THE HIGH COURT

[2014 No. 516 MCA]

IN THE MATTER OF THE EMPLOYMENT EQUALITY ACTS 1998 TO 2011

ON THE APPLICATION OF NANO NAGLE SCHOOL

AN APPEAL PURSUANT TO SECTION 90 (1) AGAINST DETERMINATION EDA 1430 BY THE LABOUR COURT DATED THE 12TH OF AUGUST 2014

BETWEEN

NANO NAGLE SCHOOL

APPELLANT

AND

MARIE DALY

RESPONDENT

JUDGMENT of Mr. Justice Noonan delivered the 11th day of December, 2015

Introduction

1. This matter comes before the court be way of appeal on a point of law pursuant to s. 90 (1) of the Employment Equality Acts 1998 (2011).

Background facts

2. The Appellant ("the school") is a special school for children with varying degrees of disability ranging in age from 4 to 19. There are currently approximately 77 children attending the school with 12 classes containing between 6 and 8 children. The school employs 12 teachers and 27 special needs assistants (SNA's) of which the Respondent ("Ms. Daly") was one. She commenced her employment as a SNA with the school in or about December, 1998.

3. In 2010, Ms. Daly was involved in a serious accident in which she suffered spinal injuries which have left her paralysed from the waist down and wheelchair bound. After the accident, Ms. Daly was admitted to the National Rehabilitation

Hospital in Dun Laoghaire for a period of some five months. While there, she was assessed by a senior occupational therapist, Ms. Fiona Ryan, who concluded in a report in late 2010, that Ms. Daly could return to work on a phased basis. Ms. Daly was discharged from the NRH on the 19th of December, 2010, and in January, 2011, she sought to return to work at the school. She was advised by the school that she would have to be assessed by an occupational health expert.

4. Accordingly, on the 23rd of February, 2011, Ms. Daly attended with Dr. David Madden, an occupational health physician, of the Medmark practice. She furnished Dr. Madden with a copy of the report of Ms. Ryan on that occasion.

5. In a report of the 1st of March, 2011, Dr. Madden considered that Ms. Daly was fit to return to many of the duties of a SNA but there were some she could not undertake. He recommended that a risk assessment be carried out and that the school should implement it "to ensure her safe return to work." He went on to say "I am happy to support her return to work once a risk assessment has been completed."

6. In or about mid March, 2011, a risk assessment was carried out by a group called Southern Safety who recommended that Ms. Daly's return to work be accommodated by implementing a number of measures including rearranging her work practices so her role would be less challenging. The report further advised that Ms. Daly be consulted on all matters relative to her reintegration in the workplace.

7. Dr. Madden assessed Ms. Daly for a second time on the 15th of August, 2011, with the benefit of the Southern Safety report. He reiterated his earlier opinion and expressed the view that the risk assessment report was inadequate and the school should obtain another report from a suitable individual such as an occupational therapist. Ms. Ina McGrath was identified as a suitable expert occupational therapist to carry out the assessment. On the 2nd of September, 2011, Ms. McGrath carried out a half day assessment of the school and then she subsequently attended on the 9th of

September, 2011, at the school where she carried out a full day assessment of Ms. Daly when she was at work. On the 29th of September, 2011, Ms. McGrath completed her report and presented it to the school. Prior to that, Ms. Daly had not been given a draft of the report in advance or invited to make any comments on it.

8. In the report, Ms. McGrath identified 16 categories of duties required of SNA's working in the school. She considered that Ms. Daly was able to carry out the duties in 9 of the categories either wholly or partly but not in the remaining 7. She concluded her report with the recommendation that Ms. Daly could act as a floating SNA and could perform SNA duties with children who need verbal or physical prompts. She recommended that Ms. Daly should not work with children who act out physically. On the 26th of October, 2011, a meeting of the board of management of the school took place when Ms. Daly's case was discussed and Ms. McGrath's report was considered. It was felt that the issues raised in the report were of great concern to the board and as a result, it was agreed to request Medmark to review the situation having regard to Ms. McGrath's report. This decision was reflected in a subsequent letter of the 28th of October, 2011, from the board to Ms. Daly.

9. It would appear that on the 20th of November, 2011, a telephone conversation took place between Dr. Madden and the school principle, Ms. Murphy. In that regard, the Labour Court in its determination noted the following evidence of Ms. Murphy (at page 9):

> "In relation to [Ms. Daly's] evidence to the effect that she had been told by Dr. [Madden] that the [school] was not in a position to accommodate her disability, the witness accepted that she had a discussion with Dr. [Madden] on this matter. While she could not recall the verbatim content of their conversation the witness believed that she had told Dr. [Madden] that providing the type of accommodation required by [Ms. Daly] would be very

difficult. Ms. [Murphy] did not accept that she had told the doctor that the [school] would not provide [Ms. Daly] with accommodation."

10. The Labour Court further noted in relation to Ms. Murphy's evidence (at page 10):

"In response to questions from the court the witness agreed that she had spoken to Dr. [Madden] in relation to the feasibility of relieving [Ms. Daly] from some duties before he finalised his report. She told Dr. [Madden] that this would be difficult. Ms. [Murphy] accepted that she was of the opinion that [Ms. Daly] could only return to work if she able to perform all of the duties of an SNA. She expressed this opinion to Dr. [Madden] before the matter was discussed by the board of management."

