# Irish Court of Appeal



**Judgment**

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| **Title:** | Nano Nagle School -v- Daly |
| **Neutral Citation:** | [2018] IECA 11 |
| **Court of Appeal Record Number:** | 2016 67 |
| **High Court Record Number:** | 2014 516 MCA |
| **Date of Delivery:** | 31/01/2018 |
| **Court:** | Court of Appeal |
| **Composition of Court:** | Ryan P., Finlay Geoghegan J., Birmingham J. |
| **Judgment by:** | Ryan P. |
| **Status:** | Approved |
| **Result:** | Allow and set aside |

| Judgments by | Link to Judgment | Concurring |
|---|---|---|
| Ryan P. | Link | Finlay Geoghegan J, Birmingham J. |
| Finlay Geoghegan J | Link | Ryan P., Birmingham J. |

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**THE COURT OF APPEAL**

Neutral Citation Number: [2018] IECA 11

**[2016 No. 67]**

**The President**
**Finlay Geoghegan J.**
**Birmingham J.**

**IN THE MATTER OF THE EMPLOYMENT EQUALITY ACTS 1998-2011 ON THE APPLICATION OF NANO NAGLE SCHOOL**

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

**BETWEEN**

**NANO NAGLE SCHOOL**

**APPELLANT**

**AND**

**MARIE DALY**

**RESPONDENT**

**JUDGMENT of the President delivered on 31st January 2018**

**Introduction**

1. This appeal by Nano Nagle School from the judgment of the High Court delivered by Noonan J. on 11th December 2015 is episode four of a saga of litigation arising from an unfortunate dispute concerning the capability of an enthusiastic disabled employee to work in a school providing essential services to children who face physical, intellectual and behavioural challenges.

2. Ms. Marie Daly was a Special Needs Assistant on the staff of the Nano Nagle School in Killarney from 1998 until she sustained severe injuries in a road traffic accident in 2010. After a long period of treatment and rehabilitation, she achieved a partial recovery, but she was left with significant disability, being confined to a wheelchair because of paraplegia. She was keen to get back to work and believed that she would be able for it and her doctors encouraged her to do so. She approached the school in January 2011 with a view to doing that. The school sought advice from experts, including an occupational health physician and experts in risk assessment and occupational therapy/ergonomics. In light of these reports, the Board of the school concluded that Ms. Daly did not have the capacity to undertake the duties associated with a Special Needs Assistant and that it would not be possible for her to return to work at the school. Ms. Daly complained to the Equality Tribunal on the ground that the school had failed to provide appropriate measures to enable her as a person with a disability to return to work contrary to the Employment Equality Acts 1998 to 2011.

3. The appeal concerns the interpretation and application of s. 16 of the Employment Equality Act (as amended) which provides statutory protection against discrimination in the workplace. The 2004 Amending Act brings into legislative form the provisions of Council Directive 2000/78/EC which declares in Recital (16) that such measures play an important role in combating discrimination on grounds of disability.

4. 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 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;"

5. The dispute has been considered in turn by the Equality Tribunal which dismissed Ms. Daly's claim; by the Labour Court, which allowed her appeal and awarded compensation; by the High Court, which upheld the Labour Court and now by this Court on appeal from the judgment of Noonan J.

**The Equality Officer's Decision**

6. Ms. Daly's case was that the school failed to take reasonable or appropriate measures to facilitate her return to work and that she was quite capable of fulfilling a role with the school as an SNA and a secretary. The school's case was that SNAs had to work in pairs in the school because of the sort of pupils that it catered for. The bulk of the jobs of the SNA position were beyond Ms. Daly's ability and so the only option for her to remain in employment with the school was if funding could be obtained for a floating SNA in addition to the staff complement funded at the time. The school submitted that it made enquiries to see if such funding for a floating SNA could be obtained, but the response was that SNAs are provided for the benefit of the pupils and not for the benefit of the staff, and accordingly, funding for a floating SNA could not be sanctioned.

7. The Equality Officer was satisfied that the school is a special needs school, caring for students with moderate, severe and profound disability. The number of students with severe or profound disability, including elements of behavioural difficulties, is high. The role of an SNA in this type of environment is not exactly comparable to the role of an

SNA in a more mainstream school.

8. The Equality Officer noted that there were no areas of contention surrounding the relevant issues. When the complainant sought to return to work, the school sent her for assessment by an occupational health physician, who recommended an independent risk assessment. He was not satisfied with the details in the risk assessment and suggested that a second risk assessment be carried out. The school conferred with Ms. Daly and engaged an ergonomics/occupational therapist consultant nominated by her to undertake the second risk assessment. This consultant was familiar with the complainant disability, having worked with her during her recuperation period. This is a reference to Ms. Ina McGrath and the fact that she knew Ms. Daly because she had worked with her during her period of recuperation. Ms. McGrath's report to the school and evidence to the Labour Court are important features of the case as later appear.

9. The Equality Officer recorded the evidence of the Principal of the school that she had sought funding for a floating SNA, but had been informed that SNAs were provided to enable the care of children, not of adults. The school's budget was externally controlled and the Principal was not able to fund a floating position. The Officer considered a recent determination of the Labour Court in Shannon Regional Fisheries Board and A Worker (Determination EDA 1318) from which he cited the following passage:

> "The general principles set out in Humphries v. Westwood Fitness Club require an employer to make a bona fide and informed decision concerning a disabled employee's capabilities before concluding that he or she is unable to perform the duties of their employment. The test is an objective one to be applied by reference to the range of responses to be expected of a hypothetical reasonable employer, faced with similar circumstances, seeking to reach a fair and balanced conclusion having full regard to the right of a disabled person to work and earn a livelihood within the constraints occasioned by their disability. At a minimum, it requires the employer to fully and properly assess all of the available medical evidence and, where necessary, to obtain further medical advice where the available evidence is not conclusive."

