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(subject to editorial corrections)*

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

MARY McCARROLL

Plaintiff;

-and-

NORTHERN IRELAND HOUSING EXECUTIVE

Defendant.

GILLEN J

The Claim

[1] In this matter the plaintiff seeks damages for personal injuries, loss and damage sustained by her allegedly by reason of the negligence and breach of statutory duty and harassment of the plaintiff by the defendant its servants and agents in course of the employment of the plaintiff between 12 May 2003 and 30 November 2009. In particular it is alleged that the plaintiff was subjected to discrimination, harassment, embarrassment, differential treatment and stress by the defendant culminating in her dismissal on 30 November 2009.

Background

Matters not in dispute

[2] A number of aspects of this case were common to both parties. It was agreed:-

- The plaintiff commenced employment with the defendant on 12 May 2003 as a part-time Hostel Assistant at Greystones. The hostel consisted of 4

separately constructed houses on the same site. The first was used as an office, and the others for accommodating persons who required housing as a result for example of money problems, domestic abuse, homelessness etc. It was accepted by all that prior to the difficulties that arose she had been an excellent employee.

- Her duties included supervising the occupants of the houses who were provided by the Housing Executive. Part of her duties was to receive complaints from the individuals.
- She was a part-time worker for approximately 2 days per week.
- On 15 March 2004 Colm O'Loan (CO) was employed on the same basis on a full-time job.

Matters in dispute

[3] A number of non-medical aspects of this case were in dispute and they largely surrounded the relationship between the plaintiff and CO and how the defendant had dealt with this. Problems started with CO and the plaintiff in or about 2005. Essentially the plaintiff's case was that she was advised by residents of matters that led her to make a number of complaints about the manner in which CO carried out his work. She considered that the attitude of her employers was to support him almost unconditionally and to take no account of the concerns she had about the manner in which he was carrying out his work. This had the effect of destroying her confidence in the employer and in feeling that she was treated in an inferior way to him. The end result was that primarily from in or about 2007 she and CO did not communicate other than through the communication book at the hostel and when she refused to be transferred to Ballymena in order to resolve the impasse this led to disciplinary proceedings and eventually to her dismissal.

[4] The defendant's case was in essence that it had looked into her complaints against CO, dealt with them in a proper manner and when the plaintiff refused to communicate with CO the smooth running of the hostel became untenable; hence she was asked to transfer. When she declined to resume contact with CO or to transfer disciplinary proceedings were instituted.

[5] On these matters I heard from the plaintiff and, on behalf of the defendant Mrs Smyth the district manager in the Antrim area, Mr Murphy the Assistant manager and Ita McCrory the personnel manager. The principle areas of contention were as follows.

[6] First, in April 2005 the plaintiff submitted a complaint on behalf of a resident Sheila Minford that CO had been conducting an inappropriate relationship with Mrs Minford's daughter e.g. giving her lifts both when he was on and off duty, going for walks with her, not taking steps to avoid the young woman being in her night attire when entering the house etc. There was a dispute as to the age of the girl, the plaintiff asserting that she was 17 whereas Mr Murphy asserted that she was 18. In any event the plaintiff documented the complaint and informed the District

Office. At the monthly hostel meeting in the Antrim District Office shortly thereafter, to which the plaintiff had been invited, and at which the plaintiff handed Mr Murphy the complaint, allegedly Mr Murphy had said "Oh shit what he has done. Leave it to me." CO telephoned her after the meeting and asserted he was simply befriending the resident as a family figure. The plaintiff then convened a meeting with CO, Mrs Minford and herself" to calm the situation"

[7] Mrs Smith gave evidence that she had discussed the matter with CO and given advice to him about his future behaviour. She thought that he had been more naive than anything else and she believed the matter had been resolved.

[8] Mr Murphy said that he had carried out an investigation into the matter and had spoken to Mrs Minford point by point. He thought there was a possibility that CO might be dismissed over this but when he discussed it with him he was satisfied with his explanation. CO was advised that he should not be alone with this girl, not to go into the house when she was there and should not give her lifts etc. Mr Murphy had thought that the plaintiff had played a role in sorting it out. He denied saying what the plaintiff alleged when confronted with the situation. In short he alleged that the defendant had treated this matter seriously but having investigated it and heard CO's explanation, the steps he took he thought were appropriate.

[9] All of this carried the imprimatur of Ita McCrory the Personnel Manager. It was her decision to bring in CO for an explanation of his behaviour and after his explanation was relayed to her she concluded that there was no need for further action unless there was a repetition of behaviour of this kind.

