Bullying and Personal Injuries*

"It is important to record at the outset that bullying is one of the more obnoxious traits in human behaviour. That is so because it involves a deliberate and repeated course of action designed to humiliate and belittle the victim."

This is how the former President of the High Court, Mr. Justice Nicholas Kearns, described the act of bullying in the case of *Glynn –v- The Minister for Justice, Equality and Law Reform, Ireland and the Attorney General [2014] IEHC 133*. He is right. In fact, I think many would be in agreement with him and yet bullying continues to be an ongoing issue in many Irish workplaces.

Bullying can have a devastating impact on an employee's health and lead to an employee becoming very ill and being uncertified as unfit for work. For those employees who have suffered personal injuries as a result of bullying in the workplace, there is little legal redress available to them. There are no laws on bullying in the workplace. The Safety, Health and Welfare at Work Act 2005 is about as close as one can get to redress. There are various codes of practice on what is

best practice in the area of bullying in the workplace but codes of practice are not laws.

Due to the lack of legislation in this area, employees with injuries as a result of bullying in the workplace are left with seeking redress through a personal injuries claim. This is not the best form of redress for an ongoing injury that has been manifesting over a long period of time as a result of treatment in the workplace that more than likely has been ongoing for years. No clear statutory framework means that this is very costly litigation for an employee. Personal injury cases as a result of workplace bullying are a textbook example of having to be *"a pauper or a millionaire"* to be in a position to litigate in the higher courts of our judicial system.

Before embarking on a personal injuries case arising out of bullying, an employee needs to ensure the following: -

There must be an injury to health. If this is not a physical injury, it needs to be a recognisable psychiatric injury. Only a specialist medical practitioner such as a psychiatrist can make this prognosis.

The injury must have been caused by the treatment in the workplace, i.e. the bullying. Again, only a specialist medical practitioner such as a psychiatrist can determine the causation of the injury.

The treatment in the workplace must be wrongful and actionable in law.

It must have been likely that in all of the circumstances, the employer should have foreseen that the employee would be harmed.

The employee must be within the 2 year statute of limitation period within which to bring the claim.

Each of the above elements must be met before embarking on a claim for personal injuries as a result of bullying. Let us examine each element in more detail below.

<u>A Recognisable Psychiatric Injury:</u>

A specialist medical practitioner will make this prognosis. There will be no compensation for upset, distress, humiliation and ordinary stress as a result of bullying with no treatment from a specialist

medical practitioner. A certain degree of robustness is expected of employees and this has been recognised by the Supreme Court. The Supreme Court have also noted that the injury must be measurable and the conduct which caused the injury must be severe.

Causation of Injury:

It might be very obvious to state that the bullying must cause the injury. However, an employee may have a psychiatric history or an underlying condition and, in those circumstances, it might be difficult to separate what has been caused by the bullying and what may have manifested itself over a period of time. Again, it will be up to a specialist medical practitioner to make this prognosis.

Wrongful Treatment:

What an employee may think is bullying can be very different to what the law determines as bullying. The legal definition of bullying is as follows: -

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

The Supreme Court in the case of *Ruffley –v- The Board of Management of St. Anne's School [2017] IESC 33* indicated that all elements of this test must be fulfilled, i.e. each of incident of bullying must be repeated and inappropriate and be regarded as undermining the individual's right to dignity at work. With regard to repeated, the Supreme Court did indicate that two different incidents would not be enough. It was also indicated that inappropriate behaviour does not mean unfair behaviour. Inappropriate behaviour is behaviour that is unacceptable at a human level. The element of undermining dignity at work must be severe and offensive at a human level. It was also noted in this case that while a malicious intent and public humiliation were not necessary components to a bullying claim, their presence would certainly strengthen a claim for personal injuries as a result of bullying.

When determining if the behaviour towards the employee was wrong and actionable in law, the court will adopt an objective test, i.e. would any reasonable person deem this behaviour as wrong and actionable in law? In the case of *Berber –v- Dunnes Stores [2009] 20 ELR 61*, the Supreme Court set out the following test: -

" 1. The test is objective;
2. The test requires that the conduct of both employer and employee be considered;

3. The conduct of the parties as a whole and the cumulative effect must be looked at;

4. The conduct of the employer complained of must be unreasonable and without proper cause and its effect on the employee must be judged objectively, reasonably and sensibly in order to determine if it is such that the employee cannot be expected to put up with it."

Foreseeability: Could or should the employer have seen this injury coming?

As seen in *Ruffley*, an employer is entitled to expect a certain degree of "robustness" from employees. When addressing the issue of foreseeability in *Berber*, the Supreme Court indicated that the question which must be asked is whether the employer was aware or ought to have been aware of an employee's particular vulnerability. What will help get over this test will be scenarios such as where there has been grievances raised by the employee, long periods of sick leave from work, absenteeism from work which would be unusual for the employee, excessive working hours and/or any previous issues with bullying in the workplace.

Statute of Limitations:

The claim for personal injuries must be within the two years of the first incident of bullying. This is usually very difficult as the bullying will usually occur over a period of time. If the claim is issued late and the earlier incidents of bullying are not included, then there may be an argument that the events which caused the harm might be statute barred. The statute of limitations is a very difficult aspect of bullying cases and another example of why personal injuries litigation is not the best method of dealing with injuries as a result of bullying. This

issue was dealt with very well by Mr. Justice McDermott in the High Court in the case of *Catherine Hurley –v- An Post [2017] IEHC 568*. The Defendant in this case argued that the Plaintiff's case was statute barred. Mr. Justice McDermott did not accept this argument and stated that the Plaintiff's date of knowledge of a significant injury only became available to her when;

The symptoms manifested themselves;

The symptoms were diagnosed; and

The symptoms were attributed professionally to the behaviour of which the Plaintiff now complains.

While it is clear from the case law that employees are entitled to protection from bullying and psychiatric injury, these cases are very difficult cases to win and should not be entered into lightly. Due to the absence of any real legislation in this area of law, they are extremely expensive cases for employees and are a classic example of the type of case that only a "millionaire or pauper" can afford to take on. In addition, where an employee has suffered an injury to mental health as a result of bullying, litigating the issue is often counterproductive to recovery. Before embarking on such a case, take careful consideration to the advice given by both legal and medical advisors.

Before acting or refraining from acting on anything in this guide, legal advice should be sought from a solicitor.
In contentious cases, a solicitor may not charge fees as a proportion or percentage of any award or settlement.