11. The Labour Court in its determination referred to Dr. Madden's account of this conversation with the school principal in the following terms (at page 13):

"An appointment was then made for him to see [Ms. Daly] for the third time. On the day before the appointment he reviewed [Ms. Daly's] file and he again read the second assessment report. He telephoned the school principal and enquired as to the degree of accommodation that could be provided to [Ms. Daly]. Dr. [Madden's] recollection was that Ms. [Murphy] told him that there were a significant number of issues around the proposals contained in the risk assessment and that the school could not provide the level of accommodation needed to facilitate [Ms. Daly's] return. Dr. [Madden] understood from this conversation that [Ms. Daly] could only return to work if she could perform the work of an SNA in its entirety.

Dr. [Madden] was satisfied that [Ms. Daly's] condition was such that she could not perform the role of an SNA in its entirety. In these circumstances he

felt obliged to conclude that [Ms. Daly] was medically unfit to return to work."

12. Dr. Madden then carried out his third and final assessment on Ms. Daly involving his report of the 21st of November, 2011. He referred to the report of Ms. McGrath and said:

"The report suggests that she may be suitable for the position of floating SNA. I note no such position exists. I reviewed the risk assessment and acknowledge that there are many tasks that Ms. Daly is not fit to participate in. I understand from discussing with her school, the level of accommodation required is not possible to meet to ensuring the safety of all those involved. I acknowledge the number of roles that Ms. Daly would need accommodation would be significant.

Conclusion:

Ms. Daly is in satisfactory health and fit for some work. I acknowledge she has a medical issue that renders her unsuitable to perform many of the roles critical of a special needs assistant. I note that the level of accommodation is significant and her employer is not in a position to facilitate such a level of accommodation in the workplace.

I feel Ms. Daly is not medically fit for the position of special needs assistant. I feel Ms. Daly's medical condition is genuine and permanent. I feel she is likely to remain unfit for the position of SNA permanently."

13. Following receipt of this report, the board of management convened in a further meeting on the 15th of December, 2011. The following is an extract from the minutes of that meeting:

"Marie Daly:

- The board discussed Marie Daly's Medmark report dated the 21st of November 2011 in detail.
- As already discussed at our board of management meeting on the 26th of October, discussion took place re the many challenging duties of SNA in the special circumstances within Nano Nagle School.
- Ina McGrath occupational therapist had stated in her risk assessment that Marie Daly could act as a floating SNA. With the board's permission I contacted the Department of Education outlining Marie Daly's case and questioning the feasibility of a floating SNA. The department informed me that school staff is a matter for the NCSE. I phoned the NCSE and spoke with SCNO Marie Clifford. She informed me that the NCSE appoints staff for pupils with disabilities and not for adults.
- In light of this information and Dr. Madden's Medmark report it was with deep regret that the board decided that Marie would not be suitable for the challenging role of an SNA in Nano Nagle School…
- It was also decided by board members not to agree to mediation (an option presented to the board by the union) as it was felt it would only prolong a decision being made and would not be fair or kind to Marie."

14. Arising from that board meeting, the school wrote to Ms. Daly on the 27th of December, 2011, informing her that she was medically unfit for the position of special needs assistant in the school and effectively dismissing her.

The Labour Court's Determination.

15. The Labour Court in a detailed 35 page determination commenced by setting out some of the relevant background to the matter and noted with regard to the position adopted by the parties the following (at page 2):

> "[The school] contends that, having taken professional and medical advice, it became clear that [Ms. Daly] lacked the capacity to perform all of the duties of an SNA and that there were no facilities that it could have made available to [Ms. Daly] which would have rendered her fully capable of performing the role for which she had been employed."

16. A number of witnesses gave oral evidence before the Labour Court and Ms. Daly was represented by her union official and the school by solicitors and counsel. The Labour Court noted the evidence of Ms. Daly, her husband, the school principal, Ms. McGrath, Dr. Madden, the deputy school principal and the principal of another special school. The Labour Court noted the evidence of Ms. Daly's husband as follows (at page 7):

> "[Ms. Daly's] husband told the court in evidence that he had accompanied his wife at the final consultation with the Dr. [Madden]. He confirmed that Dr. [Madden] had informed them that he was obliged to certify [Ms. Daly] as unfit for work because he had been told by [the school] that it was not prepared to provide the necessary accommodation so as to allow her to resume working."

17. With regard to the evidence of Ms. Murphy, school principal, the Labour Court noted (at page 9):

> "It was Ms. [Murphy's] evidence that the decision of the board of management not to allow [Ms. Daly] return to work was based on the advice of Dr. [Madden] and on the conclusion of Ms. [McGrath] that [Ms. Daly] could not work full-time and perform the full range of duties attached to her role as an

SNA. The witness accepted that Ms. [McGrath] had recommended that [Ms. Daly] be accommodated as a "floating" SNA but no such position existed.

In cross examination the witness was asked if she had formed the view in relation to [Ms. Daly's] capacity before receiving the final report of Dr. [Madden]. She said that the level of accommodation that would be required in order to allow [Ms. Daly] return to work was not possible.

The witness also accepted that she had been informed that Dr. [Madden] and [Ms. Daly] had agreed a possible return to work dated the 8th of March 2011 but that this was conditional on the result of a risk assessment. The occupational therapist had recommended using [Ms. Daly] as a "floating" SNA but no such position exists. Ms. [Murphy] told the court that she had spoken to a named official of the National Council for Special Education who informed her that the engagement of a SNA in such a capacity would not be approved.

The witness also accepted that [Ms. Daly] was not asked to make submissions or to comment on the risk assessment report before the board of management decided that she could not return to work…

In response to further questions from the court the witness said that at the material time there were 26 permanent and one substitute SNA employed. Ms. [Murphy] told the court that she had not considered reallocating duties that [Ms. Daly] could not perform amongst the other SNAs. She said that it would be unfair to do so and it would involve the other 26 SNAs undertaking additional heavy lifting and other physically demanding work. The witness thought that this could have health and safety implications for them. The witness did not discuss the possibility of reallocating tasks in this was with the

other SNAs nor did she obtain advice on the health and safety implications of such reallocation."

