplace from a commercial law perspective. The author will define and trace the separate headings under which the law governing bullying, stress and harassment has evolved. In the second part of the article (which will appear in the next edition of the journal), the author will examine recent developments in tortious claims for psychiatric injuries arising from bullying, stress and harassment cases, and raise the question whether it would be more appropriate to streamline and codify this area of law in order to provide greater clarity to potential litigants and employers, and reduce the number of jurisdictions in which claims are brought.

Introduction

That nature abhors a vacuum is an oft-used cliché but one certainly worth considering in any clinical examination of the myriad of laws that encompass the present regime for dealing with cases concerning bullying, harassment and stress in the workplace. What is clear from a cursory examination of the law presently is that the current multiplicity of jurisdictions and cause of actions is unsustainable in the long term, and in my opinion serves no-one's interest, be it client, lawyer, tribunal or court.

Curiously, the inter-relationship between bullying, stress and harassment is often overlooked by jurists and legislators and as such they have in the past been classified independently. However, the lines of demarcation between bullying, stress and harassment in the workplace are far more nebulous; indeed, in many cases they are symbiotic in so far that harassment is a form of bullying and stress the result of such behaviour. In a recent report on Bullying in the Workplace carried out by the ESRI on behalf of the Department of

Enterprise Trade and Employment, 43 per cent of respondents surveyed, who were the victims of bullying in the workplace, suffered from stress.¹ The reductive approach taken in the past by jurists and legislators towards bullying, stress and harassment in the workplace has resulted in a patchwork approach to this important area of law, hence the unsatisfactory situation where there are overlapping causes of action and multiple jurisdictions.

This lack of clarity is a cause of concern for prospective litigants, be they employers or employees, but more particularly for the practitioner as illustrated by a case involving alleged bullying, leading to a stress induced injury whereby the victim is forced to resign from their work position. This poses the potential problem: should the practitioner recommend the victim bring a case for constructive dismissal under the statutory regime for unfair dismissals (thus limiting their remedies and compensation), or gamble and bring a case for wrongful dismissal where it arises, thus exposing the client to serious loss if he or she fails in their action before the courts?² A victim who has suffered a stress induced injury can initiate a claim for constructive dismissal under the Unfair Dismissals Acts as well as a separate claim for personal injuries before the Personal Injuries Assessment Board. However, this places the victim in the unenviable position of having to initiate two separate claims in two separate jurisdictions.

From a commercial, and indeed an employer's perspective, the growth in cases involving bullying, stress and harassment present real challenges to the running of commercial and public undertakings, particularly in terms of organisational and management culture. Increasingly, commercial and public undertakings are diverting resources to meet such challenges ranging from employee awareness programmes and management retraining to re-writing health and safety statements. However, in the absence of clarity in the law, employers often find themselves fighting rearguard actions in trying to reconcile pressurised work environments with complex and opaque legal rules.

One solution which has been mooted in respect of the above problem is the introduction of comprehensive legislation along the lines of the once proposed *Dignity at Work Bill*, introduced in 2001 by Baroness Gibson before the House of Lords.³ As to whether

legislation in itself would be appropriate in drawing together the strands of bullying, stress and harassment in the workplace is in itself a matter for debate. Nevertheless, the vacuous condition of the present state of the law is a cause for concern for reasons which I have set out below.⁴

Nature of bullying

As aforementioned, bullying is a nebulous concept with many guises and can include:

“constantly criticising, belittling, degrading, shouting at, humiliating, overworking, denying job information, singling out for unfavourable treatment, threatening, ostracizing, trivial-fault finding, applying unrealistic deadlines, assaulting and ridiculing”.⁵

Middlemiss and Hay in their 2003 research observed:

“[that] where such bullying or intimidating actions are perpetrated by supervisory employees against other employees in the workplace, it is often symptomatic of a poor organisational culture, which perpetrates or condones such behaviour.”

Prevalence of bullying in the workplace

Arising out of research carried out by the ERSI on behalf of the Taskforce on the Prevention of Workplace Bullying, about 7.9 per cent of the Irish workforce recorded themselves as having been bullied in the six months preceding the survey.⁶ The rate of victimisation is approximately 1.8 times greater among women than it is for men. Interestingly, the level of workplace bullying rose substantially with increases in the level of educational attainment. Indeed, men who left education on completion of third level have a 55 per cent higher chance of being bullied than their counterparts who left education with a junior / leaving certificate or less. The highest risk of bullying was found in the education (14%), public administration (13.3%) and health (13 %) sectors. However, in the private sector there are high incidences of bullying in financial

services (8%), IT (9%) and wholesale / retail (10.9%).⁷

The impact of bullying, stress and harassment cases

In terms of the victim, bullying can have serious ramifications on a personal and professional level to the point where it can destroy a person's mental health irrespective of the other losses which may be incurred such as loss of occupation and financial loss. For an employer it may result in a loss of productivity, absenteeism, workplace disruption, staff discontent and possible litigation, both in the civil and criminal courts. Aside from these considerations, employers will also have to cover the cost of having to investigate and respond to complaints by employees and the need to sometimes remove or suspend an accused employee from the workplace; not to mention the cost of having to find a temporary replacement for both the perpetrator and the victim who may or may not be on sick leave. As observed by Middlemiss and Hay⁸ :

“Victims of bullying will want bullying to come to an end but are often powerless to stop it. Grievance procedures, normally invoked to deal with internal complaints of employees, can be ineffectual for dealing with claims of bullying”.

Middlemiss and Hay further note that:

“This is particularly true where the first stage of complaint for the employee is to raise the matter with their line-manager and it is his or her behaviour that is the subject of the complaint.”