The Officer concluded: "In the instant case, I consider that the respondent has fully and properly assessed all of the medical evidence available and that upon obtaining further medical advice that evidence is conclusive." His decision accordingly was expressed as follows: –

> "Having considered all the written and oral evidence presented to me, I find that the medical evidence indicates that the complainant is no longer fully competent and available to undertake, and fully capable of undertaking, the duties attached to the position to which she was recruited for, having regard to the conditions under which those duties are, or may be required to be, performed. Accordingly the provisions of Section 16 (1) of the Acts applies in relation to this complainant and therefore this complaint must fail.
>
> Additionally, notwithstanding the foregoing, I have considered all the written and oral evidence presented to me, and I find that the respondent has given consideration to the provision of appropriate measures to enable the complainant to return to work but that these measures give rise to a cost other than a nominal cost. Therefore the respondent is entitled to rely on the provisions of Section 16 (3) of the Acts and accordingly this complaint must fail."

10. Ms. Daly appealed to the Labour Court which conducted a hearing into the matter on oral evidence and delivered its determination dated 12th August 2014, allowing the

appeal and ruling in her favour. The grounds of this decision are the essence of the appeal to this Court and require detailed examination. Either party could appeal that determination to the High Court on a point of law and the school challenged the interpretation of the law and the findings of fact. In his judgment delivered on 11th December 2015, Noonan J. rejected the challenge, holding that the school had failed to demonstrate any error of law or absence of factual ground in the determination of the Labour Court.

11. The issue for this Court is whether the High Court was correct in law in endorsing (a) the Labour Court's interpretation of s. 16 and (b) its application of the law to the facts.

**The Directive and HK Denmark**

12. The legal context of the case has as its foundation Directive 2000/78/EC establishing a General Framework for equal treatment in employment and occupation. The preamble at Recital (16) declares that the "provision of measures to accommodate the needs of disabled people at the workplace plays an important role in combating discrimination on grounds of disability". Recital (20) says: "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". Article 5 mandates provisions to facilitate persons with disabilities to obtain employment and to participate as fully as possible in it:

> "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."

13. In cases C-335/11 and 337/11, shortly identified as HK Denmark which judgment is relied on by both parties in the appeal, the Court of Justice opens its judgment with reference to the United Nations Convention on the Rights of Persons with Disabilities of 13th December 2006 which was ratified by the European Union on 23rd December 2010, citing paragraph (e) of the Preamble, which says that:

> "Disability is an evolving concept and the disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others."

14. The case was a request for a preliminary ruling on the issues with which we are not concerned in this appeal but in addressing a question of a different, shortened dismissal notice period in cases of disability, the Court of Justice held that a reduction in working hours may be regarded as an appropriate accommodation measure for an employee with a disability. In its conclusions, the Court of Justice held:

> "Article 5 of Directive 2000/78 must be interpreted as meaning that a reduction in working hours may constitute one of the accommodation measures referred to in that article. It is for the national court to assess whether, in the circumstances of the main proceedings, a reduction in working hours, as an accommodation measure, represents a disproportionate burden on the employer."

15. Other Recitals in the preamble to the Directive cited by the court included numbers

16, 17, 20 and 21 which are as follows in the Preamble to the Directive:

> "(16) The provision of measures to accommodate the needs of disabled people at the workplace plays an important role in combating discrimination on grounds of disability.
>
> (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 Labour Court**

16. The Labour Court conducted a hearing into the matter on oral evidence and delivered its determination dated 12th August 2014. Ms. McGrath, the occupational therapy assessor who had provided a report to the school also gave evidence to the Labour Court. One of the school's grounds of appeal is that the Tribunal ignored her testimony in reaching its determination. The court heard the evidence of Dr. Madden, the occupational health physician who had furnished three reports to the school. The Principal and Deputy Principal of the school and the head of a similar school also testified.

17. The Deputy Principal described the then current pupil roll. 28 children had complex needs meaning that they had more than one disability and 46 pupils had significant care needs and required total support. Many of the pupils presented challenging behaviour and required one-to-one assistance. 18 pupils suffered from Epilepsy; four required peg feeding; two had specific toileting needs and four required regular medication during the school day.

18. The Labour Court held that Ms. Daly was entitled to succeed in her appeal because the Board of management of the school failed to discharge its statutory duty to take adequate measures to provide her with reasonable accommodation so as to allow her to continue in employment. The Labour Court did not find that Ms. Daly was competent to carry out the duties of a Special Needs Assistant at the school, but rather 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 Special Needs Assistants so as to relieve Ms. Daly of those duties that she was unable to do. It might have transpired that it was not possible to make the necessary adaptations. However, in circumstances where the Labour Court held that the school had failed to carry out such exploration, it found that the school was in breach of its statutory duty and Ms. Daly was entitled to succeed.

19. The Determination of the Labour Court dated 12th August 2014 is a detailed 35-page analysis of the European and Irish legislation with references to case law including *HK Denmark* above cited, English and Irish court judgments and some previous determinations of the court itself. I will endeavour presently to identify the key legal and

factual findings the Labour Court made in coming to its conclusions. Before doing that it is convenient to set out the Conclusion and Summary with which the determination ends. The Conclusion is as follows:

> "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."

The summary says:

"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."

20. Regarding the law, the Labour Court set out its interpretation of section 16. The court understood the requirement in s. 16 to make adjustments that represent reasonable accommodation as including allocating tasks that the person is unable to do among other staff members. The court declared: "[t]here is no reason to exclude in principle extending that duty [the duty on an employer] to include the redesign of a position so as to include those duties that a disabled person can perform if that is a reasonable and proportionate means by which the disabled person can be facilitated in

exercising their right to work". The court rejected a submission by the school that the wording of the legislation meant that it was not required to continue the person in employment if she could not fully discharge the duties of the job that she held before she had the disability.