[10] The plaintiff alleged that after April 2005 she noted that families were complaining that CO was often not in the office when they needed him and that he was all too frequently attending the Antrim main office. When she had raised this with Mr Murphy he had said that she also should come down to the Antrim office when free and she might get to sit in on some problems with homeless families. She felt this had all come about because CO had told Mr Murphy that they had plenty of spare time which was not the plaintiff's experience.

[11] The plaintiff considered that at monthly meetings, a two to one relationship was developing with Mr Murphy always backing up CO.

[12] During 2006 a difficulty arose concerning a lady from the travelling community. There had been some concern about her mental state triggering a meeting with CO. In the event after CO left her, she had taken an overdose of tablets. The plaintiff felt that CO should not have left her because she was vulnerable, had spoken of suicide and should not have been left alone. When she raised it with Mr Murphy, allegedly he said "You would not go to CO for counselling" and made a joke of it. Mr Murphy denied this reaction on his part and

saw no blame resting on CO who indicated to him that a social worker was coming from Coleraine very shortly after he left.

[13] An incident occurred arising out of the alleged anti-social behaviour of another family. CO had alleged that the family had been drinking on the premises which was against the rules and that the police had been called to remove them. The plaintiff alleged that a Mrs Donna White had claimed that the family were still drinking but that the plaintiff was aware that this was untrue because she had been with the family 20 minutes earlier. CO and the plaintiff disagreed about how this matter should have been dealt with. He had been insistent that social services should obtain a letter from management about this behaviour whereas the plaintiff felt there was no evidence to justify this. CO considered that the plaintiff was undermining his authority according to her evidence. At a meeting the following Monday it was the plaintiff's case that Mr Murphy made light of the plaintiff's account whereupon she walked out. She allegedly was very upset, hurt and angry and nothing more was done about the matter.

[14] Further conflicts arose between herself and CO. On 9 April 2007 CO apparently accused her of taking paper for the printer and wrongly giving it to children. Nothing occurred about this incident save that the plaintiff said that she was now starting to withdraw and became isolated in terms of having no support from management because her complaints about CO were falling on deaf ears. CO and the plaintiff were no longer conversing and the plaintiff now dealt with the assistant manager Bridie if any matter arose referable to the hostel.

[15] In April 2007 the plaintiff took exception to the fact that CO had assisted a family by paying for a driving theory test and insurance of the vehicle with his own credit card. The plaintiff raised that with staff as she felt that it was inappropriate on his part to have done this. The defendant's case was that it had also investigated this complaint and found that CO had used his debit card to assist two families in circumstances where their car insurance had to be paid by a deadline and that he had simply been helping them out. In short the defendant's case here was that this was an example of CO and the plaintiff doing their job in different ways and that if it was not done the way the plaintiff envisaged it became a major problem.

[16] In July 2007 the plaintiff contacted Mary Shannon in the Welfare Office of the defendant because she felt isolated. A meeting occurred at the plaintiff's house and Ms Shannon agreed to contact the Area Manager Patsy Smith. Two weeks later Patsy Smith came to meet the plaintiff at an informal meeting. The plaintiff claimed that she broke down in tears at this meeting but that during her explanation of her complaints about CO, Patsy Smith said that she liked him. Mrs Smith claimed that she had suggested mediation but this had never been taken up by the plaintiff. Mrs Smith denied that she ever insisted on CO visiting the plaintiff's home and all she meant was that they should have face to face conversations either by telephone or for example at training sessions. She felt there was a need to talk about work at hand-over periods from time to time. She also denied ever saying that she "liked

Colm". The plaintiff claimed that Mrs Smith offered to come back to her within two weeks but that nothing happened.

[17] The plaintiff telephoned her in September 2007 because CO had complained about the manner in which the plaintiff had been cleaning some houses. Mrs Smith had dealt with this by saying she would have a word with him.

[18] There was a further meeting between Mrs Smith and the plaintiff on 29 November 2007 where Mrs Smith discussed with her the difficulties that were being presented for the hostel by virtue of the fact that the plaintiff and CO were not communicating. She said there would be a meeting in February 2008 about this matter.

[19] In January 2008 the plaintiff reported that an Adele Brady had complained that CO was using foul language, and that when she had asked for assistance he had informed her that it was not his "fucking job". The plaintiff claimed that she made a note at Mrs Brady's request about these complaints and sent Geraldine Haire, Senior Housing Officer in the Antrim District an e-mail about this matter.

[20] On 8 February 2008 Mrs Smith arranged a meeting in the Antrim Office with the plaintiff to discuss the vexed area of handovers. Mrs Smith took the view that there needed to be a handover to get the two of them communicating even if this meant that CO had to come to her house. The plaintiff alleged that she said it was not in her job description to do this. At this meeting the e-mail she had sent to Mrs Haire was produced and allegedly CO shouted "there is nothing going on here except what's going on in your head". This was said in the presence of Mrs Smith and Mrs Haire. The plaintiff said she was very upset and tearful, excused herself from the meeting and left in order to ring up her union representative. Subsequently, after she had composed herself, she telephoned Mrs Smith to say that she was returning to work.