Workplace bullying and harassment may arise in a variety of different ways. It may be group-oriented (sometimes referred to as mobbing), peer-related, hierarchical or involve subordinates. Periodically, bullying behaviour can extend outside work hours and include individuals who are not under the direct control of the employer but who are to some degree associated with the employees who are perpetrating the behavior against the victim in the workplace.

In general terms it is assumed by workplace psychologists that all

employees will have been a victim of moderate or immoderate bullying at some point in their career, whether overt or covert. The degree of harm caused by bullying will depend on the nature and effect which it has on the individual, so that some employees will not manifest signs of bullying, while others clearly will.

Legal environment

From a preliminary examination of the law, there is no one statute dealing with bullying in the workplace. There is however, a variety of causes of action under which a bullying claim may be brought against an employer. From an employer's perspective, he or she will need to be familiar with the different laws and venues where a bullying claim may be brought. Typically, a plaintiff in a bullying case can rely on the following causes of action: breach of contract, the tort of negligence, unfair dismissals, health and safety, and equality law.

The law on bullying in the workplace is in a constant state of evolution and nowhere is this more evident than in the tort of negligence. It has long been established that employers owe a duty to take reasonable care for the safety of their employees at work whether expressed in the contract of employment or implied by common law. Up until the mid-1990s this duty almost exclusively concerned physical injuries sustained in the workplace. However, over the past 12 years, since the seminal decision of the House of Lords in *Walker v Northumberland County Council*, the law both in the UK and Ireland has evolved to include a duty to take reasonable care for employee safety from mental, psychological or psychiatric injuries that emanate from workplace stress, harassment and bullying.⁹

Defining the issues

In order to have a fuller understanding of how the courts deal with

these complex issues, it is necessary at the offset to define what is meant by bullying, stress and harassment from a legal perspective.¹⁰

Bullying

There is no statutory definition of bullying; however, The Report of the Expert Advisory Group on Workplace Bullying defines it in the following way:

“Workplace Bullying is repeated inappropriate behaviour direct or indirect whether verbal, physical or otherwise, conducted by one or more persons against one another or others, at the place of work and / or in the course of employment, which could be reasonably regarded as undermining the individual's right to dignity at work. An isolated incident of the behaviour described in this definition may be an affront to dignity at work but as a once off incident is not considered to be bullying.”

The expert advisory group commented that the definition of bullying is in a state of evolution. Examples of the type of bullying behaviour envisaged in the report include the following:

- • undermining an individual's right to dignity at work;□
- . • humiliation;□
- . • intimidation;□
- . • verbal abuse;□
- . • victimisation;□
- . • mobbing;□
- . • exclusion and isolation;□
- . • intrusion by pestering, spying and stalking;□
- . • repeated unreasonable assignments to duties which are obviously unfavourable to one individual;□
- . • repeated requests giving impossible deadlines or impossible tasks; and□
- . • implied threats.¹¹ □

Some commentators have noted that bullying of course is an entirely subjective experience. Some employers may not be aware that they

are engaging in bullying behaviour—this can arise for example where an employer/employee is over assertive and does not realise there is a fine line between being assertive and being a bully. It is of course entirely possible that the victim likewise does not realise that he or she is being subjected to what amounts to bullying behaviour. However, ignorance of the law is not an excuse and the courts have demonstrated a willingness to act sternly with an employer who has engaged in unacceptable behaviour towards an employee.

Workplace stress

As in the case of bullying, there is no statutory definition for work-related stress. Guidance, however, has been sought from both government and nongovernmental agencies. In 2000, the European Commission carried out significant work in the area of work-related stress, publishing a comprehensive document "*Guidance on Work-related Stress*". This document provided guidance and general information on the causes, manifestations and consequences of work-related stress, both for employees and employers. Within the document, the Commission defined workplace stress in the following circumstances:

“The emotional, cognitive, behavioural and physiological reaction to aversive and noxious aspects of work, work environments and work organisations. It is characterised by high levels of arousal and distress and often by feelings of not coping.”

In the absence of statutory definitions both the tribunals and courts have had to develop their own versions of what amounts to work-related stress, relying initially on UK case decisions before developing their own jurisprudence.

Harassment

Unlike bullying and work-related stress, harassment is defined under statute—Irish law having followed American jurisprudence by adopting a discrimination-based approach to harassment. The Employment Equality Act 1998 prohibited harassment and defined it as occurring where one person was less favorably treated than another on any of nine separate grounds:

- . 1. Gender.□
- . 2. Marital status.□
- . 3. Family status.□
- . 4. Sexual orientation.□
- . 5. Religion.□
- . 6. Age.□
- . 7. Disability.□
- . 8. Race, that is discrimination on grounds of an individual's race, colour, nationality or ethnic or national origin.□
- . 9. Membership of the travelling community.□

The concept of harassment was broadened in the Equality Act 2004 and now reads as follows:

Section 14 (A) of the Equality Acts 1998–2004

“(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, [...].”□

Causes of action

Having defined the issues it is now necessary to consider the different headings under which actions for bullying, stress and harassment are brought:

- . • Breach of express and implied duties under the contract of employment. □
- . • Harassment—Employment Equality Acts 1998-2004 . □
- . • Harassment under criminal and employment law. □
- . • Breach of contract—Wrongful dismissal. □
- . • Constructive dismissal—Unfair Dismissals Acts 1977-2005 . □
- . • Constructive dismissal—Employment Equality Acts 1998-2004 . □
- . • Section 9 application pursuant to the Industrial Relations Act 1969 . □
- . • Tortious claims for psychiatric injuries arising from bullying and stress cases. □
- . • Safety, Health and Welfare at Work Act 2005 . □