21. The Labour Court said that the law does not require an employer to employ a person in a position "the essential functions of which they are unable to perform". It introduced the concept of the essential functions of the position, which it found in Directive 2000/78/EC. It proposed, erroneously, that if there is a difference between s. 16 of the Act and the Directive, the latter takes precedence. The Labour Court and this Court are bound by the law as enacted by the Oireachtas. If a person maintains that the State has not properly or fully brought into effect a Directive, he can raise that claim in a number of procedures. But that is not the issue here. The Act is to be interpreted in light of the Directive, but the statement made by the Labour Court is not correct. The issue in this case is the meaning of the section of the Act as passed by the Oireachtas. However, I do not think that this point is actually significant because s.16 expressly envisages some distribution of tasks: see subsections (4)(b).

22. The Labour Court said that the essential tasks that it spoke of might actually refer to a reorganised position. In other words, an employer may be required on this principle, firstly, to reorganise the work, including allocating tasks that the person is unable to do among other staff members. The person with a disability may still be unable to perform all the tasks of the newly defined position for him or her but only the essential tasks thereof. That would leave a new residue of tasks for distribution to others.

23. The Labour Court held as a matter of law that the employer's duty to provide reasonable accommodation carried with it "a concomitant obligation to make an informed and considered decision on what is or is not possible, reasonable and proportionate". This expression has its source in English employment litigation decisions. The court referred to previous decisions that the Labour Court had reached to the effect that "a failure to adequately consider all available options on how a disabled person can be accommodated can amount to a failure to discharge the duty to provide reasonable accommodation. Those cases also indicate that an enquiry in that regard can only be regarded as adequate if the affected employee is afforded an opportunity to influence the decision that the employer ultimately makes". On this analysis, it is the quality of the enquiry process that determines compliance with the statutory obligation.

**Factual Findings of the Labour Court**

24. The Labour Court rejected the school's contention that employing Ms. Daly as a floating SNA, as recommended by Ms. McGrath, would mean creating an entirely different job in order to accommodate her needs. The expert had explained in evidence that "what she meant was that the work of all the SNAs 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". Although doing that would "undoubtedly have involved a significant change in how the care needs of those attending the schools could be met", the court held that "it cannot be fairly characterised as expecting the school to create a wholly new job".

25. The Labour Court criticised the principal for not exploring the option by consulting the other SNAs. Her evidence was that it would involve the other SNAs in undertaking additional lifting and other physically demanding work. It would be unfair to them and could pose a health and safety risk for them. She did not discuss the matter with them and had not had an assessment undertaken of the possible impact on their health and safety. The court held that the school had not adequately considered this option.

26. The Labour Court found that Ms. Murphy's involvement was decisive in influencing the conclusion of Dr. David Madden, the occupational health physician, who carried out three assessments of Ms Daly, culminating in his third report, prepared following consultation with the principal of the school, in which he expressed a different opinion to his earlier views. In the final assessment, Dr. Madden 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."

27. In his previous reports, the first of which was in 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 was "happy to support her return to work once a risk assessment has been completed". On 15th August, 2011, he held the same opinion but he was not satisfied with the risk assessment report that the school had obtained and he advised the school to procure another report. The report 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. Ms. Ina McGrath was identified as a suitable expert occupational therapist to carry out the fresh risk assessment.

28. Ms. Murphy was of the opinion that Ms. Daly could only return to work if she was able to perform all of the duties of an SNA and told that to Dr. Madden. She said it would be difficult for the school to relieve her from some duties. 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.

29. The Labour Court said that the school Board was influenced in its decision by Dr. Madden's conclusion that Ms. Daly was medically unfit to work as an SNA. However, there was 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.

30. The Labour Court noted 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."

**The High Court**

31. Noonan J. upheld the Labour Court's rejection of the school's interpretation of s. 16 and implicitly endorsed the test applied to decide the issue. He also dismissed the school's protest in regard to the oral testimony that the Labour Court had not had regard to the evidence given by Ms. McGrath, a case which it supported by evidence from her on affidavit, by the school's solicitor's note of the evidence and of the court's secretary's note, which the solicitor exhibited in another affidavit. The judge was satisfied that there was more than ample evidence available to support the Labour Court's findings. The notes of the evidence from the school's solicitors and the secretary of the Tribunal and Ms. McGrath's affidavit did not go anywhere near establishing that the Labour Court ignored or misinterpreted Ms. McGrath's evidence or reached a conclusion that was perverse. Indeed, the trial judge was prepared to endorse the criticisms made by the court of the engagements by the principal of the school with the experts. It is clear that the judge would have accorded significant deference to the Labour Court's findings of fact which he felt were within its area of expertise.

32. The High Court's findings included the following:

> "The school's position at the Labour Court was that reasonable accommodation and appropriate measures in subs. (3) and (4) applied only to such measures as would render Ms. Daly capable of fulfilling all the duties of the job. The definition of "appropriate measures" in subs. (4) includes the adaptation of both patterns of working time and distribution of tasks. 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.
>
> 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.

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.

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."

**The Appeal to the Court of Appeal**

33. The school appeals to this court on grounds of appeal that it formulated into four compressed and summarised issues as follows, claiming that the learned High Court judge erred:

(i) In his determination and application of the standard of appeal on incorrect findings of fact in appeals on a point of law and failed to overturn the findings of the Labour Court in relation to the evidence of Ms. Ina McGrath on the basis of the error in the determination and application of the said principles;

(ii) in his interpretation of s. 16 of the Employment Equality Act 1998, in his analysis and application of the EU case law and Directives in relation to the interpretation of this section and in upholding the analysis of the Labour Court in relation to this section;

(iii) in his finding and in upholding the finding of the Labour Court that the appellant failed to consider reorganising the role of SMAs and

(iv) in his interpretation of the Irish case law in relation to reasonable accommodation and in relation to his analysis of the attempts of the appellant to afford same to the respondent and he erred in his upholding of the Labour Court determination in relation to these issues, particularly in relation to the interpretation of the *Humphreys v. Westwood* case.