[21] The plaintiff alleged that Mrs Smith then said that she required a risk assessment to be carried out on her and on 19 February 2008 an occupational health appointment was made. This arrangement was with the approval of Ita McCrory. Ms McCrory wanted to establish whether it was a work stressor or a personal stressor that was causing the problem. The defendant employs an occupational health nurse four days per week. On 19 February 2008 Mrs Smith had received a report from Jill Hamilton the occupational health expert. Mrs Smith was relieved to find that the plaintiff had insisted that she was medically sound and that she felt that it was simply a case of her being angry with CO and there was nothing more could be done in light of it. Ms Hamilton had made no adverse finding re the plaintiff's health.

[22*]* At about this time Ms McCrory also met with the plaintiff as an independent person hoping to find a resolution of the impasse between herself and CO. She also oversaw the complaint emanating from Ms Brady and it was she who suggested that

someone who was independent eg. Ms Ross a senior housing officer in Ballymena should conduct the interviews. It was her conclusion, having heard from June Ross, that the plaintiff was acting unprofessionally in eliciting a complaint from someone who did not wish to make one. She was intimately involved in the decision to take disciplinary action in circumstances where the plaintiff was making it clear to her that she did not accept Ms Brady's assertions and was refusing to communicate or perform handovers with CO. She regarded the plaintiff as taking a very entrenched attitude refusing to transfer to another location even on a trial basis. In the circumstances Ms McCrory indicated that she saw no alternative to disciplinary proceedings.

[23] On 13 March 2008 a meeting was arranged with the plaintiff and her trade union representative. Mrs Smith and Ms McCrory were present. The contrasting accounts of this meeting were as follows. The plaintiff alleged that she was now to face disciplinary proceedings because she was refusing to engage in a verbal handover with CO. She was also accused of eliciting complaints from CD.

[24] The defendant's case was that she was unreasonably refusing to communicate face to face with CO and, having produced the complaint from Ms Brady, it was agreed that there would be further investigations into those allegations and CO would be interviewed. On 8 April 2008 CO was interviewed about Ms Brady's allegations and once again the conclusion was that he had been trying to help a vulnerable woman and had not done anything inappropriate. Having investigated the matter with Ms Brady, the defendant through Ms Ross had been informed by Ms Brady that she had not signed any complaint and that she had no problem with CO. She also claimed that she had asked the plaintiff not to report any complaint. Having interviewed Mrs Brady, Mrs Smith also said that she was informed by this woman that she had been pressed into this matter by the plaintiff. In short it was the defendant's case that the plaintiff had influenced a resident of the hostel to make an unfounded complaint against CO.

[25] On 9 April 2008 Mrs Smith caused a letter to be sent to the plaintiff indicating that the defendant had concluded that there was no rational explanation or reason for her continued refusal to communicate with CO. In the letter she said "There are clear differences of opinion about how various aspects of the work should be done, however, these are issues which should be sorted out through discussions at meetings in this office with management and reinforces the need for face to face communication and verbal handovers. I would wish to explore further what arrangements can be put in place to ensure that this can be achieved."

[26] This letter went on to deal with the complaint of Adele Brady. The letter recorded:

> "As promised I have carried out an investigation into this complaint and I have interviewed Adele Brady. On this issue I am concerned that you have prepared

> and written this complaint on behalf of Adele Brady. She has informed me that you wrote the complaint and she signed it. She indicates that she is not in agreement with the content of the complaint and is not pursuing the matter further. I would take the view that this is acting in an unprofessional manner and is conduct which is not expected of an Executive employee. The Executive would consider such behaviour as serious misconduct under the Executive's disciplinary procedure. Before deciding if action is appropriate under the Executive's disciplinary procedure I would wish to give you the right to further explain the matter."

[27] Mrs Smith drew attention in that letter to how the defendant could not manage the hostel effectively if a staff member refuses to communicate with another "It is impossible to provide services to residents when the only communication is through notes written in a book"

[28] Eventually a meeting took place on 4 June 2008 at which Mrs Smith and the plaintiff were present to discuss again these matters. The plaintiff was informed that June Ross from the Area Office had spoken to Mrs Brady, had re-affirmed that the complaint had been prepared by the plaintiff and that Mrs Brady did not have a complaint to make about CO apart from one minor issue of removing a bicycle without permission from her property. It was also recorded at the meeting that whereas the plaintiff would not communicate at any level with CO, he had indicated that he had no problem communicating face to face with her to do handovers and discuss matters regarding the management of the hostel.