18. The determination then goes on to deal with the submissions of the parties and notes that the school submitted that the Act does not require an employer to continue an employee in employment who is not fully capable of undertaking the job that he or she was employed to do.

19. The Labour Court then undertook a comprehensive analysis of the law both in terms of national and European legislation and case law. It then went on to consider the evidence that had been given and said (at page 30):

> "[The school] has characterised the claim made by [Ms. Daly] as amounting to a contention that an entirely different job should have been created in order to accommodate her needs. This contention is based on the recommendation contained in the report of Ms. [McGrath] that she could be employed as a 'floating SNA'. In her evidence to the court Ms. [McGrath] accepted that her use of that term was somewhat infelicitous. Ms. [McGrath] told the court that what she meant by that term was that the work of all the SNAs employed by [the school] could be reorganised so as to confine [Ms. Daly] to performing those tasks that she was physically able to perform safely across a number of classes while distributing those tasks that she could not undertake amongst the other 26 SNAs.
>
> That will undoubtedly have involved a significant change in how the care needs of those attending the schools could be met. But it cannot be fairly characterised as expecting [the school] to create a wholly new job. [Ms. Daly] at all times wished to return to work as an SNA but with the various components of that role reorganised so as to relieve her of responsibility for undertaking those tasks that she could not perform.

In her evidence to the court Ms. [Murphy] dismissed this possibility because, she said, it would involve the other SNAs in undertaking additional lifting and other physically demanding work. She said that this would be unfair to [Ms. Daly's] colleagues and could pose a health and safety risk for them. Ms. M. accepted that she had never discussed this possibility with the other 26 SNAs nor did she have an assessment undertaken of the possible impact on their health and safety. The court is satisfied on the evidence that this possibility was never adequately considered by the respondent."

20. With regard to the apparent change of opinion by Dr. Madden between that expressed in his first two reports and his third and final report on the 21st of November, 2011, the Labour Court reached the following conclusion (at page 31):

"The conversation between Ms. [Murphy] and Dr. [Madden] appears to have taken place on or about the 20th of November 2011. The content of that conversation was the principle reason why Dr. [Madden] revised his earlier conditional opinion on [Ms. Daly's] fitness to resume working and certified her as unfit for work."

21. With further regard to the interaction between Dr. Madden and the school principal immediately prior to his final report, the Labour Court said (at page 32):

"It is also clear both from the evidence given in the course of the appeal and from [the minute of the board meeting of the 15th of December 2011] that the board was influenced in its decision by Dr. [Madden's] conclusion that [Ms. Daly] was medically unfit to work as an SNA. However there is no evidence that the board was made aware that Dr. [Madden] formed that opinion on the understanding that [the school] would not or could not make the necessary adjustments in work organisation so as to accommodate [Ms. Daly]. Nor was

the board of management made aware that if those arrangements were made she would be fit to return to work."

22. With regard to the issue of Ms. Daly's input to the ultimate decision and attempts made to accommodate a reorganisation of her duties, the Labour Court reached the following conclusions (at page 32):

> "[The minute of the board meeting of the 11th of December 2011] and the testimony of Ms. [Murphy] confirm that the board of management of the [school] reached its decision without seeking any input from [Ms. Daly]. The decision not to pursue the possibility of reorganising duties among the SNAs was based on the import of a conversation reported to it between Ms. [Murphy] and a named official of NCSE concerning the feasibility of such an approach. This named official of NCSE did not give evidence and the court was not made aware of the details of the opinion expressed by this official or the basis upon which it was formed. Furthermore, the court finds the minute of record of the report made to the board somewhat puzzling. It reports that Ms. M. was informed that NCSE *appoints staff for children with disabilities and not for adults*. There was never any suggestion that [Ms. Daly] should work with adults.
>
> It was, however, for the board of management, as [Ms. Daly's] employer, to reach its own conclusions on the reasonableness and proportionality of the form of accommodation that was needed in order to facilitate [Ms. Daly's] return to work. Apart from seeking an opinion from NCSE, there is no evidence that the board of management ever independently considered that question."

23. In a section of the report entitled "Conclusion", the Labour Court said the following (at page 33):

"There is no doubt that [Ms. Daly] was severely limited by her disability and the range of tasks that she could perform. She could not carry out all of the duties attaching to the role of an SNA. But she could undertake many of those tasks. It appears from the evidence adduced that the school's response to that position was based on the belief that its duty was confined to providing [Ms. Daly] with such accommodation as might enable her to undertake the full range of tasks expected from a SNA. Regrettably, no amount of accommodation could produce that result. In that respect [the school] construed its duty to narrowly and took a mistaken view of what the law required in the prevailing circumstances.

[The school] has a duty to fully consider the viability of a reorganisation of work and a redistribution of tasks among all of the SNAs so as to relieve [Ms. Daly] of those duties that she was unable to perform. That, in effect, was what had been proposed by Ms. [McGrath]. At the material time [Ms. Daly's] interest was being represented by her trade union. [The school] might reasonably have sought an input from [Ms. Daly] herself and her trade union before making its decision. Furthermore, as was proposed in the first assessment report, [the school] could have considered returning [Ms. Daly] to work with modified duties for a trial period. However on the evidence the court is satisfied that [the school] did not give any real consideration to these possibilities. The court cannot speculate as to what the outcome might have been if [the school's] board of management had given proper and adequate consideration to these or any other options that [Ms. Daly] may have advanced if given the opportunity to make submissions in defence of her position. Had [the school] given full and proper consideration to these possibilities it might

or it might not have concluded they were viable, reasonable and proportionate in the circumstances prevailing.