34. Ms. Daly's essential case is summarised in her submissions as follows:

"In summary, the School never considered in any meaningful or serious way making any adjustments to the actual nature of the role being performed by Ms. Daly. They were unwilling to and/or believed that they were not legally required to engage in the necessary process.

This would have involved meaningful industrial relations and human resources discussions with the other SNA's and their trade union

representatives and the school's funders to explore making adjustments to the duties performed by Ms Daly. This should have been done to properly investigate whether her return to work could be accommodated by for example assigning to her more of the types of tasks which she could perform and potentially re-allocating to other SNAs some of the tasks she could not perform.

In truth, the School took a misinformed view of its legal obligations and believed wrongly, that if Ms Daly was unable to perform (with physical or mechanical assistance) all of the duties which traditionally attached to the role of SNA in that school, then they were under no obligation to consider accommodating her.

The Labour Court's finding was correctly upheld by the High Court and the succinct ratio of the learner to Trial Judge at paragraph 61 of the Judgment is, it is respectfully submitted, correct: –

Noonan J. decided that the fundamental determination of the Labour Court 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 decide that she could be accommodated but that the school failed to consider redistributing her tasks as an SNA, which constituted a breach of section 16. The High Court held that the Labour Court was entitled to reach that conclusion."

**Discussion**

**Factual Context**

35. Did the Labour Court apply the law correctly? Was the court's view of the interpretation of the section correct? Did the court correctly apply the law to the known or ascertained facts? Was the High Court correct to endorse the Labour Court's approach and decision?

36. The best place to begin consideration of the appeal is with the facts. As Noonan J. held: "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".

37. We have to look at Ms. McGrath's report in ascertaining the factual background to the Labour Court's decision. The Labour Court relied in its determination on the views of Ms. McGrath, an ergonomics/occupational consultant, whose report is dated 29th September 2011. Ms. McGrath's conclusion that Ms. Daly could act as a floating SNA in the school forms a prominent part of the Labour Court's consideration. It is important to understand the report as a whole to see this recommendation in context. The school also raises an issue about the evidence given by Ms. McGrath at the Labour Court hearing and the alleged failure of the Labour Court to record it or take note of it, but that is a separate consideration.

38. Ms. McGrath's qualifications are a BSc. in Occupational Therapy from Trinity College Dublin. She worked in rheumatology, neurology and rehabilitation in Ireland and America. She returned to university to complete a Masters in Science in Ergonomics from Loughborough University in 1999. She works in private consultancy as an

ergonomist and also works for the HSE as an occupational therapist.

39. The report beings with information about the school. It is a Special Needs school with approximately 70 students with moderate, severe and profound disability. The staff included 12 teachers and 26 Special Needs Assistants as well as a caretaker, secretary, bus staff and ancillary therapy staff. The school also relied on help from volunteers. There are ten classes in total: a reception class for the younger children; a junior class; two middle classes; two senior classes; classes for children with Autism Spectrum Disorder and for children with severe/profound disability.

40. The report has an Appendix with details of the role of a Special Needs Assistant which includes duties of preparing and tidying up classrooms; helping children to get on and off school buses; travelling with them as required; giving special assistance as necessary for pupils with particular difficulties, such as helping physically disabled pupils with typing or writing; helping with clothing, feeding, toileting and general hygiene; helping on out-of-school visits, walks and similar activities; helping teachers supervising pupils with special needs during assembly and other times; accompanying children or groups who may have to be withdrawn temporarily from the classroom; general assistance to the class teachers and where specifically assigned to an individual pupil, catering for his or her needs. SNAs do not act as substitute or temporary teachers.

41. Ms. Daly is wheelchair-dependent for mobility and she can transfer independently from the wheelchair. She is able to get around the school. She has passed her Driving Test as a wheelchair user. She has good upper extremity range of motion and strength and she demonstrated, on the occasion of Ms. McGrath's visit, that she could pick up items from the floor when she leaned to the side. She is independent in all her own care needs, but needs assistance with getting items from higher shelves and for using sinks because they are at standing height.

42. On the second day of Ms. McGrath's visit, 9th September 2011, she observed Ms. Daly in two classes that were deemed as potentially most suitable for her. On the date of her first visit, 2nd September 2011, Ms. McGrath assessed the other classes beginning with the one in which Ms. Daly had taught prior to her accident which was the junior special class. Ms. McGrath concluded that Ms. Daly would not be suitable for work as an SNA in this class. The children are physically dependent and need to be physically assisted for mobility, transfers, feeding, medication and safety. Bending, pushing, pulling, physical manipulation of children's limbs is required throughout the day. The SNAs switch between the children so there is equal distribution of workload. Ms. McGrath and the junior special class teacher, Ms. Gabrielle Browne, discussed the suitability of the other nine classes. In seven of those classes, the children needed physical assistance or had to leave the classroom and be accompanied or were inclined to act out and needed physical attention to help control outbursts or needed assistance in going to the toilet or using facilities or leaving the school for one reason or another. It was clear to Ms. McGrath that Ms. Daly would not be suitable for work as an SNA in any of those classes. That left two classes that were possible locations where Ms. Daly might be accommodated as an SNA and so, on the second day, 9th September 2011, Ms. McGrath accompanied Ms. Daly in those classes and spent half a day in each.

43. In one class, three of the children had Autistic Spectrum Disorder. Two children needed close supervision. One child required assistance with changing a nappy for toileting. Another needed close supervision because of acting out. A child had Dyspraxia resulting in clumsiness leading to accidents and falls. A new child who had joined the class recently was observed hitting out during assembly and had to be stopped by the SNA in the class and removed to the Sensory Integration Room. That happened again and the child required hands-on intervention and was removed from the classroom by two SNAs. Ms. Daly was able to bring a child with Dyspraxia to the Sensory Integration

Room to work on therapy exercises which she did by giving verbal direction to the child, but she was limited to minimal physical assistance. The other SNA who was present in the Sensory Integration Room said she did not feel safe at the time because she felt that there was a need for two physically able SNAs because the children had the capacity to act out.