[29] It was suggested to the plaintiff that she might consider moving to another hostel on a trial basis but the plaintiff ruled that out on the basis of travel difficulties. Accordingly in a letter of 10 June 2008 Mrs Smith wrote to the plaintiff indicating "that she had no alternative but to refer this matter before a disciplinary hearing".

[30] 11 September 2008 was the first stage of the disciplinary process. During the hearing management advised that it would consider further discussions for the plaintiff. However she refused to do this. The matter was then adjourned pending a consideration of other alternatives.

[31] On 3 December 2008 the Disciplinary Panel reconvened. The Panel decided that the plaintiff had influenced the tenant to complain and that by refusing to communicate she was failing to carry out her responsibilities. They therefore concluded that the plaintiff should be transferred from Greystone Hostel to another vacancy in Ballymena and indicated that she should be advised that if she did not comply with the decision, disciplinary measures would need to be invoked.

[32] On 19 February 2009 a Joint Appeals Board heard the plaintiff's appeal against the decision of the Disciplinary Panel. It decided to support the decision made by that Disciplinary Panel and added a rider that the matter be reviewed in August 2009 to determine whether circumstances in relationships had changed to the extent that the plaintiff could return to Greystone. They also noted the plaintiff's "total refusal to consider any mediation or other efforts to resolve the issues". That decision was issued on 5 March 2009.

[33] On 11 March 2009 a letter from Ita McCrory to the plaintiff instructed her to move to the Ballymena hostel from 1 April 2009. No confirmation was ever received from the plaintiff that she was prepared to do this.

[34] On 23 March 2009 the plaintiff commenced sick leave claiming work related stress. On 15 April 2009 there was an occupational health appointment made for the plaintiff. The report indicated that the plaintiff stated that she was distressed at perceived unfair treatment by management.

[35] After various adjournments on the basis that the plaintiff was alleging she was unfit to attend Dr McCrea a specialist in Occupational Health with the defendant carried out an assessment as to her fitness to attend a tribunal. Thereafter a further disciplinary hearing was convened on 29 September 2009. That hearing was postponed and rescheduled for October 2009. Eventually the hearing was convened on 30 October 2009 and the Panel concluded that the instruction for the plaintiff to move to another hostel was reasonable. It determined that failure to comply with the instruction was gross misconduct and in the circumstances dismissal was the appropriate penalty.

Did the plaintiff suffer from a psychiatric condition as the result of stress at work?

[36] The first matter I have to consider is whether the plaintiff did suffer from a psychiatric condition as a result of stress at work. Two psychiatrists were called to give evidence in this case. Dr Brown on behalf of the plaintiff and Dr Chada on behalf of the defendant. Dr Brown considered that the plaintiff was suffering from an adjustment disorder as recognised by the International Classification of Diagnosis of Mental Disorders. An Adjustment Disorder is defined as occurring when someone is:-

> " subjected to stress and emotional disturbance, usually interfering with social functioning and performance and arising in the period of adaption to a significant life change or the consequences of a stressful life event. Common symptoms of this condition are anxiety, depression."

[37] Dr Chada on the other hand felt that the plaintiff was simply suffering upset and feelings of anger and frustration as the result of her work problems.

[38] I have come down in favour of the assessment made by Dr Brown for the following reasons:-

- The plaintiff had a significant vulnerability to stressful situations. She suffered from pre-existing fibromyalgia and stress due to problems at home in the past.
- There is independent evidence that she attended her General Practitioner Dr Moss on 20 October 2008 for treatment for sinusitis but she did mention there were stress issues at work albeit no treatment was then prescribed. In March 2009 Dr Moss refers to her "current episode of stress starting in March 2009 after the result of an Appeals Tribunal work and was not related to previous issues". He treated her with half Inderal LA and she was off work at that time with what he described as "work related stress".
- Dr Chada characterised this treatment as indicative of occasions in her experience when practitioners prescribe treatment such as this when in fact there is no clinical basis. I do not accept that this was such an occasion in March 2009.
- Dr McCrea, the specialist in Occupational Health who carried out an assessment on the plaintiff at the request of the defendant on 31 August 2009(see para 35 above) concluded:-

> "It is clear that Mary has developed a significant adjustment reaction to the situation in work in which she perceives herself to be a victim of harassment and subsequently unfair treatment. Of course it is not a primary medical problem amenable to medical solution and while the secondary picture is being managed currently by a period of absence from work the prescription of medication and a referral for counselling this of course is not going to resolve the primary issues which remain outstanding."