It is also significant that [the school] never considered offering [Ms. Daly] a renewal of her secretarial role, which she could plainly perform with little or no adjustments, or consider the feasibility of providing her with part time employment."

24. In a section entitled "Summary", the Labour Court concluded:

"In this case [the school] did obtain independent professional advice on [Ms. Daly's] capacity. That advice did not rule out the possibility of [Ms. Daly] returning to work if certain adjustments were made to the range of tasks that she would be expected to perform [Ms. Daly] was not consulted on the question of how effect have been given to the recommendation made by the professional advisors. Nor did [the school's] board of management properly or adequately consider that question. It simply concluded that because [Ms. Daly] was manifestly unable to undertake the full range of duties attaching to the job of an SNA she could not return to work. Had [the school] given full and adequate consideration to all the possible options it might or it might not have reached a different decision. That, however, is not a matter on which the court can speculate."

25. The Labour Court went on to reach its final conclusion that Ms. Daly was entitled to succeed in her appeal and awarded her a sum of €40,000 in compensation.

The Legislative Framework.

26. Section 16 of the Employment Equality Act 1998, as amended, provides as follows:

(1) Nothing in this Act shall be construed as requiring any person to recruit or promote an individual to a position, to retain an individual in a position, or to

provide training or experience to an individual in relation to a position, if the individual—

(a) will not undertake (or, as the case may be, continue to undertake) the duties attached to that position or will not accept (or, as the case may be, continue to accept) the conditions under which those duties are, or may be required to be, performed, or

(b) is not (or, as the case may be, is no longer) fully competent and available to undertake, and fully capable of undertaking, the duties attached to that position, having regard to the conditions under which those duties are, or may be required to be, performed.

(2) In relation to—

(a) the provision by an employment agency of services or guidance to an individual in relation to employment in a position,

(b) the offer to an individual of a course of vocational training or any related facility directed towards employment in a position, and

(c) the admission of an individual to membership of a regulatory body or into a profession, vocation or occupation controlled by a regulatory body,

subsection (1) shall apply, with any necessary modification, as it applies to the recruitment of an individual to a position.

(3)

(a) For the purposes of this section, a person who has a disability is fully competent to undertake, and fully capable of undertaking, any duties if, the person would be so fully competent and capable on reasonable accommodation (in this subsection referred to as "appropriate measures") being provided by the person's employer.

(b) An employer shall take appropriate measures, where needed in a particular case, to enable a person who has a disability -

i. To have access to employment

ii. To participate and advance in employment,

iii. To undergo training,

Unless the measures would impose a disproportionate burden on the employer.

(c) In determining whether the measures would impose such a burden account shall be taken, in particular, of –

(i) The financial and other costs entailed.

(ii) The scale and financial resources of the employer's business and

(iii) The possibility of obtaining public funding or other assistance.

(4) In subsection (3)—

"employer" includes an employment agency, a person offering a course of vocational training as mentioned in section 12 (1) and a regulatory body; and accordingly references to a person who has a disability include—

(a) such a person who is seeking or using any service provided by the employment agency,

(b) such a person who is participating in any such course or facility as is referred to in paragraphs (a) to (c) of section 12 (1), and

(c) such a person who is a member of or is seeking membership of the regulatory body;

'appropriate measures', in relation to a person with a disability—

(a) means effective and practical measures, where needed in a particular case, to adapt the employer's place of business to the disability concerned,

(b) without prejudice to the generality of paragraph (a), includes the adaptation of premises and equipment, patterns of working time, distribution of tasks or the provision of training or integration resources, but

(c) does not include any treatment, facility or thing that the person might ordinarily or reasonably provide for himself or herself;"

27. Council Directive 2000/78/EC of the 27th of November, 2000, provides that Article 5 as follows:

"Reasonable accommodation for disabled persons

In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned."

28. The following recitals to the Directive were referred to by the Labour Court in its determination:

"(17) This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to

undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities…

(20) Appropriate measures should be provided, i.e. effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources.

(21) To determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance."

The Arguments

29. Although the school's originating notice of motion contained a large number of grounds, Ms. Bolger S.C. for the school said that these could be grouped into four categories. Ms. Bolger referred to a number of well known authorities such as *Ahern v UCC* [2005] 2 IR 577 where it was held that the findings of a body such as the Labour Court could be set aside by the High Court where it was clear that there was no evidential basis for those findings.

30. First, she submitted that the Labour Court has analysed Ms. McGrath's evidence wrongly and had ignored the most significant parts of that evidence. It was submitted that the Labour Court in its determination simply recited the evidence contained in Ms. McGrath's report but failed to refer to the actual oral evidence she gave which was significantly different. It was contended that Ms. McGrath's oral evidence to the Labour Court was to the effect that Ms. Daly was in Ms. McGrath's opinion not fit for the role of SNA in the school. Although there was some controversy as to what Ms. McGrath's evidence actually was, it was submitted on

behalf of the school that Ms. McGrath had said that she did not believe there were steps that the school could take to enable Ms. Daly to carry out the duties of an SNA.

31. However, there was no dispute between the parties that the following critical exchange took place between the chairman of the Labour Court and Ms. McGrath:

> "Chairman: Could she work as an SNA in a reorganised environment?
>
> Ms. McGrath: No. I now believe that this wouldn't be possible. But this would be an issue for the employer."

