

The Irish Supreme Court judgment in *Nano Nagle School v Marie Daly:* a saga of litigation

DR SHIVAUN QUINLIVAN

AND

DR CHARLES O'MAHONY

National University of Ireland Galway

1 Introduction

The decision of the Supreme Court in the case of *Nano Nagle School v Daly* is of significant importance for employees and employers, as well as for the Labour Court.¹ A key implication of the Supreme Court judgment is that reasonable accommodation can entail the redistribution of duties, subject, of course, to the statutory limitation that this accommodation does not impose a disproportionate burden on the employer. Flowing from this, the Supreme Court held that employers are under an obligation to consider the impact of a proposed redistribution of duties before they can refuse to provide reasonable accommodation. Moreover, the wise employer would meaningfully consult with the employee concerned in the discharge of their duty of reasonable accommodation.

A further key element of this decision, and a marked departure by the Supreme Court from its relatively recent decisions, is its engagement with the relevant EU law.² In this judgment the Supreme Court not only referenced the Court of Justice of the European Union's analysis of the Framework Employment Directive³ but also accepted that the Directive must be interpreted in light of the UN Convention on the Rights of Persons with Disabilities (CRPD).⁴ This opens up the potential for the CRPD to impact upon the interpretation of Irish employment equality law.

2 Background to this case

This case relates to Marie Daly, a special needs assistant (SNA) who worked for the Nano Nagle School in County Kerry. The school operates under the aegis of the National Council for Special Education (NCSE), which is a state agency and a funding authority. The school has operated since 1998 for children with learning and/or physical disabilities.

1 *Nano Nagle v Daly* [2019] IESC 63.

2 For a discussion of this issue see Mel Cousins, 'Education and the Equal Status Acts: Stokes v Christian Brothers High School Clonmel' (2015) 38 Dublin University Law Journal 157; Shivaun Quinlivan, 'Stokes v Christian Brothers High School: An Exercise in Splendid Isolationism?' (2015) 18(2) International Journal of European Law 81.

3 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (hereafter Framework Employment Directive).

4 UN General Assembly, Convention on the Rights of Persons with Disabilities: Resolution/Adopted by the General Assembly, 24 January 2007, A/RES/61/106.

In 2010 the appellant Marie Daly was involved in an accident while on holiday, as a result of which she was paralysed from the waist down. Following an intensive period of rehabilitation, in 2011 she sought to return to work. In a subsequent review of expert reports, the school board concluded that she did not have the capacity to undertake the full set of duties associated with her post as an SNA and that she would not be able to do so in the future. The school declined to allow her return to work. The appellant made a complaint to the Equality Tribunal (now subsumed within the Workplace Relations Commission (WRC)) on the basis that the school had failed to provide appropriate measures to accommodate her, as a person with a disability, to return to work contrary to section 16 of the Employment Equality Acts 1998–2015.

The case was described by Ryan P in the Court of Appeal as a ‘saga of litigation’⁵ and by MacMenamin J in the Supreme Court as ‘overlong litigation’.⁶ As will be discussed below, the Supreme Court has now remitted the case back to the Labour Court to resolve. The case had been considered first by the Equality Tribunal (now WRC); second by the Labour Court on appeal; third by the High Court, by way of an appeal on a point of law; fourth by way of appeal to the Court of Appeal; and most recently on appeal to the Supreme Court.

One of the core legal issues that came before the different tribunals/courts in the *Nano Nagle* case related to the interpretation of section 16 of the Employment Equality Acts, which addresses the duty to provide ‘appropriate measures’ more commonly described as the duty to provide reasonable accommodation. Specifically, the question was whether the school was in breach of the obligations imposed by that section in dismissing the appellant from her employment. The Equality Tribunal delivered its decision in 2013 and determined the case in favour of the employer. Marie Daly appealed the decision to the Labour Court, which delivered its determination in 2014. The Labour Court determined the case in favour of Marie Daly and awarded her €40,000 by way of compensation. It held that the school ‘had 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’.⁷ This determination was then appealed to the High Court on a point of law.

In the High Court, Noonan J upheld the determination of the Labour Court. He held that the school was in breach of section 16 of the Employment Equality Acts on the basis that the employer had failed to consider a redistribution of tasks. This decision was further appealed to the Court of Appeal. Ryan P, Finlay Geoghegan J and Birmingham J delivered their judgments in 2018 allowing the appeal and setting aside the determination of the Labour Court.

The judgment by the Court of Appeal was criticised as not providing full or appropriate protection for employees with disabilities.⁸ In particular, the court’s interpretation of section 16 of the Employment Equality Acts did not meet the minimum standard required by the Framework Employment Directive, which requires reasonable

5 *Nano Nagle School v Daly* [2018] IECA 1.

6 *Nano Nagle v Daly* [2019] IESC 63, para 111.

7 *A Worker (Complainant) v A School (Respondent)* [2014] 25 ELR 307, 342–343.