- Dr Meena, Consultant Rheumatologist, gave evidence that the underlying condition of fibromyalgia from which the plaintiff undoubtedly suffered before she even commenced employment with the defendant (but which she had not revealed in a pre-employment medical) can be exacerbated by work related stressors. In this case he considered that there was a temporal relationship between her muscular skeletal symptoms which manifested as widespread muscular pain and joint problems and the stressors at work. He felt it required a bit more than the" normal rough and tumble of work "to bring this about.

[39] I have concluded therefore that in March 2009 in the wake of the disciplinary process the plaintiff was suffering from a work related adjustment disorder but it is important to observe that the plaintiff had not sought any medical advice or

treatment for such a condition prior to March 2009 and had not informed her employer of any such condition or symptoms (even though she had such an opportunity when she had seen Ms Jill Hamilton).

Legal Principles governing liability for an employee's psychiatric illness caused by stress at work

[40] The seminal case laying out the legal principles governing cases of this type is to be found in Hatton v Sutherland, Barber v Somerset County Council, Jones v Sandwell Metropolitan Borough Council and Bishop v Baker Refractories Limited [2002] 2. A.E.R. 1.

[41] Hale LJ summarised the legal principles governing such cases at paragraph 43 as follows.

[42] First there are no special control mechanisms applying to claims for psychiatric (or physical) illness or injury arising from the stress of doing the work an employee is required to do. The ordinary principles of employer's liability apply.

[43] The threshold question is whether this kind of harm to this particular employee was reasonably foreseeable. This has two components:

(a) An injury to health (as distinct from occupational stress) which,

(b) Is attributable to stress at work (as distinct from other factors).

[44] Foreseeability depends upon what the employer knows (or ought reasonably to know) about the individual employee. Because of the nature of mental disorder, it is harder to foresee than physical injury but may be easier to foresee in a known individual than in the population at large.

[45] An employer is usually entitled to assume that the employee can withstand the normal pressures of the job unless he knows of some particular problem or vulnerability.

[46] Factors likely to be relevant in answering the special question in the context of this case include:

- The nature and extent of the work done by the employee

- Has she a particular problem or vulnerability

- Has she already suffered from illness attributable to stress at work

- Signs from the employee of impending harm to health. Has she a particular problem or vulnerability? Has she already suffered from illness attributable

to stress at work? Have there recently been frequent or prolonged absences which are uncharacteristic of her. Is there reason to think that these are attributable to stress at work?

- The employer is generally entitled to take what he is told by his employees at face value unless he has good reason to think to the contrary. He does not have to make searching inquiries of the employee or seek permission to make further enquiries of his medical advisors.

- To trigger a duty to take steps, the indications of impending harm to health arising from stress at work must be plain enough for any reasonable employers to realise that he should do something about it.

- The employer is only in breach of duty if he has failed to take steps which are reasonable in the circumstances, bearing in mind the magnitude of the risk of harm occurring and the gravity of the harm which may occur.

- An employer who offers a confidential advice service with referral to appropriate counselling or treatment services is unlikely to be found a breach of duty.

- In all cases it is necessary to identify the steps which the employer both could and should have taken before finding him in breach of his duty.

[47] So far as causation is concerned the claimant must show that the breach of duty has caused or materially contributed to the harm suffered. It is not enough to show that the occupational stress has caused the harm.

[48] I find it useful to quote what Simon Brown LJ said in Garrett v Camden London BC [2001] All ER (D) 2002 at paragraph 63:

> "Many, alas, suffer breakdown and depressive illnesses and a significant proportion could doubtless ascribe some at least of their problems to the strains and stresses of their work situation: be it simply overworking, *the tensions of difficult relationships*, career prospect worries, fears or feelings of discrimination or harassment, to take just some examples. *Unless however there was a real risk of breakdown which the claimant's employers ought reasonably to have foreseen and which they ought properly to have averted, there cannot be liability." (My emphasis)*

[49] The above-mentioned principles are all borrowed from the leading authority of Hatton. In the ensuing years there have been certain refinements of those principles traced in decisions of Court of Appeal and such leading text books as

Munkman on Employer's Liability 15th Edition. I found particular assistance to be derived from the Northern Ireland cases of Michael Beattie v Ulster Television Plc [2005] NIQB 26 and Charles Wayne McClurg and Others v Chief Constable of the Royal Ulster Constabulary [2007] NIQB 53. From these authorities I have distilled the following refinements to Hatton.