Breach of contract

Bullying claims can result a breach of the terms of the contract whether this arises under express or implied terms. Again it has been noted by Middlemiss and Hay:

“[that] ... Employers are unlikely to offer protection against bullying to employees in the form of a written or oral express term in an employment contract. In the event that an employer introduces a policy for bullying or dignity at work and it is incorporated into employees’ contracts of employment, then an express contractual right to be protected against bullying would be provided. An action for breach of a contract will otherwise only be available to a victim of workplace bullying where it represents a breach of an implied term of his contract.”¹²

Having considered a variety of authorities before the courts in the United Kingdom, the authors formed the opinion:

“[that] ... Where an employer breaches its implied duty, this can represent repudiation by him of an employee's contract of employment and provide the basis for an action against him by the employee for breach of his contract. The most important of the implied terms is the mutual duty to maintain trust and confidence. This term and the term that places a duty on the employer to provide for the safety of his employees are the most relevant to bullying.”¹³

O’ Connell in her article on *Bullying in the Workplace* notes that a breach of contract may occur where the employer failed to comply with fair procedures most notably in dealing with accusations of bullying; in which case it is possible for both the victim and the alleged perpetrator to initiate a claim. She further notes that cases have arisen in the past where perpetrators of bullying have sought injunctions claiming fair procedures have not been followed, even in circumstances where it had been shown the perpetrators were actively involved in bullying fellow employees.¹⁴

A consideration of what is fair will depend largely on the facts of each individual case; the presence or absence of either grievance or disciplinary procedures will be a critical factor the court or tribunal will take into account in arriving at a decision.

Breach of express and implied duties under the contract of employment

Under a contract of employment, whether expressed or implied, an employee will owe several duties to an employer, including but not limited to:

- . **1.** Honesty.□
- . **2.** Loyalty.□
- . **3.** A duty not to act contrary to the employer's interests.□

Correspondingly, an employer owes duties to an employee whether expressed in the contract or implied by law, including but not limited to:

- . 1. Duty of employer to maintain his employee's trust and confidence.□
- . 2. Employer's duty to take reasonable care for the safety of his employees.□
- . 3. The duty to provide a safe system of work.□
- . 4. A duty to ensure compliance and enforcement of reasonable rules of conduct.□
- . 5. A duty to provide a workplace that is free from harassment.□
- . 6. A duty to ensure that employees are free to carry out their work free from harassment.□

Of those employer's duties mentioned above perhaps the most important for the purpose of this article are the duties: to maintain an employee's trust and confidence, to take reasonable care for their safety and to provide a workplace free from harassment.

(1) Duty of employer to maintain his employee's trust and confidence in the employment relationship

In recent years the courts, both in the UK and Ireland, have demonstrated a willingness to recognise an implied duty placed on the employer to maintain his employee's trust and confidence. This duty is not a mutually exclusive obligation, and it applies in a situation where an employee acting in a supervisory capacity engages in bullying of a subordinate employee, resulting in an overall breach of the employer's duty.

The application of the implied duty of trust and confidence to situations involving bullying represents a novel departure by the courts and a far remove from the concept originally conceived by the House of Lords in the case of *Malik v BCCI*.¹⁵ In this case the House of Lords held that:

“Subject to issues of causation, mitigation and remoteness, an employee might in principle recover damages for financial loss stemming from a loss of reputation caused by breach of the employer's implied obligation not, without reasonable and proper cause, to conduct itself in a manner likely to destroy or seriously

damage the relationship of confidence and trust between employer and employee.”¹⁶

The court noted that an employment contract creates a close personal relationship where there is often a disparity of power between the parties. The court observed that employers should not damage their employees’ future employment prospects by harsh and oppressive behaviour, or by any other conduct which falls below the standards set by the implied duty of trust and confidence. Of critical importance here is the use by Lord Nichols of the expression “any other conduct” which has evolved over time to embrace conduct of a bullying nature.

Nevertheless, the expansion of the implied duty of trust and confidence since *Malik* has not been without reservation, a point which can be gleaned from the decision of the House of Lords in the case *Johnson v Unisys Ltd*,¹⁷ where the court tried to place some limits on the evolution of the principle developing to “reflect modern perceptions of how employees should be treated fairly and with dignity”. Indeed, when the *Johnson* case was before the Court of Appeal, the court citing an earlier decision in *Addis v Gramophone Company Ltd*, did not accept that the *Malik* principle allowed damages for the manner in which a dismissal took place. In *Johnson*, the plaintiff sought compensation for wrongful dismissal alleging he suffered a major psychiatric illness from the manner of his dismissal and the circumstances leading up to it. He claimed financial loss of £400,000 due to this mental breakdown and his consequent inability to find employment.¹⁸

There is concern that the scope of the implied duty of trust and confidence is so wide that it could embrace a situation such as the imposition of an intolerable workload—something which has traditionally fallen within the remit of constructive dismissal.¹⁹ Certainly, there is an ongoing debate in academic circles that, notwithstanding the *Johnson* decision, the implied duty of mutual trust and confidence will evolve to form an all-embracing super-principle under which each of the more “traditional” implied duties will rest; although this point has been discounted by many commentators.²⁰

In this jurisdiction the High Court recently considered the nature and

scope of the implied duty of trust and confidence in a variety of cases, most interestingly in the decision of *Berber v Dunnes Stores*.

²¹ In the context of the implied duty of trust and confidence, Laffoy J. in the High Court held that the defendant was in breach of the implied duty in circumstances where the defendant had known of the precarious nature of the plaintiff's physical and psychological health and that this amounted to oppressive conduct which seriously damaged the relationship between the parties.