44. The other class was the middle class which had eight children and two fulltime SNAs and a further SNA that the class shared with the reception class. In effect, there were 2.5 SNAs available in this class. Three children needed assistance with mobility. One child had Epilepsy and needed physical assistance when walking, which meant that two SNAs escorted the child to the bus. One with Autistic Spectrum Disorder needed to be escorted to a quiet room. Another child had stiff and shuffling gait and needed assistance. Children needed assistance with toileting. Ms. Daly was able to give good assistance with a child who was able to lift her feet up so Ms. Daly could take her clothes off and put them on over her feet, but another child was less compliant because of not being as physically flexible. Ms. Daly could not assist the SNA with taking one of the children to a quiet area while the others were being disruptive. The result was that there was no class in which Ms. Daly could participate in any physical sense with the principal duties of an SNA.

45. Ms. McGrath then provided a Job Demands Analysis in tabular form in which she listed particular SNA duties and in each case, having listed the duty in turn, she tabulated the task demands and whether there was a fit with Ms. Daly, and finally, whether adaptations or equipment were required to facilitate Ms. Daly in dealing with the particular duties. This is the source of the claim on Ms. Daly's behalf, that of the 16 tasks that are associated with the job of an SNA, she is unable to do seven of them, but is able to perform some nine functions wholly or partly. In regard, for example, to a duty entitled 'Supervision in Assembly', the demands of which are described as "walk with students to assembly, sit with student group in assembly, say prayers with group", Ms. McGrath commented that Ms. Daly was able to do this by giving verbal direction or physical prompt to children who are independently mobile and not at risk of absconding and that she could sit and encourage input from children. Obviously, she was not able to assist with dancing. Neither could she help to prevent hitting out and acting out behaviour.

46. Ms. McGrath turned to a question of safety. She said that Ms. Daly is in a more vulnerable position in a wheelchair than other staff in instances where a child is acting out by throwing items etc. She cannot move as quickly to get herself out of the way, if required, or to intervene to protect a child or a staff member. There is a requirement for two physically-able SNAs with children who act out or need physical assistance. She said that there may be a concern that Ms. Daly would not be able to support the other SNA in the instance of a physical outburst that put that SNA at risk. There may also be a concern regarding division of labour i.e. would an SNA working in tandem with Ms. Daly get all the heavy jobs and therefore be at greater risk of injury?

47. Ms. McGrath's conclusions referred back to her table of duties and said that:

> "It is clear that she is limited from assisting with children with physical care needs. Safety, however, is the main concern for Ms. Daly, staff and the children. Both classes assessed had children who can act out and need hands-on intervention and/or escorting. This suggests that these classes would need two physically-able SNAs to assist with these children."

Accessibility was not a limitation for Ms. Daly while some relatively minor adjustments might be required. She then added the following paragraph which is central to the determination of the Labour Court:

> "The recommendation is that Ms. Daly could act as a floating SNA. The

> Risk Assessment/Care Need Sheets (Appendix 2) used to assess children could be used to identify children that Ms. Daly could work with. She can perform SNA duties with children who need verbal or physical prompts. It is not recommended that Ms. Daly work with children who act out physically.
>
> I hope that Nano Nagle School have resources to support Ms. Daly as it is evident that she is very motivated to return to work.
>
> If I can be of any other assistance, please do not hesitate to contact me."

48. I have set out this report in some detail because it is important to understand the process that Ms. McGrath engaged in; the nature of the school; the needs of the pupils and the requirements of the job of an SNA. Ms. McGrath made later comments in her evidence about the suggestion of a floating SNA, but taking the report as it stands it is clear what Ms. McGrath means. Ms. Daly is unable to perform the normal tasks of an SNA. She would not be suitable to work in any of the ten classes that there are in the school. She could not deal with children who have any physical needs, which is a large proportion of the children. Some of them have clear physical needs and disabilities that require hands-on assistance on a regular and predictable basis. Many of the others are subject to episodic acting out that is not predictable, but which calls for rapid intervention by a fully able-bodied SNA or possibly two such persons. A person with a severe disability, such as Ms. Daly, could be a danger to herself as well as to others, whether children or colleagues. The parts of the job that she can do are those parts that do not require physical involvement, such as giving verbal instructions or encouragement, but that is only one part of the job of an SNA.

49. It is clear that Ms. Daly is a committed worker and her record before the accident was exemplary. However, enthusiasm is not enough in a situation where there are vulnerable children who are in need of special care that involves hands-on attention at a quite intense level at times.

50. It is clear without considering the evidence that Ms. McGrath and the other witnesses gave at the Labour Court hearing, that Ms. McGrath's report indicates that the redistribution of tasks to accommodate Ms. Daly as an SNA in the school would take out all of the elements of the job consisting of physical involvement with children. That would include dealing with children who might require physical restraint or accompaniment, as well as those whose behaviour could be anticipated. The suggestion made by Ms. McGrath was that Ms. Daly might act as a kind of supernumerary SNA, operating in any part of the school where she might be able to do something useful. It is apparent that Ms. McGrath hoped that the school would have the resources to accommodate Ms. Daly in this manner.

51. This report furnishes the factual background against which we have to assess the practicality or otherwise of the factual assessment made by the Labour Court. The legal issue is the interpretation of the section.

**Legal Context: Interpretation of Section 16**

52. As appears above, the Directive mandates that employers make reasonable accommodation for disabled persons:

> "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."