[50] There has been restoration of the traditional approach to an employer's duty to be proactive and not merely reactive in considering an employee's health and safety. The employer is not excused of constructive knowledge. The statement of Swanwick J in Stokes v Guest, Keen and Natlefold (Bolts and Nuts) Limited [1968] 1 WLR 1776 at 1783 has received judicial approval in the House of Lords in Barber v Somerset County Council [2004] UKHL 13, [2004] 1 WLR 1089:

> "… The overall test is still the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know; where there is a recognised general practice which has been followed for a substantial period in similar circumstances without mishap, he is entitled to follow it, unless in light of common sense or newer knowledge it is clearly bad: but, where there is developing knowledge, he must keep reasonably abreast of it and not be too slow to apply it; and where he has in fact greater than average knowledge of the risks, he may be thereby obliged to take more than the average or standard precautions. He must weigh up the risk in terms of the likelihood of injury occurring and the potential consequences if it does; and he must balance against this the probable effectiveness of the precautions that can be taken to meet it and the expense and inconvenience they involve. If he is found to have fallen below the standard to be properly expected of a reasonable and prudent employer in these respects, he is negligent."

It was this approach that was adopted by Higgins J in Beattie's case.

[51] Thus, where an employer foresaw that employees exposed to particular traumas might suffer psychiatric injury and a particular employee suffered such injury as a result of such trauma, having previously shown no impending signs of psychiatric injury, foreseeability will be established .It is not relevant that they should be made to ask whether the employer could reasonably have foreseen the risk of the injury to the particular employee in such circumstances. This must be tempered by cases such as McClurg's case where the Northern Ireland Court of Appeal rejected a claim by a police officer who had suffered a psychiatric

breakdown as a result of the particular pressures on him arising out of "the troubles", including a failed assassination attempt, where he had shown an "adamantine" determination not to tell his employers that he was suffering and they could not otherwise have known.

The Protection from Harassment Order (Northern Ireland) 1997(" the 1997 Legislation ")

[52] I permitted the plaintiff in this action to amend the Statement of Claim on 13 September 2012 to include a claim for breach of the Protection from Harassment Order (Northern Ireland) 1997. Article 3 of that Order provides as follows:

> "**Prohibition of harassment**
>
> 3.-(1) A person shall 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 Article, 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) Paragraph (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 statutory provision or rule of law to comply with any condition or requirement imposed by any person under any statutory provision; or
>
> (c) That in the particular circumstances the pursuit of the course of conduct was reasonable.
>
> …..

Civil remedy

> 5.-(1) An actual or apprehended breach of Article 3 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)In 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."

[53] Article 4 provides that a person who pursues a course of conduct in breach of Article 3 shall be guilty of an offence.

[54] A leading authority on the interpretation of the comparable sections in the Protection from Harassment Act 1997 is the decision of the House of Lords in Majrowski v Guy's and St Thomas's NHS Trust [2006] UKHL 34. That case involved allegations of harassment in a hospital setting. In the course of the judgment, Lord Nicholls made the following observations on the sort of conduct that might constitute harassment in a workplace :

> "…..(when) the quality of the conduct said to constitute harassment is being examined, courts will have in mind that irritations, annoyances, even a measure of upset, arise at times in everybody's day-to-day dealings with other people. Courts are well able to recognise the boundary between conduct which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable. To cross the boundary from the regrettable to the unacceptable the gravity of the misconduct must be of an order which would sustain criminal liability under s. 2."

[55] In Conn v Sunderland City Council 2008 IRLR 324 a case dealing with the same legislation, Gage LJ added some observations of his own at paragraph 5 in the following terms:

> "…..harassment is left deliberately wide. Section 7, to which I have referred, points to elements which were included in harassment namely alarming or causing distress. Speech is also included as conduct which is capable of constituting harassment. The definition of 'course of conduct' means that there must be at least two such incidents for harassment to satisfy the

> requirements of a course of conduct. It is also in my judgment important to note that a civil claim is only available as a remedy for conduct which amounts to a breach of s. 1 and so by s. 2 constitutes a criminal offence. The mental element in the offence is conduct which the alleged offender knows, or ought to know judging by the standards of what the reasonable person would think, amounts to harassment of another."

[56] In short the conduct in question must be grave since the only difference between the crime and the tort of harassment is the standard of proof. On the other hand the relationship between the gravity of the crime and its tortious equivalent is not a precise one since a tort action may lie even though the facts would not persuade a prosecuting authority to pursue the case criminally (see Veakins v Kier Islington Ltd [2009] EWCA Civ 1288).

[57] So far as harassment at common law is concerned, in Hunter v Canary Wharf ltd [1997] A.C. 655 Lord Hoffmann noted that there was no necessary reason to confine the well-trodden principles in Wilkinson v Downton [1897] 2 QB 57 – an act wilfully calculated to cause harm which has caused physical harm creates liability even where there is no assault or threat of force --to the intentional infliction of psychiatric injury. However he noted that the 1997 legislation rendered it unnecessary to consider how a common law tort of harassment might have developed. (see also Wong v Parkside Health NHS Trust [2001] EWCA Civ 1721).