A breach of the implied duty of trust and confidence was also considered in the High Court in the case of *Pickering v Microsoft Ireland Operations Limited* ²² where the plaintiff, who did not have a written contract, brought an action for wrongful dismissal, submitting that in addition to the implied duty of trust and confidence there was a second implied term in the contract that required or obliged her employer not to expose her to a risk of personal injury. ²³

One of the issues raised in *Pickering* was whether the plaintiff could avoid the restrictive principle set down in *Addis v Gramophone Company* that where a servant is dismissed from his employment the damages for the dismissal cannot include compensation for the manner of his dismissal, for injured feelings or from the loss he may sustain from the fact the dismissal makes it more difficult for him to obtain fresh employment. ²⁴

In *Pickering*, Smith J. considered the restrictive principle in *Johnson* ²⁵ and how it was assessed in an earlier judgment of Laffoy J. in *McGrath v Trinitech*. ²⁶ In particular, the judge referred to the defendant's submission that: (a) the plaintiff had no right to claim any remedy, apart from damages at common law, and that these damages do not include damages for the manner of the plaintiff's dismissal; (b) whether the implied term of mutual trust and confidence can be relied on, if it is inconsistent with an express term in a contract of employment; and (c) the legal position in relation to an employer's liability for psychiatric injury induced by stress and pressure at work.

Smith J. considered the proposition that an implied term must be consistent with an express term (in this case the express term being the right of the employer under the common law to terminate the

contract of employment, the remedy for this breach of contract being no more than the remuneration which should have been paid during the notice period). It was concluded that the common law position in relation to dismissal had not changed and therefore an implied term of trust and confidence could not be relied on to circumvent that principle. However, the court having discounted that point, considered the implied duty of trust and confidence independent of and unconnected with the manner of the plaintiff's dismissal; namely in the context in which the defendant had given expressed assurances that the plaintiff would be involved in the resolution of any difficulties arising from the implementation of the re-organisation plan. The court was satisfied that this term had been breached which amounted to constructive dismissal entitling the plaintiff to treat the contract as repudiated.

It would appear from the above decisions that the High Court has recognised the existence of the implied duty of trust and confidence in this jurisdiction; however, it would also appear that the court, at least in *Pickering*, is prepared to limit the scope of its application.

(2) Employer's duty to take reasonable care for the safety of his employees

It is long established under the law governing contracts of employment that in the absence of an expressed term there is an implied duty placed on the employer to take reasonable care for the safety of all his employees. However, this duty under contract is mirrored in the law of torts where a general duty of care exists; therefore a prospective litigant can sue under different headings. Since the seminal case of *Walker v Northumberland County Council* it has been accepted that a breach of a general duty of care could take place, where it is established that an employer, in this case a local authority, subjected an employee to unacceptable levels of stress, caused by a health endangering workload.²⁷ The ambit of this duty is wide enough to apply to cases of bullying where it is incumbent on an employer to provide a safe working environment.

In *Johnstone v Bloomsbury Health Authority* , the plaintiff was employed as a senior house officer by a hospital authority. His standard working week was 40 hours; however, he was required to make himself available for an additional 48 hours on call. In certain weeks he worked in excess of 88 hours and this over a period of time adversely affected his health. Stuart-Smith L.J. in his judgment noted:

“There is no difference between the duty to provide a safe system of working and the duty to take reasonable care for the safety of the employee. The former is merely an ingredient in the latter duty.... It must be remembered that the duty of care is owed to the individual employee and different employees may have different stamina. If the defendants in this case knew or ought to have known that by requiring him to work the hours they did, they exposed him to risk of injury to his health, then they should not have required him to work in excess of those hours that he safely could have done”.

The court concluded that the defendants were in breach of an implied duty of care in that they should not have required the plaintiff to work so far in excess of his standard working week. Indeed, it would have been reasonably foreseeable that to do so would have injured the plaintiff's health.

Recently, the High Court considered the scope of duty in this jurisdiction both in *McGrath and Pickering* , the subject of which will be discussed in greater detail later in this article.

(3) Common law duty on an employer to provide a workplace that is free from harassment

Even before the introduction of the Employment Equality Acts 1998-2004 , there was an implied duty on an employer to provide a workplace free from harassment; the Labour Court having recognised that harassment was a form of discrimination as far back as 1985 in *A Worker v A Garage Proprietor* .²⁸ The common law duty has been somewhat superseded in recent years by the placing of

harassment (including sexual harassment) on a statutory footing. It is within this context that harassment must now be examined.

As mentioned above, s. 14(A) inserts a new provision into the Employment Equality Acts dealing with harassment and sexual harassment, extending it in relation to gender, marital status, family status, sexual orientation, religion, age, disability, race or membership of the travelling community.²⁹ This provision provides that an employee is harassed or sexually harassed either at the place where he or she is employed or otherwise in the course of his or her employment. Proving harassment depends on showing that the victim and the other individual are both employed at that place or by the same employer; the other individual is the victim's employer; or the other individual is 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. The provision goes on to read:

“...or the victim is treated differently in the workplace (victimisation—harassment) or otherwise in the course of his or her employment by reason of rejecting or accepting the harassment, or it could reasonably be anticipated that he or she would be so treated.”

It is clear from the wording of the provision that harassment is a form of bullying especially where victimisation is present.