32. Ms. Bolger submitted that this evidence, which was undisputed, was ignored by the Labour Court and its conclusions were arrived at in the teeth of the evidence to such an extent that those conclusions could not be regarded as rational and flew in the face of reason and common sense, a reference to the classic *O'Keeffe v. An Bord Pleanála* [1992] ILRM 237 test. The second ground relied upon by the school was that the Labour Court made an error of law in relation to its interpretation of s. 16 of the Act. She said that the Labour Court had in effect concluded that s. 16 could be construed so as to require the employer to reorganise and restructure the job so that the employee would only be required to carry out the essential duties of the job so restructured rather than the original job itself. Ms. Bolger referred to the judgment of the Court of Justice of the European Union in *HK Danmark acting on behalf of Ring (applicant) v Dansk Almennyttigt Boligselskab (respondent)* [2013] IRLR 571 where it was held that the context of reasonable accommodation may include reducing the hours to be worked in the job. However, she said that the Labour Court equated the reduction of hours in the *Ring* case with the reduction of duties in Ms. Daly's case for which there was no authority.

33. The school submitted that the Labour Court had misconstrued the effect of the recitals to the EU Directive. Whilst the court initially appeared to accept that the recitals do not form part of the Directive and have no binding force, the court then

went on in effect to rewrite s. 16 on the basis that the recitals took precedence by importing the concept of essential functions or essential tasks into the Section, which was clearly impermissible.

34. The third ground of appeal relied upon by the school was that the Labour Court were wrong in arriving at the conclusion that the employer had an obligation to consult with the employee in so far as the preparation of Ms. McGrath's report was concerned. It was submitted that there could be no obligation to consult in relation to a medical report which was clearly a matter of expert evidence and the Labour Court's determination in this regard was contrary to the judgment of the Circuit Court in *Humphries v Westwood Fitness Club* [2004] ELR 296. The school submitted that the Labour Court had ignored significant correspondence which demonstrated that Ms. Daly had in fact intended to retain her own occupational therapist to conduct a review and was facilitated in that regard by the school but she had not yet proceeded with it.

35. Finally, the school submitted that the Labour Court had failed to engage in any analysis with regard to the disproportionate financial burden which would be imposed on the employer were the school to reorganise the job of SNA to suit Ms. Daly. In this regard, the school pointed to the fact that it had made contact with the relevant government agency which was responsible for funding all SNA's with a view to establishing whether funding might be forthcoming for the job of floating SNA proposed originally by Ms. McGrath, for which she felt Ms. Daly might be suitable. Counsel submitted that the Labour Court had treated in a somewhat disdainful manner the evidence of telephone contact between the school principal and the government agency concerned when that evidence was unchallenged.

36. Mr. Quinn S.C. on behalf of Ms. Daly submitted that the reports initially obtained by the school from both Dr. Madden and Southern Safety were positive in

terms of Ms. Daly returning to work. Ms. McGrath in her report had identified 16 categories of duty inherent in the SNA role and she said that there were 7 that Ms. Daly could not do and 9 that she could undertake either fully or partly. Counsel said that Ms. Daly was therefore able to undertake a significant part of the SNA role. He said that the underlying philosophy of the Act was to adapt the job to the person rather than the other way around and this was common case between the parties. Counsel submitted that the Labour Court were entitled to come to the view, as they appear to have done, that Dr. Madden in effect changed his opinion about Ms. Daly's suitability for the job solely as a result of having been told by the school principal that the school would not accommodate the necessary changes. Yet this opinion was relied upon by the school at its board meeting of the 11th December, 2011, to reach the conclusion in effect that Ms. Daly would be dismissed. Thus the school's decision to dismiss Ms. Daly, while ostensibly based on Dr. Madden's medical opinion, was in fact the result of its determination that it would not facilitate her. Mr. Quinn submitted that it was important to remember that when the school made this decision, they had Ms. McGrath's report available which suggested that Ms. Daly was fit for a significant part of the duties of SNA and could be accommodated as a floating SNA but the school had simply decided that they would not afford her that accommodation. That decision was arrived at despite the conclusions of Ms. McGrath contained in her report and of course the evidence she gave several years later before the Labour Court, in so far so it differed from her report, was not a matter that the school could have had regard to in 2011 when it made its decision.

37. He contended that while it initially appeared that the evidence given orally by Ms. McGrath to the Labour Court differed to a significant degree from what was said in her report, when one analysed it closely, and in particular the exchange above referred to with the Chairman, it was clear that what Ms. McGrath was saying was

that she now believed that Ms. Daly could not work as an SNA in a reorganised environment because the school had since made it clear that they would not take the necessary action. The fact that Ms. McGrath said that this would be an issue for the employer reflected this fact and thus she was not offering an expert opinion but merely reciting what she had been told by the school. Accordingly, there was no question of the Labour Court ignoring her evidence and analysed properly the court had arrived at a conclusion that was manifestly sustainable on that evidence.

38. Mr. Quinn submitted that the school's whole approach was premised on an incorrect understanding of the meaning of s. 16. The school believed that reasonable accommodation within the meaning of the section meant taking steps to enable the employee to do all of the job. This was in fact the school's submission to the Labour Court and again before the High Court. The school erroneously thought that what s. 16 meant was that unless they are in a position to put steps in place to enable Ms. Daly to do the entirety of her job, they had no further obligation to her. Accordingly, the school never engaged with the concept of adapting or changing the job to fit with Ms. Daly's disability. He said that the school were still clinging to the notion that because no amount of measures would ever enable Ms. Daly to do the entire job, their obligation to pursue the matter further was discharged. In the light of that, the Labour Court where perfectly entitled to form the view that the employer had never properly engaged with its obligations under the Act.