In its conclusions in *HK Denmark*, cases C-335/11 and 337/11, the Court of Justice

held:

> "Article 5 of Directive 2000/78 must be interpreted as meaning that a reduction in working hours may constitute one of the accommodation measures referred to in that article. It is for the national court to assess whether, in the circumstances of the main proceedings, a reduction in working hours, as an accommodation measure, represents a disproportionate burden on the employer."

53. Subsection (3) (b) of section 16 requires an employer to

> "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."
>
> Subsection (4) defines 'appropriate measures', in relation to a person with a disability as including, inter alia, distribution of tasks.

54. It follows from these citations that section 16 does not require any special construction because interpretation of its meaning is available in the ordinary meaning of its words. The section does envisage some distribution of tasks, just as it also specifies time adjustments, as HK Denmark found was the case with the Directive. It is correct to infer that the requirement to be able to perform all the tasks of the position means the tasks after adjustment or distribution. Adjustment to access and workplace and hours and tasks does not mean removing all the things the person is unable to perform; in general it is reasonable to propose that tasks that are not essential to the position could be considered for distribution and/or exchange. That does not mean stripping away essential tasks, especially the precisely essential elements that the position entails. On a legitimate, reasonable interpretation it is incorrect to demand that redistribution however radical must be essayed no matter how unrealistic the proposal. The section requires full competence as to tasks that are the essence of the position; otherwise subsection (1) is ineffective. The fundamental proviso in section 16 (1) must be respected. The section does not in its terms make the process of enquiry a ground of default, neither does a failure to consult constitute breach of the duty imposed.

55. In this case, the employer was obliged to give objective consideration to Ms. Daly's capacity to perform the tasks of a Special Needs Assistant in this school. On that question, the facts as reported by Ms. McGrath were not in dispute.

**The Labour Court's Conclusion**

56. Was the Labour Court entitled to hold that the school did not comply with its statutory duty under s. 16? Did the school comply fully or substantially or not at all?

57. The school obtained expert reports. On the advice of the occupational health physician, it engaged Ms. McGrath who had worked with Ms. Daly on her recovery. The Principal followed up the floating SNA idea, as suggested by Ms. McGrath, by contacting the school's funding body, the NCSE, but that proposal was not approved. The official who dealt with the request was named in the Labour Court so the school was specific as to the refusal of funding. The point that he made to the Principal was that SNAs were provided for care of children, not to support adults i.e. adult workers, so the Council would not fund a position of floating SNA who would not be doing the work required of such a worker. The Labour Court and the High Court appear to have had some difficulty

in deciphering the shorthand message conveyed by the NCSE official, but it was clear to the Equality Officer and the school.

58. The Labour Court was in error in dismissing the school's argument that the floating SNA position required the creation of an entirely new position. That is just what it involved. Such a job would be a new position in the school; there was not a floating SNA working in different classes from time to time. It would be entirely different from the work of the other SNAs. Classes in which two assistants were needed would continue to need them and Ms. Daly would not be able to replace one person, as the report made clear. Ms. McGrath expressed the hope when making the recommendation that the finances of the school would permit its implementation. In the result it is hard to reconcile this finding of the Labour Court with the known facts. Ms. McGrath's report confirms the school's argument that this was a new job being created, for which the writer hoped the school would have funds, namely a supernumerary SNA position with all the physical elements removed.

59. The criticism of the Principal for not approaching the other SNAs to take on between them the physical aspects of the job is not justified. The school had a decision to make about Ms. Daly's capacity to work as an SNA. The Principal was not required to canvas with the other SNAs whether they would be willing to take on the work that Ms. Daly could not do. Even if they were willing, the school Principal and the Board would still had the decision to make. It was not sufficient to have a majority vote of the SNAs.

60. The fact that the occupational health physician discussed with the Principal the situation in the school in regard to Ms. Daly's proposed return to work is not a matter for criticism of that expert or of the Principal. The impact on the school and the facilities available to accommodate Ms. Daly were proper points for consideration as the expert saw fit. It was his report to the school and he was entitled to obtain relevant information. The fact that Ms. Murphy was of the view that Ms. Daly would have to be able for all the SNA tasks is in the circumstances of this case of no significance because of the extent of the reorganisation that would have been necessary. If the case had been that some non-essential tasks which could be distributed among other employees were stopping Ms. Daly from getting back to work, the mistaken belief as to the need for full capability might be relevant but the situation here was entirely different.

61. The school Board made its decision based on the reports and in light of the refusal of funding for the new position. The school management had to decide in the interests of the whole school community, but primarily the children whose care was entrusted to the school. They needed physical, hands-on SNA care work. Parents were entitled to insist on a full complement of capable care staff. Safety is a major concern: of children from children who act out; of the children who act out; of the SNAs; of other staff; and of Ms. Daly herself. The school was not in a position to take chances with care and safety obligations towards the whole school community; it was entitled to say that it needed all of its complement of SNAs to be fully capable. All of this was in the McGrath report expressly or impliedly and was not in dispute. The failure of the Labour Court to address these matters not only undermines the validity of its analysis but also serves to highlight the error of its approach in focussing on the position of Ms. Daly to the exclusion of the other legitimate interests that the school had to accommodate.

62. The High Court discounted the school's complaints about the Labour Court's analysis of the law, holding that the ultimate conclusion in the determination concerned the process of evaluation and that any such errors as might have been found, which the court did not find it necessary to decide, did not impact on the decision made in the end. For the reasons I have stated above, I do not agree with that conclusion, but I want to say why I also do not consider that the ultimate decision is valid as a matter of law. The proposition that there is a freestanding obligation on an employer to carry out an

evaluation, irrespective of the other circumstances of the case and without regard to the fundamental question as to whether the employee is actually capable of doing the job, is starkly stated as a matter of law by the Labour Court. This is ultimately the basis for its conclusion that Ms. Daly was entitled to compensation on the basis that the employer failed in its duty under the Act to make reasonable accommodation for the employee. The Labour Court said:

> "If all of the options that may be available are not adequately considered, the employer cannot form a bona fide belief that they are impossible, unreasonable or disproportionate. As was pointed out by this Court in Humphreys v. Westwood Fitness Club and in A Worker v. An Employer, a failure to adequately consider all available options on how a disabled person can be accommodated can amount to a failure to discharge the duty to provide reasonable accommodation. Those cases also indicate that an inquiry in that regard can only be regarded as adequate if the affected employee is afforded an opportunity to influence the decision that the employer ultimately makes."