Under Art. 11 of the Equal Treatment Directive, Member States were obliged to introduce measures dealing with victimisation in their respective legislation.³⁰ The concept of victimisation was incorporated into the Employment Equality Act 1998 and occurs where the dismissal or other penalisation of the complainant was solely or mainly occasioned by the complainant having, in good faith sought redress under the Acts.³¹ In the case of *Jacqui McCarthy v Dublin Corporation*, the claimant succeeded in her action against the respondent who was held to be vicariously liable for the actions of its employees who victimised the claimant for having previously brought a claim under equality legislation.³² The provision dealing with vicarious liability is set out under s. 15(1) of the Act, however, an employer can escape liability in respect of an alleged act of harassment or victimisation (carried out by subordinates) if he can demonstrate that he or she took such reasonable steps as were

practicable to prevent the perpetrator (a) from doing that act, or (b) from doing, in the course of his or her employment, acts of that description.³³

One of the major considerations which an employer must have in relation to a potential claim for harassment under the Equality Acts is that scope for compensation is much greater than that provided for under the Unfair Dismissals Acts 1977-1993.³⁴ This can be seen from the *Atkinson* decision in which Delahunt J. awarded a claimant the sum of €137,000 less 25 per cent for contributory negligence on account of the plaintiff being aware for a two-year-period prior to making a complaint that she was sexually harassed.³⁵

Criminal law

Harassment must also be understood within its criminal law context under the *Non-Fatal Offences Against the Person Act 1997*.³⁶ The breadth of this provision is sufficiently wide to encompass situations that can arise within a working environment; however, the behavior in question would have to be very serious before the authorities intervene. In 1997, Parliament in the UK introduced the Protection Against Harassment Act, a legislative response to the public order offence of stalking (although the act itself is not confined to that particular offence). The Protection Against Harassment Act creates not just a criminal offence for harassment but also provides a complainant with a civil remedy. The extent of the vicarious liability of the employer in this context was recently considered in the case of *Majrowski v Guy's and St Thomas's NHS Trust*.³⁷

In *Majrowski*, the claimant, a homosexual male, brought an action against his employer for breach of statutory duty, claiming that he had been unlawfully harassed by a female manager in breach of s. 1 of the Act, maintaining that the employer was vicariously liable.³⁸ The House of Lords upheld the decision of the Court of Appeal in dismissing the employer's contention that the Act did not provide for the vicarious liability of the employer.³⁹ In particular, and of relevance to this article, Nicholl L.J. noted:

“I am at a loss to see why these particular features of this newly created wrong should be thought to place this wrong in a special category in which an employer is exempt from vicarious liability. It is true that this new wrong usually comprises conduct of an intensely personal character between two individuals. But this feature may also be present with other wrongs which attract vicarious liability, such as assault. Nor does imposition of criminal liability only on the perpetrator of the wrong, and on a person who aids, abets, counsels or procures the harassing conduct, point to a different conclusion. Conversion, assault and battery may attract criminal liability as well as civil liability, but this does not exclude vicarious liability.”

Breach of contract—Wrongful dismissal

Under contract law, an employee can bring an action for wrongful dismissal where, for example, he or she has brought to the employer's attention instances of bullying or harassment, a result of which leads to the victim being dismissed. Consequently, the employee can initiate a claim in either the Circuit Court or indeed the High Court for damages.⁴⁰ The nature of the wrongful dismissal action will depend on whether the employee was dismissed without proper notice,⁴¹ or as the case may be, the employee was dismissed summarily.⁴² Depending on the circumstances of the case the employee has an option of either pursuing a claim for wrongful dismissal in the courts or bringing a case for unfair dismissal before the Employment Appeals Tribunal.⁴³

The nature of a wrongful dismissal action was considered in the case of *Wallace v United Grain Growers Ltd*, in which McLaughlin J. in the Canadian Supreme Court stated:

“... ‘wrongful dismissal’ action is not concerned with the wrongness or rightness of the dismissal itself. Far from making dismissal a wrong, the law entitles both employer and employee to terminate the employment relationship without cause. A wrong arises only if the employer breaches the contract by failing to give the dismissed employee reasonable notice of termination. The remedy for this

breach of contract is an award of damages based on the period of notice which should have been given.”

Whereas claims for wrongful dismissal are limited if taken within the jurisdiction of the Circuit Court, the same cannot be said for claims taken within the jurisdiction of the High Court. However, typically the award is normally concerned with compensating the plaintiff for inadequate notice and the amount of damages will often be limited to the wages due under the notice period.

Constructive dismissal

Perhaps the most recognisable avenue for seeking redress for actions amounting to bullying in the workplace is where the employee resigns from the position of employment and brings an action for constructive dismissal or discharge by breach as it was originally referred to.⁴⁴ However, this is perhaps the riskiest course of action a potential litigant may take; s.1 of the Unfair Dismissals Acts 1977-2005 defines constructive dismissal as:

“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.”⁴⁵

It should be noted that a claim for constructive dismissal is not limited to the Unfair Dismissals legislation; an action may be brought under s.2 of the Equality Acts 1998-2004 which includes constructive dismissal within the definition of dismissal.⁴⁶ Such a claim can be pursued before the Equality Tribunal, or in the case of gender discrimination, to the Circuit Court. As mentioned above, in the context of harassment the Tribunal not only has the power to award compensation, re-instatement or re-engagement, but accordingly may also award damages. Not surprisingly, the equality

route for dismissal is becoming increasingly popular particularly among non-nationals who are the victims of bullying in the workplace.⁴⁷