39. With regard to the correct interpretation of s. 16, Mr. Quinn submitted that it was only on the second day of the trial that the school conceded for the first time in submissions that it was possible to strip out peripheral tasks, whatever that may mean, from the job provided the essential one was remained. That was entirely contrary to the position that the school had adopted throughout up to that point, viz, that the

employee must be able to do all the job. He referred to the submissions made by the school before the Labour Court on this point where it was stated:

> "III Are there any 'appropriate measures' which would render the disabled person capable of doing the job for which they were employed? Is the respondent required to 'adapt' or strip the duties and responsibilities of the job of the complainant within the school?
>
> (51) The answer to both questions is no. There is nothing that the respondent can do which would render the complainant capable of performing all of the duties expected of a Special Needs Assistant with the student profile of the type that exists in the respondent's school. What has been recommended is that the respondent would strip the core duties of a Special Needs Assistant from the complainant's job and create an entirely new position of 'floating' Special Needs Assistant to specifically accommodate the complainant. This is not an 'appropriate measure' required under the law."

40. Counsel submitted that the school had now entirely resiled from this position.

41. He submitted that the school's misunderstanding of the true import of s. 16 stemmed from an initial reading of s. 16(1)(b) on its own which appears to suggest that the employee must be fully competent to do the entire job. However, it is clear when one considers subsections (3) and (4) that this is not what the section requires. "Appropriate measures" as defined in subsection (4) expressly envisage adaptation of the distribution of tasks which is in fact what Ms. McGrath had originally proposed. Although the school were now conceding that peripheral tasks could be stripped out of the job, there was no authority for the proposition that only such tasks could in fact be taken from the job. In any event there was no practical means of establishing what the peripheral tasks were as Ms. McGrath in her report did not separate out these from what the school were now calling essential tasks.

42. Mr. Quinn submitted that if the school's original case were correct i.e. that you must be able to do all the duties, then no disabled person could ever succeed in a claim under the Act. Therefore he submitted that the Labour Court was correct in reaching its conclusion. It viewed the Act as requiring the employer to consider changing the job and the Act clearly envisages changing the duties assigned to the employee, something which the school were unwilling to consider right from the outset as a result of an incorrect understanding of the Act. He referred to the *Ring* case and said although that referred to reduced hours, there was no reason why the same logic could not be applied to reduce tasks as the Labour Court had correctly concluded.

43. On the right to consult in relation to Ms. McGrath's report, counsel for Ms. Daly submitted that this was not in fact a medical report and at no time before reaching its determination to dismiss Ms. Daly on the 11th December, 2011, did the school permit her to make any representations regarding how she might be accommodated. The Labour Court in its decision in the *Humphries* case had spelt out the steps appropriate for such consultation and contrary to what the school argued, the Labour Court had not been over ruled by the Circuit Court on this point.

44. On the final argument regarding disproportionate burden, counsel said that the evidence was that the Department indicated that they would not pay the cost of a floating SNA. The Labour Court said that the engagement with regard to this aspect was confined to simply ringing the NCSE and the Labour Court properly held this to be an inadequate effort to explore the issue. The Labour Court noted that there was no way of knowing what information was given to the NCSE on foot of the inquiry made but certainly if it was based on the erroneous assumption that had been made by the school throughout that Ms. Daly had to be fit for the entirety of the job, then one could readily see how the decision of the NCSE was made without it being informed

as to the correct criteria to be applied. Counsel argued that the Labour Court were perfectly entitled to conclude that this was an insufficient effort on the part of the school to determine whether or not it might be possible to adapt the job in a way that could be particularised to the department before any decision was taken about funding.

45. However, he said fundamentally the funding issue was irrelevant because the school had already taken a decision that Ms. Daly could not do the job. This was clear from the board minute which said that the board would not even entertain mediation which clearly indicated that they had made up their minds finally at that stage.

Discussion.

46. The appeal in this case is brought pursuant to s. 90 (1) of the Employment Equality Acts 1998-2011 which provides as follows:

> "90. Appeals and references from the Labour Court.
>
> (1) Where a determination is made by the Labour Court on an appeal under this Part, either of the parties may appeal to the High Court on a point of law."

47. The jurisdiction of the High Court in appeals from different decision makers on points of law has been considered in many cases. I think it is fair to say at this juncture that the jurisdiction coincides to a significant degree with that exercised by this court in dealing with applications for judicial review of decisions of administrative bodies. Where findings of fact are concerned, this court cannot intervene unless the conclusion arrived at is manifestly without any evidential basis. The frequently cited locus classicus is the decision of the Supreme Court in *Henry Denny and Sons (Ireland) Ltd v. Minister for Social Welfare* [1998] 1 IR 34. Hamilton C.J., while agreeing with the other judgments of the court, delivered a short judgment to emphasis this principle, saying (at page 37):

"...I believe it would be desirable to take this opportunity of expressing the view that the courts should be slow to interfere with the decisions of expert administrative tribunals. Where conclusions are based upon an identifiable error of law or an unsustainable finding of fact by a tribunal such conclusions must be corrected. Otherwise it should be recognised that tribunals which have been given statutory tasks to perform and exercise their functions, as is now usually the case, with a high degree of expertise and provide coherent and balanced judgments on the evidence and arguments heard by them it should not be necessary for the courts to review their decisions by way of appeal or judicial review."