8 Claire Brutton and Katherine McVeigh, ‘Effects of the Judgment of the Court of Appeal in *Nano Nagle v Daly* on the Duty to Provide Reasonable Accommodation’ (2018) 15(2) International European Law Journal 36–47.

accommodation to be interpreted broadly.⁹ A related concern was the Court of Appeal's distinction between two terms used in that section: 'tasks' and 'duties', specifically equating 'duties' with 'essential functions'.¹⁰ The Court of Appeal held that an employer was only required to consider the redistribution of 'tasks' and was not required to consider the redistribution of 'duties'. Therefore, the distinction between the terms 'tasks' and 'duties' becomes important as it 'marks the line between protection and no protection for employees with a disability'.¹¹

Unfortunately, the Court of Appeal failed to provide adequate clarification on how to differentiate between those terms. In this, it adopted an unduly restrictive and narrow interpretation of the reasonable accommodation duty. In effect as Bruton and McVeigh stated, the Court of Appeal focused on the perceived 'incompetency and incapability of a person with a disability . . . as opposed to the abilities of employees with disabilities with the provision of reasonable accommodation'.¹² The judgment of the Supreme Court is important in rejecting the Court of Appeal's narrow interpretation of section 16(1), which effectively restricted the duty to provide reasonable accommodation and ran counter to the purpose of introducing this legal duty into Irish employment equality law.

3 The Supreme Court decision

3.1 THE TEST FOR REASONABLE ACCOMMODATION

The duty to provide reasonable accommodation can be broken down into two constituent parts.¹³ The first part imposes a positive legal duty to provide a reasonable accommodation where required. The second part of this duty ensures that those required accommodations do not impose a disproportionate burden on the employer. With regards to the first part of this test, the Supreme Court determined that this was a question of fact and one that was for the Labour Court to determine. On the second part, of what would give rise to a disproportionate burden, the Supreme Court provided useful guidance.

In determining what is a disproportionate burden, the Supreme Court noted that the duty to accommodate was neither 'infinite, [nor] at large'.¹⁴ In determining that there was no real distinction to be made between 'tasks' and 'duties', there was 'no reason, in principle, why certain work 'duties' cannot be removed or 'stripped out'.¹⁵ That stated, the subtraction of certain duties cannot result in removing all duties, because that would

⁹ HK Danmark, acting on behalf of Jette Ring v Dansk Almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S (Ring and Skouboe Werge) (2013) Joined Cases C-335/11 and C-337/11.

¹⁰ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation establishes that the duty to recruit, promote, maintain in employment or train an individual only applies to those willing, capable and competent to undertake the 'essential functions' of the post. This is without prejudice to the obligation to provide reasonable accommodation for people with disabilities.

¹¹ Bruton and McVeigh (n 8).

¹² Ibid.

¹³ See Shivaun Quinlivan, 'Reasonable Accommodation: An Integral Part of the Right to Education for Persons with Disabilities' in Gauthier De Beco, Shivaun Quinlivan and Janet E Lord (eds), *The Right to Inclusive Education in International Human Rights Law* (Cambridge University Press 2019) 169–189, 175; UN Committee on the Rights of Persons with Disabilities, *General Comment No 6: Equality and Non-discrimination* (2018) CRPD/C/GC/6, para 25.

¹⁴ *Nano Nagle v Daly* [2019] IESC 63, 89.

¹⁵ Ibid.

almost inevitably become a ‘disproportionate burden’.¹⁶ The test to determine the extent of the duty must be one of fact and is guided by the principles of ‘reasonableness and proportionality’.¹⁷

3.2 THE DUTY TO CONSULT

The issue of the duty to consult with an employee in determining whether or not a reasonable accommodation is possible was previously considered by Dunne J in the Circuit Court case of *Humphries v Westwood*.¹⁸ In that case, she determined the nature and extent of the enquiry that an employer should undertake to determine whether an employee was fully capable of undertaking the duties of the post and what, if any, special treatment or facilities might be available by which the employee could become fully capable. Dunne J went on to hold that such ‘enquiry could only be regarded as adequate if the employee concerned is allowed a full opportunity to participate at each level and is allowed to present relevant medical evidence and submissions’.¹⁹ In this case it was clear that the school principal did not consult with Ms Daly in reaching the decision that the ‘appellant could return to work only if she was able to perform all the duties of an SNA, with assistance or otherwise’.²⁰ The Labour Court held that the school had failed to comply with section 16(3) of the Act as it had failed to consult with the appellant and awarded her €40,000 in compensation for this failure. In contrast, the Court of Appeal rejected the notion that a failure to consult constituted a breach of the duty imposed.²¹ The Supreme Court addressed whether dialogue with a person with a disability was a necessary element of the duty to provide reasonable accommodation. While accepting the wisdom of including the person with a disability in the process, the Supreme Court held that the ‘absence of consultation cannot, in itself, constitute discrimination under s.8 of the Act’.²²

3.3 IMPLICATIONS OF THE JUDGMENT FOR EMPLOYMENT TRIBUNALS

The Supreme Court in its judgment made a number of statements that have implications for tribunals adjudicating on employment law. It is of note that the Supreme Court acknowledged that the courts exercise a measure of deference ‘to an administrative tribunal acting within the scope of its duty’.²³ However, it also noted that, where there is a substantial failure by a tribunal to comply with its statutory duty, a court must intervene. The Supreme Court was critical of the Labour Court’s handling of this case in that it had omitted any reference to expert evidence described as highly important and capable of having a direct bearing on the outcome of the case. The Supreme Court described this as a ‘factual lacuna’.²⁴

In order to address this lacuna the Supreme Court decided to remit the appeal back to the Labour Court, which is the body that has the mandate to evaluate evidence in accordance with the relevant legislation, and assess its significance. The rationale for this was that the issues around the omitted evidence could only be resolved by the Labour

16 Ibid.

17 Ibid.

18 [2004] 15 ELR 296.