63. There is nothing in s. 16 to justify this rule. The argument has its origin in English employment law decisions on their disability legislation, culminating in the case cited by the Labour Court in Mid-Staffordshire General Hospital NHS Trust v. Cambridge [2003] IRLR 566. That case, however, has been disapproved and not followed in cases decided from as early as 2006 until recent judgments. See Tarbuck v. Sainsbury Supermarkets Ltd [2006] IRLR 664. The point is a simple one: the statutory duty is objectively concerned with whether the employer complied with the obligation to make reasonable accommodation. If no reasonable adjustments can be made for a disabled employee, the employer is not liable for failing to consider the matter or for not consulting. It is not a matter of review of process but of practical compliance. If reasonable adjustments cannot be made, as objectively evaluated the fact that the process of decision is flawed does not avail the employee.

64. I find myself in agreement with the Equality Officer's conclusion in this matter. He applied the terms of the Act to the facts of the case. The facts are incontrovertible and the Labour Court paid insufficient attention to them. The central reality is that Ms Daly is unable to perform the essential tasks of a Special Needs Assistant in this particular school. No accommodations can change that, unfortunately. Neither is it suggested otherwise. Instead, the Labour Court thought that the employer's obligation was to strip away the things she could not do and then to ask whether she was able to perform the essential tasks that remained. It discounted the consideration the school gave to the new position arising from Ms. McGrath's report, which in my judgment was erroneous.

65. In view of these conclusions, it is not necessary to consider the ground of appeal based on the evidence given by Ms. McGrath to the Labour Court. My judgment is that the court did not correctly apply the law to the undisputed facts contained in that expert's report. In other circumstances, I would be concerned if a Tribunal were to make no reference to relevant evidence on a central issue or to appear to reach conclusions that were not grounded in evidence.

66. For the reasons I have given, I would allow the appeal and set aside the determination of the Labour Court.

**Judgment of Ms. Justice Finlay Geoghegan J. delivered on the 31st day of**

**January 2018**

1. This appeal raises difficult and important questions of construction of s.16 of the Employment Equality Act, 1998 as amended by the Equality Act, 2004. The section has subsequently been further amended but it was the section as amended by the 2004 Act which applied at the time of the decision of the Labour Court which gave rise to these proceedings.

2. The judgment delivered by the President has set out in full the background to the proceedings, the decision of the Labour Court, of the Equality Officer and of the High Court which I gratefully rely upon and do not propose repeating save as necessary.

3. I am in agreement with the President that the appeal should be allowed and the construction of s.16 of the 1998 Act by the Labour Court and upheld by the High Court was not correct.

4. In this judgment I only wish to make some additional comments on the proper construction of s.16 of the 1998 Act (as amended).

5. Section 16 of the 1998 Act as amended by the 2004 Act insofar as relevant provides:

> *"(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) . . .*
>
> *(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 –*

*. . .*

*(4) In subsection (3)—*

*"employer" includes . . .*

*'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;"*

6. The Equality Act, 2004, which inserted the provisions under consideration as appears from its long title was enacted *inter alia* for the purpose of giving effect to the State's obligations pursuant to Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ("the Directive"). Section 16 gives effect to Art. 5 of Directive 2000/78. Article 5 provides:

> *"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."*

7. The dispute in relation to the construction of s.16 and this appeal arose from the following facts. Ms. Daly was employed by the Nano Nagle School ("the School") as a Special Needs Assistant ("SNA") from 1998. Unfortunately in 2010 she suffered serious injuries in a road traffic accident as a result of which she is confined to a wheelchair by reason of paraplegia. She is obviously a remarkable person. She was a well respected and admired SNA. She was anxious to return to work and approached the School in January 2011 with a view to returning to work. The School is one which caters for children with profound disabilities, extreme care needs and for challenging children on the autistic spectrum. It had approximately 77 pupils, 12 teachers and 27 SNAs.

8. Following Ms. Daly's request to return to work as an SNA the School had her initially assessed by Dr. Madden, the School's occupational physician and subsequent risk assessments were conducted, as recommended by Dr. Madden by Ms. McGrath an occupational therapist. The report of Ms. McGrath sets out in table 1 "the duties an SNA performs in Nano Nagle's School" which as in a note she explains "is not a finite list of

SNA duties but the main duties determined by this assessor from the information and reports provided to her". There does not appear to have been any dispute that the 16 duties identified by Ms. McGrath were main duties of an SNA in the School. In relation to each of the 16 duties Ms. McGrath then identifies one or more task demands relating to the duty and states whether such task would be suitable for Ms. Daly and finally whether in relation to those which were suitable whether adaptations or equipment were required. Her finding was that there were seven duties which were not suitable for Ms. Daly or to put another way were duties which Ms. Daly was unfortunately now unable to perform. There were nine duties which she could either fully or partially perform some of which required some adaptations of the physical environment or equipment.

9. Ms. McGrath recommended that Ms. Daly "could act as a floating SNA". There was at the time no such position or job in the School. The report made clear unfortunately that Ms. Daly was unable to perform a significant number of the duties or main duties of the position of an SNA in the School and no adaptations or equipment could make her capable of doing so.

10. Dr. Madden subsequently advised that she was unfit to return to work and the School so informed her.

11. Ms. Daly made a complaint to the Equality Tribunal that the School failed to provide her with reasonable accommodation for her disability so as to allow her to continue in employment. That complaint was rejected and she thereafter appealed to the Labour Court.