One of the quintessential problems with any case for constructive dismissal is whether the employee left his employment too soon or correspondingly too late.⁴⁸ It is of course possible for an employee to leave on account of one act of bullying, provided the behaviour was particularly serious. In respect of a situation where an employee is exposed to unacceptable behaviour over a period of time, the tribunal will consider whether the complainant made use of the grievance procedure; the nature of that procedure; whether the rules applying to that procedure were followed or ignored, and furthermore who was the person(s) to whom the employee complained—was the referee impartial and removed from both the complainant and the perpetrator(s)?⁴⁹ The Tribunal has made it quite clear that in order to succeed “the complainant must demonstrate, and the tribunal must find as a matter of fact, that the financial loss is attributable to the dismissal”. Perhaps the most high profile case involving bullying and constructive dismissal in recent years was the case of *Liz Allen v Independent Newspapers* where the complainant was awarded the sum of £70,500 or 78 weeks pay.⁵⁰

Traditionally, for a constructive dismissal action to succeed the plaintiff had to make a complaint; however, there is now authority that in a limited number of circumstances an employee may not have to if the person they should complain to is in fact the perpetrator of the alleged conduct which led them to leave their position.⁵¹ However, an employee should, where practicable, use the grievance procedure; failure to do so in circumstances where it is reasonable to, will militate against a complainant.

Recently in the UK, the Employment Appeals Tribunal in *Abbey National Plc v Fairbrother*,⁵² considered the scope of constructive dismissal in the context of discrimination and the appropriate use of grievance procedures. The case is an authority for the proposition that conduct by an employer said to destroy the implied term of trust and confidence inherent in the employer/employee relationship (and so entitling the employee to resign and claim constructive dismissal) will not do so if the employer had reasonable and proper cause for the conduct in question.

A claim for a trade dispute under the Industrial Relations Act 1969

O' Sullivan in his article on *Preventing and Defending Stress and Bullying at Work Cases* notes that there is a more unusual route for taking a bullying claim under the Industrial Relations Act 1969 . Section 9 of that Act provides that where there is a trade dispute as defined under the Industrial Relations Act 1946 , a case may be referred to the Rights Commission. The Rights Commissioner may make a recommendation, however his/her decision is not binding unless the employer agrees to be bound under s.20 of the Industrial Relations Act 1969 .⁵³

Conclusion

Having established that there are a variety of actionable causes for cases involving bullying, stress and harassment, and having demonstrated how the law in this field has evolved in tandem with existing common law rules and statutory provisions, it is fair to say that the existing laws have been used by litigants to seek redress in the absence of dedicated legislation. The concluding part of this article will examine how the courts in the UK and Ireland have dealt with the emergence of the tortious claims for psychiatric injuries relating to bullying, stress and harassment cases. Furthermore, the author will examine in light of recent developments, whether it is desirable to consolidate and codify employment rights law in order to provide clarity to prospective litigants. Finally, the author will argue that if codification is required, then this will necessitate a change in the nature of present jurisdictions for bringing claims involving bullying, stress and harassment in the workplace.⁵⁴

¹ [*Bullying in the Workplace: Survey Reports 2007— (The Economic and Social Research Institute, 2007) p.53.]*

² [*Where there has been a breach of an express or implied term in*

the contract (including action in tort under separate headings).]

³ *[This is discussed in greater detail later in the article.]*

⁴ *[It has been argued that bullying in the workplace has become a source of socio-economic concern not just in Ireland but also within the European Union. It has been estimated by the Eurofound that as much as 10% of the European workforce reported being subject to harassment in the workplace and 2% of respondents reported sexual harassment. European Foundation for the Improvement of Working and Living Conditions, Report on Violence, Bullying and Harassment in the Workplace (European Foundation, 2000).]*

⁵ *[Sam Middlemiss and Olga Hay, “Legal Redress Against Employers for Victims of Workplace Bullying— Part 1” [2003] 16 I.L.T. 250. Sam Middlemiss has been at the forefront of research into bullying in the workplace, his three articles published in volume 21 Irish Law Times 2003 were groundbreaking and set the stage for several articles which have since followed.]*

⁶ *[The ERSI carried out two surveys, one in 2001 followed by a second survey conducted by telephone using a representative sample of 3,500 adults in the Autumn/Winter 2006-07. The rate of bullying complained of has increased for men from 5.3% to 5.9%, and for women from 9.5% to 10.7%. According to the report, as many as 159,000 people have been subjected to bullying in the immediate six-month-period before the survey was carried out. See O'Connell, Calvert and Watson, “Bullying in the Workplace— Survey Reports 2007” (Economic and Social Research Institute, 2007).]*

⁷ *[The figures make for interesting reading especially in relation to the type of bullying behaviour, of the sample who were questioned 43% encountered exclusion, 77% verbal abuse, 61% treated less favourably, 75% undermining, 58% humiliation, and 62% harassment.]*

⁸ *[Above n. 5.]*

⁹ *[It was noted by McMahan J. in Curran v Cadbury (Ireland) [2000] 2 I.L.R.M. 343 , that “The duty of the employer towards his employee is not confined to protecting the employee from physical*

injury only; it also extends to protecting the employee from non-physical injury such as psychiatric illness or the mental illness that might result from negligence or from harassment or bullying in the workplace.”]