Conclusions

[58] I am not satisfied that the plaintiff has established liability in this case on the balance of probabilities. She has not discharged the burden of proving a breach of duty on the part of the defendant or a causative link between her condition and any breach of duty of her employer. My reasons for so concluding are as follows.

[59] It must be appreciated that stress can be a normal part of life and work. Stress of course is not an injury in itself and the claim must be for psychiatric injury arising from the conditions at work to which a person is subjected. The fact of the matter is that conflicts between workmates, dissatisfaction with managerial decisions and investigations, being subjected to a disciplinary process and transfer to a different workplace are all events which though accompanied by a certain degree of stress are often encountered in the normal course of the management of any organisation. They are such that in the absence of any reasonable or contrary conclusion an employer is entitled to assume that an employee is able to withstand such stress. That stress is subjective. It is impossible to state with any certainty whether a given set of circumstance will cause injury rather than anxiety or even distress. Emotions of anxiety and distress are sadly a normal part of human experience. To be tortious it must be foreseeable in the particular case that the

person in question may suffer stress which may shade into injury. What matters is how small such a risk may have appeared such as to excuse an employer for not reacting to it.

[60] I listened carefully to the witnesses in this case. I found the plaintiff to be a sincere lady – it is common case that she was an excellent worker and indeed had received an award in her early years for her work with the defendant. However as I watched her evidence unfold I found her to be inflexible in her thinking on these issues and wedded to a version of events that excluded any element of compromise. .Her evidence had all the accusatory fervour of the disillusioned employee and displayed wells of anger which were wholly unjustified. She seemed unable to distinguish between a constructive critique of the steps taken by her employer and an obstructive attitude on her part preventing resolution of the difficulties that existed between herself and CO. I shared the expression invoked by Ita McCrory that the views of the plaintiff had become" entrenched". The alchemy of getting the balance between her concerns and the need to recognise the burden on her employer of running this hostel efficiently in the interest of the residents was simply beyond her grasp.

[61] On the other hand I found Mrs Smith a model of measured reflection who gave her evidence in a thoroughly professional manner. Whilst I can understand that the plaintiff may have found her at times somewhat icily transactional, I had no doubt having heard her that she was a person who had considered the whole matter of the conflict between the plaintiff and CO dispassionately and had overseen the investigations of the plaintiff's complaints in a reasoned manner. Unlike the plaintiff, I believe that Mrs Smith had been able to take a balanced view of the rights and wrongs in this vexed relationship. Her aim was to restore a working relationship between them in the best interests of the hostel so as to reduce any impact on the residents whilst at the same time trying her best to assuage the plaintiff's concerns. She was correct to opine that it was impossible to run a hostel such as this where staff are not speaking to each other. Dealing with vulnerable people in such a setting is fraught with danger in such circumstances.

[62] I formed a similar view of Ms McCrory. I found the tenor of her evidence dripping with common sense and laced with a realistic appraisal of the problems that the relationship between CO and the plaintiff were causing to the hostel. In my view she made all the right decisions. At all stages she looked for an independent eye to assess the situation whether it was in bringing in an independent party such as Ms Ross to view the Brady allegations, invoking the use of an occupational health expert such as Ms Hamilton, suggesting mediation and seeking to separate the warring factions by a transfer to another location for the plaintiff at least on a trial basis. In my view the invocation of disciplinary proceedings was an inevitable choice by her having tried all else.

[63] I found Mr Murphy somewhat less impressive and perhaps a little too casual in his approach to this workplace conflict. Nonetheless I concluded that he had been

cast in a difficult role once his relationship with the plaintiff seemed to take a change for the worse as early as January 2007. It is great pity that their relationship soured as early as this and perhaps he might have made a greater effort to restore the good relationship which they had earlier enjoyed. However he investigated the complaints against CO to the best of his ability and his conclusions received the approval of those to whom he was responsible. I think it unlikely that he would have made the unguarded comments which were attributed to him by the plaintiff.

[64] I am satisfied that the plaintiff genuinely found the behaviour of CO annoying and it did cause her upset in the course of her dealings with him on a day to day basis. She clearly worked to a different rhythm from him and found it impossible to adapt herself to his more informal and less prescriptive methods.

[65] However I have determined that the kind of harm which the plaintiff suffered in March 2009 was unforeseeable to the defendant. Sadly the tensions of difficult relationships bedevil many workplaces and I do not consider that the employers in this case ought reasonably to have known or foreseen that the deteriorating relationship between CO and the plaintiff or the manner in which they dealt with the complaints would cause her psychiatric illness. Foreseeability depends upon what the employer knows (or ought reasonably to know) about the individual employee. Because of the nature of mental disorder, it is harder to foresee than physical injury but may be easier to foresee in a known individual than in the population at large.