19 Ibid 297.

20 *Nano Nagle v Daly* [2019] IESC 63, 58.

21 *Nano Nagle School v Daly* [2018] IECA 54.

22 *Nano Nagle v Daly* [2019] IESC 63, 105

23 Ibid 109.

24 Ibid 108.

Court itself. The Supreme Court also noted that it ‘should not act as a surrogate Labour Court, which is charged with carrying out a statutory function’.²⁵ Given the complex and lengthy litigation preceding the judgment, the Supreme Court did not take the decision to remit the case back to the Labour Court lightly. Nevertheless, this saga of litigation continues.

3.4 EU LAW

A number of elements of the Supreme Court decision are to be welcomed. One particularly welcome development was the engagement by the Supreme Court with the provisions of both the Framework Employment Directive and the CRPD. In this respect the partial dissent of Charleton J is particularly welcome where he unequivocally accepts the impact of both the Framework Employment Directive and the CRPD, stating that the ‘1998 Act must be interpreted in the light of the Directive. In turn, the Directive requires to be seen in the light of the international obligations entered into by the European Union, the Convention’.²⁶

The majority are perhaps more tentative on this point, MacMenamin J (O’Donnell, Dunne and O’Malley JJ concurring) stating early in their judgment: ‘EU law is undoubtedly a useful point of reference. But whether it is even necessary to resort to EU law is a point to be determined’.²⁷ However, MacMenamin J did reference the CRPD and its impact on the Framework Employment Directive in his judgment. Ultimately, MacMenamin J decided that the case could be determined by reference to the wording of the relevant section alone, and there was no necessity to have ‘resort to the judgment of the CJEU in *Ring*, or the Framework Directive’.²⁸ While deciding the issue of principle in this case on the basis of statutory interpretation he went on to state:

This conclusion, based on the words of the section alone, as it happens, accords with any interpretation of the section by reference to the reasoning of the CJEU in *Ring*.²⁹

The fact that the majority of the Supreme Court engaged, albeit tentatively, with Ireland’s obligations under the Framework Employment Directive appears to be a significant change in approach since its decision in *Stokes v Christian Brothers High School Clonmel*.³⁰ In that case the Supreme Court addressed the provisions of the Equal Status Acts 2000–2015 as though only a matter of national statutory interpretation were involved, rather than giving effect to an EU obligation.

The Supreme Court appears to accept that both the CRPD and the Framework Employment Directive have relevance to this issue. It is of note that the UN CRPD Committee has clearly stated that a key element of the duty to provide reasonable accommodation includes ‘dialogue with the person with a disability concerned’.³¹ While accepting that dialogue may be the prudent approach for employers, the Supreme Court does not impose a duty to consult. In addition, the CRPD Committee has held that reasonable accommodation is a term of art, and the term ‘reasonable’ should not act as

²⁵ Ibid 111.

²⁶ *Nano Nagle v Daly* [2019] IESC 63, Charleton J dissenting at 3.

²⁷ Ibid 16.

²⁸ Ibid 91.

²⁹ Ibid.

³⁰ [2015] IESC 13.

³¹ UN Committee on the Rights of Persons with Disabilities (n 13) para 26(a).

³² Ibid para 25(a).

a ‘distinct qualifier or modifier of the duty’;³² rather the Committee has held that the reasonableness of an accommodation relates to the ‘relevance, appropriateness and effectiveness for the person with a disability’.³³ This is at odds with the Supreme Court’s position which held that the test of disproportionate burden was one of ‘reasonableness and proportionality’.³⁴ It is suggested by the authors that this case may not be the last word on this issue.

4 Conclusion

The Supreme Court judgment in this case is an important one. First, it overturns the troubling judgment of the Court of Appeal, which adopted an overly restrictive and narrow interpretation of reasonable accommodation. The Supreme Court held that reasonable accommodation can involve a redistribution of any task or duty in a particular job, provided it does not impose a disproportionate burden on the employer. Second, the Supreme Court addressed whether dialogue with an employee with a disability was a necessary element of the duty to provide reasonable accommodation. The Supreme Court noted that the prudent employer would consult. Third, the Supreme Court’s serious engagement with both the Framework Employment Directive and CRPD highlights the emerging importance of these sources of law in determining questions of domestic employment equality law.

³³ Ibid.

³⁴ *Nano Nagle v Daly* [2019] IESC 63, 89.