48. Keane J. (as he then was) in delivering a judgment with which the Chief Justice agreed, cited with approval the comments of the High Court judge whose decision was under appeal in the following terms (at page 44):

"In her judgment, the learned High Court Judge (Unreported, High Court, Carroll J., 18th October, 1995), having pointed out that the appeal was on a question of law only, observed:-

'In an appeal on a question of law the court does not go into the merits of the decision. The primary facts are not in issue. Where there is a question of conclusions and inferences to be drawn from facts (a mixed question of fact and law) the court should confine itself to considering if they are conclusions and inferences which no reasonable person could draw or whether they are based on a wrong view of the law.' "

49. Keane J. went on to refer to an earlier decision of the Supreme Court (at page 47):

"In Mara (Inspector of Taxes) v. Hummingbird Ltd. [1982] 2 I.L.R.M. 421, Kenny J., speaking for this Court, said at p. 426 in reference to findings of fact in a case stated by an appeals commissioner under the Income Tax Act, 1967:-

'A case stated consists in part of findings on questions of primary fact . . . These findings on primary facts should not be set aside by the courts unless there was no evidence whatever to support them... Finally, if his conclusions show that he has adopted a wrong view of the law, they should be set aside. If however they are not based on a mistaken view of the law or a wrong interpretation of documents, they should not be set aside unless the inferences which he made from the primary facts were ones that no reasonable commissioner could draw.' "

50. Similar views have been expressed in the subsequent cases of *Ahern v. UCC* [2005] 2 I.R. 577, *Ryanair Ltd v. The Labour Court* [2007] 4 IR 199 and *HSE v. Umar* [2011] 22 ELR 229.

51. The courts have adopted a similar standard in judicial review commencing with the seminal judgment in *O'Keeffe v. An Bord Pleanála* [1992] ILRM 237 which held that for a decision to be set aside on the grounds of irrationality, the applicant must satisfy the court that the decision making authority "had before it no relevant evidence which would support its decision" - per Finlay CJ., at 262.

52. These principles encompass the concept of curial deference which has been the subject matter of many judgments in recent times. It is now well established that significant curial deference will be extended to decisions of expert bodies when acting within their own area of expertise. Such deference does not of course apply where questions of law are concerned – see *HSE v. Sallam* [2014] IEHC 298. It seems to me that significant deference must also be extended by this court to the assessment of evidence by the tribunal in question, here the Labour Court, where the tribunal has

had the benefit of hearing oral evidence of witnesses, tested by cross examination, and observing the demeanour of those witnesses. Such an assessment cannot be disturbed by this court unless it has been shown to be unsupported by any evidence and the threshold in that respect is high. It is entirely immaterial whether this court might have reached a different conclusion provided that the conclusion actually arrived at was reasonably open on the evidence – see *Mulcahy v. Minister for Justice Equality and Law Reform* [2002] 13 ELR 12, at p. 17.

53. In the present case, the school complains that the Labour Court failed in its determination to fully recite the evidence of Ms. McGrath and in particular what the school considers to have been the most important part of that evidence. The school submits that this led the Labour Court into error in arriving at its conclusions. The Labour Court had no duty to recite verbatim the evidence of witnesses as though on a transcript. The difficulty with the school's submission in this regard is highlighted by the fact that it was necessary for me to rule on a preliminary application at the commencement of the hearing on the admissibility of notes of the evidence from the school's solicitors and the secretary of the tribunal, respectively, the latter having been obtained through an order for discovery. Furthermore, in a somewhat unusual procedure, Ms. McGrath swore an affidavit for the purpose of putting before this court the evidence she believed she gave before the Labour Court. Despite objection from Ms. Daly's counsel on the basis that these documents were an inaccurate reflection of what had actually transpired before the Labour Court and were contrary to the recollection of the union representative who appeared on Ms. Daly's behalf, who understandably did not have a note of evidence adduced while he was conducting an examination of a witness, I allowed the admission of these documents for what they were worth.

54. To my mind, these documents do not go anywhere near establishing that the Labour Court ignored or misinterpreted Ms. McGrath's evidence in particular or reached a conclusion that was perverse. It seems to me that a very significant issue that arose at the hearing before the Labour Court was the evident disparity between the opinion formed by Dr. Madden before the intervention of the school principal and the opinion expressed thereafter. A similar disparity appeared to arise between the conclusion initially arrived at by Ms. McGrath in her report and her oral evidence to the Labour Court. That was an issue that the Labour Court had to resolve and did so in the manner indicated above.

55. I am satisfied therefore that the school has failed to establish that there was either no evidence on which the Labour Court could have reached the conclusion it did on Ms. McGrath's evidence or that such conclusion was either irrational or one which no reasonable decision maker could have arrived at. There was in my view more than ample evidence available to support the Labour Court's findings.

56. Turning now to the issue of the Labour Court's interpretation of s. 16, the Labour Court noted at the outset that it was the school's position that s. 16 does not require an employer to continue an employee in employment who is not fully capable of undertaking the job that he or she was employed to do. It seems to me that as counsel for Ms. Daly submitted, the school adhered to this position throughout up to the commencement of the hearing of this appeal when it modified its position to a significant degree by conceding that s. 16 may require the stripping out of tasks peripheral to the job. That concession was not made at the hearing before the Labour Court. Thus the school's position was that the concept of reasonable accommodation and the implementation of appropriate measures as defined in subs. (3) and (4) applied only to such measures as would render Ms. Daly capable of fulfilling all the duties of the job. Since no amount of reasonable accommodation or appropriate

measures could ever achieve that situation, the school considered itself to have no further obligation to Ms. Daly.

57. In that regard, I accept Mr. Quinn's submission that this was an erroneous view of s. 16. Were the school's position correct, it would seem difficult to envisage any circumstances in which a person suffering from a disability could be reasonably accommodated. The definition of "appropriate measures" in subs. (4) includes the adaptation of both patterns of working time and distribution of tasks. Although Article 5 does not explicitly refer to patterns of working time and distribution of tasks, these expressions are to found in recital 20 which in itself does not have the force of law but is closely mirrored in the provisions of s. 16 (4) (b).