¹⁰ *[The definitions provided above are in a state of flux; some of the definitions although not defined under statute have acquired a quasi-legal status: others such as harassment have been defined under statute both in civil and criminal law. Where the definitions have not been defined by statute the courts or tribunals as the case may be are free to elaborate upon those definitions to encompass actions which previously have not been encountered in case decisions.]*

¹¹ *[See also Anne O'Connell “Bullying in the Workplace” (2005) 2 I.E.L.J. 119, who examines the Taskforce's report in greater detail.]*

¹² *[Above n.5 at 4.]*

¹³ *[Woods v W M Car Services (Peterborough) Ltd [1981] I.C.R. 666.]*

¹⁴ *[This point is examined in detail by Anne O'Connell in her article on “Bullying in the Workplace” (2005) 2(4) I.E.L.J. 119. See n. 11 above.]*

¹⁵ *[[1997] 3 All E.R. 1 (House of Lords, reversing Court of Appeal [1995] 3 All E.R. 545).]*

¹⁶ *[For a number of years after the Malik decision there was some debate over the precise meaning of Lord Steyn's dictum that “the employer shall not without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee”; on its literal wording, it imposes a higher hurdle for a claimant than the disjunctive test set out by Browne-Wilkinson J. in Woods v W M Car Services (Peterborough) Ltd that “the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. However, in the case of Baldwin v Brighton & Hove*

[2007] I.R.L.R. 202 , it was stated that Lord Steyn's use of the word "and" instead of "or" in his formulation of the implied term was not intended and should be regarded as an error of transcription and therefore should not be taken literally, and consequently does not create a conjunctive case.]

¹⁷ [[2001] U.K.H.L. 13.]

¹⁸ [Part of the rationale for the refusal in extending the principle was that Johnson had previously brought a case for unfair dismissal and had succeeded. He instituted proceedings for breach of contract two years later. The House of Lords were reluctant to develop a parallel common law to that of unfair dismissal, which would not be subject to the limits applying to unfair dismissal, and would be at odds with Parliament's policy of limiting awards in this area. Laffoy J. in her judgment in the case of McGrath v Trinitech referred to the decision in Johnson.]

¹⁹ [For a more detailed analysis of this, see Brodie, D. [2004] I.L.J. 261.]

²⁰ [See "The implied duty of mutual trust and confidence; an emerging overarching principle?" [2005] 34(4) I.L.J. 284-307.]

²¹ [[2007] 18 E.L.R. 1. At the time of writing the Berber decision is on appeal to the Supreme Court.]

²² [[2006] 17 E.L.R. 65.]

²³ [The plaintiff had set out under para. 4 of her statement of claim the full particulars of the terms implied into her contract of employment which she alleged that the defendant breached, namely "... that the defendant would not act in a manner such as to undermine the plaintiff's position and/or the discharge by the plaintiff of her duties as a director of the defendant; that it would ensure she was not treated in a manner which would make it impossible for her to discharge her duties; that she would not be subjected to an unreasonable work environment likely to cause her to suffer personal injuries, stress, loss and/or damage; that it would not act in such a manner towards the plaintiff as to undermine the mutual trust and confidence necessary to ensure that the plaintiff

was in a position to fully discharge her duties as a senior executive and director of the defendant, and finally that it would not act in such a manner as to repudiate the contract it had entered into with the plaintiff.”]

²⁴ *[The later point being circumnavigated by the implied duty of trust and confidence as held in Malik v BCCI. See n. 15 above.]*

²⁵ *[See n. 17 above.]*

²⁶ *[Laffoy J. in McGrath considered a number of authorities on the restrictive principle in common law actions for dismissal.]*

²⁷ *[(1995) I.R.L.R. 35.]*

²⁸ *[EE02/1985. The Labour Court stated that “... freedom from sexual harassment is a condition of work which an employee of either sex is entitled to expect. The court will, accordingly, treat any denial to that freedom as discrimination within the terms of the Employment Equality Act 1977 ”.]*

²⁹ *[Under s.14(7)(a), reference to harassment means (i) 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.]*

³⁰ *[Directive 2000/43/EC [June 29, 2000].]*

³¹ *[Employment Equality Act 1998 , s.74(2) .]*

³² *[[2001] E.L.R. 255.]*

³³ *[Employment Equality Act 1998 , S.15(3) .]*

³⁴ *[Section 82(1)(c) of the Employment Equality Acts 1998-2004*

provides for an order of compensation for the effects of acts of discrimination or victimisation which occurred not earlier than six years before the date of referral of the case under s.77. For an examination of this principle in practice, see Barbara Atkinson v Hugh Carty and Others below.]

³⁵ *[Barbara Atkinson v Hugh Carty and Others [2005] 16 E.L.R. 1 , where the plaintiff succeeded in an action before the Circuit Court in respect of a claim for sexual harassment.]*

³⁶ *[Section 10 of the 1997 Act provides that: “(1) Any person who, without lawful authority or reasonable excuse, by any means including by use of the telephone, harasses another by persistently following, watching, pestering, besetting or communicating with him or her, shall be guilty of an offence. (2) For the purposes of this section a person harasses another where— (a) he or she, by his or her acts intentionally or recklessly, seriously interferes with the other's peace and privacy or causes alarm, distress or harm to the other, and (b) his or her acts are such that a reasonable person would realise that the acts would seriously interfere with the other's peace and privacy or cause alarm, distress or harm to the other.”]*

³⁷ *[[2006] U.K.H.L. 34, [2007] 1 A.C. 224. The Protection against Harassment Act was not originally conceived to include employment-related issues. When the matter first appeared before the trial judge it was rejected for being inappropriate in the employment context. Ultimately, both the Court of Appeal and House of Lords held that the provisions of the Act apply.]*

³⁸ *[Section 1 of the Protection against Harassment Act 1997 provides: “(1) A person must not pursue a course of conduct— (a) which amounts to harassment of another, and (b) which he knows or ought to know amounts to harassment of the other (2) For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other. (3) Subsection (1) does not apply to a course of conduct if the person who pursued it shows— (a) that it was pursued for the purpose of preventing or detecting crime, (b) that it was pursued under any enactment or rule of law or to comply with any condition or*

requirement imposed by any person under any enactment, or (c) that in the particular circumstances the pursuit of the course of conduct was reasonable.” Section 2(1) of the Act provides that a person who pursues a course of conduct in breach of s.1 is guilty of an offence. Interestingly, in s.3(1) and (2) an actual or apprehended breach of s. 1 may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question. (2) On such a claim, damages may be awarded for (among other things) any anxiety caused by the harassment and any financial loss resulting from the harassment.]