[66] An employer is usually entitled to assume that the employee can withstand the normal pressures of the job unless he knows of some particular problem or vulnerability.

[67] I am satisfied that the defendant did try to address these personality conflicts as best it could. That the plaintiff did not welcome the outcome of the manner in which the defendant dealt with her complaints is clear. However I have formed the view that the approach of the defendant was reasonable and did not amount to conduct towards the plaintiff that was oppressive, unacceptable or amounting to harassment.

[68] It had proactively investigated all her complaints and had made a finding in each instance. CO was interviewed and advised as to his conduct.

[69] The fact of the matter is that the nature and extent of the work done by the plaintiff did not require her to do other than make handover communication with CO either by telephonic communication or by note as I believe was suggested to her by the defendant. With a minimum of effort she could have accommodated herself to such meagre contact for the sake of the hostel. It was not unreasonable for the defendant to insist that some form of handover communication had to occur. The letter from the defendant to the plaintiff of 9 April 2008 asserting that there was no rational explanation or reason for her refusal to communicate with CO was in my

view a reasonable step taken by this employer. How else could the efficient and proper administration of this home for vulnerable people be secured?

[70] Despite the conflict with CO the plaintiff prior to leaving her job manifested no sign of vulnerability. Walking out of meetings in anger and numerous complaints about CO did not reveal significant signs sufficient to alert an employer to incipient physical or psychiatric harm.

[71] The defendant in my view had taken appropriate steps to address any possibility of stress. Early discussions with management staff were set up and arrangements had been made for the plaintiff to meet the occupational health officer Miss Hamilton. . There was an e-mail dated 19 July 2007 from Mary Shannon to Patsy Smith which recorded "Mary says she feels under pressure and not listened to and is considering her position within the organisation". The reaction of the defendant through Patsy Smith was to refer her to an occupational health appointment recommending work related issues be discussed. The fact of the matter is that this employer did provide an Occupational Health Service Nurse Hamilton. She saw the plaintiff in 2008 and recorded that there was no personal or medical issue emanating from her. A defendant employer is entitled to take what it is told by the plaintiff at face value unless there is good reason to think to the contrary. In this case I do not believe the defendant was required to make searching enquiries of her other than the step it did take to have her examined by the occupational health expert. In terms she was offered an independent advice service which did not identify any problem. I am satisfied the defendant had taken positive steps for her safety.

[72] Mediation was offered as early as 2007 by Mrs Smith and again offered as a possibility at the disciplinary hearings in 2009.The plaintiff rejected this each time it was proffered.

[73] Eventually temporary transfer was mooted. The decision to transfer the plaintiff to Ballymena was within the band of reasonable discretion to be exercised by an employer in an attempt to solve a relationship problem which was clearly threatening to disturb the smooth running of the hostel. None of these steps seemed to satisfy the plaintiff. That these were not welcomed by the plaintiff does not render the complaint system and its investigations unreasonable.

[74] There was no evidence that the plaintiff had already suffered from illness attributable to stress at work prior to her leaving. The plaintiff by her own admission never informed anyone at work that she was suffering from stress or that she had attended her general practitioner. There had been no instances of frequent or abnormal absences due to sickness or other absenteeism before she left in March 2009. Indeed her own general practitioner in the course of a letter of 17 December 2009 declared "The current episode of stress started in March 2009 after the result of the Appeal Tribunal hearing." There was no evidence that this was related to the previous issues. Whilst the plaintiff had mentioned to Dr Moss in October 2008 that

there was stress at work, these comments, according to the general practitioner "were mentioned in documents for legal reasons only". In fact she had attended her doctor on that occasion "basically for treatment of sinusitis". She received no medication or treatment for stress until 2009.

[75] It has to be asked what else could the defendant reasonably be expected to have done. That stress at work may have caused her harm is not sufficient to found a claim. A plaintiff must show that there was a breach of duty on the part of the defendant that caused or materially contributed to the harm suffered. I find no such breach of duty in this case.

[76] The overarching narrative here reflects an instance where the tensions of a difficult relationship with a fellow employee and her dissatisfaction with the management as to the manner in which her complaints were dealt with caused her stress. I find nothing about this situation which puts it outside the stresses and strains which are not untypical in the workplace situation. In the circumstances I do not find there was a real risk of breakdown psychiatrically or physically which ought reasonably to have been foreseen by the defendant and which it ought properly to have averted.

[77] Finally I am satisfied that in this case, there is no arguable basis for contending that the conduct to which objection has been taken in this instance is sufficient to constitute a criminal offence or could constitute harassment under the statute or at common-law. The conduct to which I have adverted amounted to no more than annoying or upsetting conduct in a work environment. I do not consider it to have been oppressive or unacceptable in the terms of the 1997 legislation. Hence I dismiss this part of the case also.