58. In the *Ring* case, the CJEU concluded that compliance with Article 5 could require adaptation of patterns of working time by actually reducing the number of hours an employee was required to work in a particular job in order to facilitate her disability.

59. At first blush, a literal interpretation of s.16 (1) (b) considered on its own appears to support the position adopted, initially at least, by the school. However, when read in conjunction with s. 16 (3) and (4) insofar as they apply to this case, it is clear that a person with a disability is, for the purposes of the Act, to be regarded as fully competent to undertake and fully capable of undertaking the duties of a given job if such person would be so competent and capable on the distribution of tasks associated with that job being adapted by the employer. As held by the CJEU in *Ring*, the adaptation of patterns of working time must include the elimination of some of that working time, subject always to the caveat that the measures must not impose a disproportionate burden on the employer. The adaptation of the distribution of tasks must also where appropriate include the elimination of tasks since otherwise the section would fail to achieve the objective for which the legislation was enacted.

60. In considering *Ring*, the Labour Court concluded that by parity of reasoning it is also for the national court to assess if a redistribution of tasks represents a disproportionate burden on the facts of a particular case in which that question arises. I can find no fault with that logic. The adaptation of the distribution of tasks must in an appropriate case include a consideration of whether a reduction of those tasks may be necessary in order to comply with s. 16. Indeed the school has acknowledged as much in conceding that it may be necessary to strip out some peripheral tasks from the job. Of course whether, and to what extent, a reduction in tasks is required to comply with s. 16 must necessarily depend on the facts of each case. It may or may not be relevant to consider whether a point is reached when the appropriate measures transform the job into something entirely different from that which originally existed. Some of the English authorities appear to go as far as suggesting that under the equivalent, and admittedly different, English legislation which pre-dates the Directive, the requirement to reasonably accommodate a disabled employee may extend to transferring him or her to an entirely different position within the same organisation – see *Archibald v. Fife Council* [2004] UKHL 32 and *Chief Constable of South Yorkshire Police v. Jelic* [2010] IRLR 774.

61. While the school in its submissions criticises what it submits are various errors of law in the Labour Court's interpretation of the national and European case law, even if same were made, which I do not determine, these do not appear to me to undermine the ultimate outcome. The fundamental determination of the Labour Court here was that the school failed to engage with its duty to consider whether or not Ms. Daly could reasonably be accommodated by the implementation of appropriate measures. The Labour Court did not conclude that Ms. Daly could be so accommodated but rather it was the failure to even consider a redistribution of her tasks as a SNA that rendered the school in breach of s. 16. It seems to me that on the

evidence, the Labour Court was perfectly entitled to reach the conclusion that there had been no adequate consideration or evaluation of these issues by the school and a phone call to the NCSE about funding, the content of which was never precisely determined, was an insufficient effort on the part of the school to comply with its statutory obligation.

62. These are all conclusions which in my view were open to the Labour Court on the evidence and it could not in any realistic sense be suggested that these were irrational or based on an erroneous interpretation of the law.

63. Turning now to the school's third ground of appeal regarding the obligation to afford Ms. Daly to the opportunity to make submissions in relation to Ms. McGrath's report before they acted on foot of it, this appears to me to be a somewhat tangential issue to the ultimate determination that was made by the Labour Court. Both parties relied on *Humphries* on this issue.

64. The Labour Court's own determination in *Humphries*, insofar as relevant to this case, was to the effect that an employee must be allowed an opportunity to make representations to the employer before the employer decides to dismiss him. As a matter of basic fair procedures, it is difficult to argue with that proposition. The Labour Court in *Humphries* articulated the steps that it felt the employer should take to comply with this obligation. There was some dispute between the parties as to whether or not this finding was one which had been upheld by the Circuit Court on appeal or not. There was further argument about whether or not Ms. McGrath's report was a medical report and therefore susceptible to the making of submissions in any event.

65. As I read the Labour Court's conclusion in this regard, it amounts to no more than a determination that Ms. Daly should have been afforded some opportunity to make submissions on how she could be accommodated before the school decided that

she could not be so accommodated and must therefore be dismissed. As I have said, I do not consider that to be an unreasonable proposition but in any event, it does not have a particular bearing on the Labour Court's ultimate conclusion that the school failed to comply with its duty under s. 16.

66. Finally with regard to the school's ground of appeal that the Labour Court failed to analyse whether there was a disproportionate financial burden composed on the school were it to reorganise the job of SNA to suit Ms. Daly, it seems to me that the Labour Court in its determination never in fact arrived at that particular issue because it simply did not arise in circumstances where the Labour Court concluded that the school's erroneous interpretation of s. 16 led it to a failure to engage in any meaningful way with the concept of reasonable accommodation.

Conclusion.

67. It is important to recognise that in reaching its conclusions, the Labour Court did not make any determination that Ms. Daly ought to have been accommodated by the school in any particular way. Rather, the Labour Court was of the view that the school simply did not consider the possible options that were available. Had it done so, the Labour Court was of the view that the school might legitimately have concluded that Ms. Daly could not be accommodated. Thus it said (at p. 33):

> "Had [the school] given full and proper consideration to these possibilities it might or it might not have concluded they were viable, reasonable and proportionate in the circumstances prevailing."

And again on page 34, the Labour Court noted:

> "Had [the school] given full and adequate consideration to all the possible options it might or it might not have reached a different decision. That, however, is not a matter on which the court can speculate."

68. For these reasons therefore, I am satisfied that the school has failed to demonstrate any error of law arising in the determination of the Labour Court the subject matter of this appeal which I must accordingly dismiss.