³⁹ [*Prior to the enactment of the Prevention of Harassment Act 1997 , the House of Lords considered the scope of harassment in R v Ireland and R v Burstow (1997) 4 A.E.R. 225 (HL) , when Lord Steyn in his judgment before the House of Lords made it clear that verbal statements threatening physical harm could represent an assault: “The proposition that a gesture may amount to assault, but that words can never suffice, is unrealistic”. This is mirrored somewhat in the actus reus of assault pursuant to s.2 of the Non Fatal Offences Against the Person Act which provides, inter alia, under s.2(1)(b): “Causes another to believe on reasonable grounds that he or she is likely immediately to be subjected to any such force or impact.”]*

⁴⁰ [*It should be noted that in such a claim the complainant is not precluded from bringing additional headings such as a breach of duty under the tort of negligence and or a breach of statutory duty, as will be discussed below.]*

⁴¹ [*There is common law authority that an employer does not breach the contract of employment merely by dismissing the employee; rather the employee has to base his claim on the breach of contract on the failure on the part of the employer to terminate the contract in a legally permissible way.]*

⁴² [*The employer is entitled to dismiss an employee summarily and without notice; however, the courts will scrutinise the nature of the dismissal to ensure that fair procedures have been complied with.]*

⁴³ [*Section 15(3) of the Unfair Dismissals Acts 1977-2005 provides that: “where the hearing by a court of proceedings for damages at*

common law for wrongful dismissal of an employee has commenced, the employee shall not be entitled to redress under this Act in respect of the dismissal to which the proceedings relate.”]

⁴⁴ *[In the case of Western Excavations (ECC) Ltd v Sharp [1978] I.R.L.R. 27 (CA) , Lord Denning defined constructive dismissal in the following manner: “If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intend to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed.”]*

⁴⁵ *[The equivalent provision in English law is provided under s.95(1) of the Employment Rights Act 1996 . For the purposes of this Part an employee is dismissed by his employer if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.]*

⁴⁶ *[The wording under s.2 of the Employment Equality Act 1998 is quite similar to that under the Unfair Dismissals Acts. It 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.]*

⁴⁷ *[The potential outlay for employers is greater than it would be for constructive dismissal under the Unfair Dismissals Acts where a complainant cannot claim for damages and is limited to a maximum compensation award of 104 weeks, and / or reinstatement or re-engagement.]*

⁴⁸ *[The circumstances under which an employee left will be scrutinised by the Tribunal. In order to prove a constructive dismissal it must satisfy one of two tests: (a) that the employee was entitled to terminate the contract—this is sometimes referred to as*

“The Contract Test”; (b) *the employee satisfies the reasonableness requirement—“The Reasonableness Test”*. In the case of *Abbey National Plc v Fairbrother* (see below), the court examined the reasonableness requirement under UK law context. In that case the court gave the following direction in relation to a constructive dismissals case: “... the questions that require to be asked in a constructive dismissal case are what was the conduct of the employer that is complained of? Did the employer have reasonable and proper cause for that conduct? If so then that is an end to it and the employee cannot claim that he has been constructively dismissed. If not, a third question arises:-was the conduct complained of calculated to destroy or seriously damage the employer/employee relationship of trust and confidence? Conduct which destroys or seriously damages the trust and confidence inherent in the employer/ employee relationship does not automatically amount to a breach of the implied term contractual term of trust and confidence.”]

⁴⁹ [In the UK EAT decision of *GAB Robins (UK) Ltd v Trigs* (Unreported, June 13, 2007) , the EAT considered in establishing whether an employer's failure to manage properly an employee's bullying and overwork grievance was the “final straw” that entitled the employee to resign and claim unfair dismissal. It was necessary to consider whether the employer's grievance procedure conduct had fallen within the range of reasonable responses, and also on whether the employee, who had been on sick leave prior to her resignation, could claim damages for future loss of earnings.]

⁵⁰ [UD641/2000—August 2, 2001.]

⁵¹ [For a fuller discussion of this point see Stephen O'Sullivan, “Preventing and Defending Stress and Bullying at Work Cases” [2005] 1 E.L.R. 14. The author here discusses the unreported case of *Kiernan v Cathcart*.]

⁵² [[2007] I.R.L.R. [320].]

⁵³ [Again for a fuller discussion of this point see n.41 above at 16.]

⁵⁴ [The author in writing this article was assisted by some excellent publications in the field, most notably the three articles written by

Sam Middlemiss and Olga Hay, referred to at n.5 above.
Additionally, the author was assisted by: Maura Connolly's article "Harrassment in the workplace—Recent Developments" (2002) 9(6) C.L.P. 123; Stephen O'Sullivan "Preventing and Defending Stress and Bullying at Work Cases" (2005) 1 E.L.R. 14; Anne O'Connell, "Bullying in the Workplace" (2005) 2(4) I.E.L.J. 119; Marguerite Bolger, "Claiming for occupational stress, bullying and harassment" (2006) 3(4) I.E.L.J. 108; Cliona Kimber, "Stress at Work— Searching for guidance" (2004) 1(3) I.E.L.J. 80; John Eardly "Bullying and Stress in the Workplace" (Firstlaw); Murray Smith "What can be done? Suggestions for amended and new legislation dealing with workplace bullying" (2005) 3 E.L.R; and Ann Brennan "Maker v Jabil : Stress Claims and the Failure to Complain" (2005) 2 E.L.R.]