12. The decision of the Labour Court which gives rise to the dispute between the parties as to the proper construction of s.16 of the 1998 Act is evident from the commencement of its conclusion on p.33 of its decision. There the Labour Court stated:

> *"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 too 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…"*

13. As appears from the above and a full consideration of the determination, the Labour Court concluded that the School was under an obligation to consider redistributing certain of the tasks attached to the job of an SNA amongst other SNAs so as to remove from job in which Ms. Daly would return to work those duties she was not capable or competent to perform and in substance permit her to return to a modified job which Ms. McGrath had termed "a floating SNA".

14. The School disputed that it has any such obligation pursuant to s.16 of the 1998 Act (as amended) and appealed to the High Court. In the High Court Noonan J. upheld the Labour Court's construction of section 16. He did so in part in reliance upon the

judgment of the Court of Justice of the European Union in *HK Danmark, acting on behalf of Ring* (Applicant) *v. Dansk Almennyttidt Boligselskab* (Respondent) *& ors* (Cases C-335/11 and C-337/11) of 11th April 2013 to which he referred as "*Ring*".

15. Noonan J. referred to the change in position by the School in its submissions and its ultimate submission to him that s.16 only required the School to consider and implement appropriate measures as defined in s.16(3) as would render Ms. Daly capable of fulfilling all the duties of the job of an SNA and that since no amount of reasonable accommodation or appropriate measures could ever achieve that situation the School had no further obligation to Ms. Daly by reason of s.16(1)(b). Having referred to the judgment of the CJEU in *Ring* he stated at paras. 59 – 62:

> *"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."*

16. Before this Court, the School as appellant, maintained its submission that s.16 of the 1998 Act (as amended) did not oblige the School to consider removing from the position or job of an SNA in the School certain of the duties which Ms. Daly, unfortunately, was unable or not competent to perform by reason of her disability and redistribute those duties or all the tasks associated with those duties to other SNAs within in the School. The submissions made on behalf of Ms. Daly sought to uphold the opposing construction adopted by the Labour Court and upheld by the High Court that s.16 did oblige the School to consider the redistribution of those tasks or duties.

17. The School also submitted that the Labour Court and High Court incorrectly approached the construction of s.16 by making reference to and considering the recitals to the Directive.

**Conclusion on interpretation of Section 16**

18. Section 16 of the 1998 Act (as amended) is enacted to give effect to the Directive. It must therefore be construed insofar as its wording permits in a manner consistent with the Directive which it seeks to implement: *Marleasing SA v. La Commercial Internacional de Alimentation SA* [1990] ECR 4135. That principle as correctly submitted on behalf of the School has limitations and cannot serve as a basis for an interpretation of national law *contra legam*: *Albatross Feeds Ltd v Minister for Agriculture* [2007] 1 IR 221 per Fennelly J at 243-244.

19. The relevant obligation imposed on the School as Ms. Daly's employer is imposed by s.16(3)(b) to take "appropriate measures, where needed in a particular case, to enable a person who has a disability… to participate … in employment … unless the measures would impose a disproportionate burden on the employer." There are, however, in s.16 of the 1998 Act two limitations to the obligation on the employer to take such appropriate measures to enable a person with a disability participate in employment. The first is specified in sub-s.16(3)(b) itself namely that the measures would not impose "a disproportionate burden on the employer."

20. The second limitation is in s.16(1) to the effect that nothing in the Act is to be construed as "requiring any person to … retain an individual in a position … if the individual … is not (or, as the case may be, 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." The question is how to construe that limitation on the obligation placed on the employer in a manner consistent with the obligations imposed by s.16(3)(b) to take appropriate measures, where needed, to enable a person who has a disability to participate in employment and having regard to s.16(3)(a) which provides that a person who has a disability is to be considered as fully competent to undertake, and fully capable of undertaking, any duties if, the person would be so fully competent and

capable on appropriate measures being provided by the person's employer..

21. As already stated s.16(3)(b) is intended to implement Art. 5 of the Directive. The extent of the obligation imposed by Art. 5 of the Directive may be interpreted taking into account the recitals to the Directive. As correctly pointed out by the Labour Court the recitals do not form part of the Directive and do not have binding force but may be considered in the interpretation of the Directive.

22. Recital 17 of the Directive provides:

> *"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 obligations to provide reasonable accommodation for people with disabilities."*

23. It appears probable that Recital 17 informed the approach of the Oireachtas in enacting s.16(1) of the 1998 Act. Hence while s.16(1)(b) provides that a person be fully competent and capable of undertaking "the duties attached to that position" such "duties" may only be intended to include the duties attached to a position which may be considered to be "essential functions" of the position in question.

24. It is not necessary to consider further this aspect of the construction of s.16 on the facts of this appeal. It was not in dispute before the Labour Court that the sixteen duties identified by Ms. McGrath as being the main duties attaching to the position of an SNA held by Ms. Daly prior to her accident and to which she was seeking to return formed part of the essential functions of such SNA position in the School.

25. The question of construction is what the School is obliged to do before it decides whether or not Ms. Daly, with her disability, is or is not fully competent and capable of undertaking the duties attached to the position of SNA having regard to the conditions under which those duties are, or may be required to be performed. On the facts of this appeal the duties of an SNA must be performed under conditions which include that the pupils of the School are themselves persons who suffer from physical or mental or behavioural disabilities.

26. It is correctly not in dispute that the School as employer was obliged, subject to it not being a disproportionate burden, to take appropriate measures, where needed and available, which would enable Ms. Daly undertake the duties of the position of an SNA in the School. This follows from s.16(3)(a) and (b). The question is do those appropriate measures include the removal from the position of an SNA (by distribution of tasks to others) those duties which regrettably Ms. Daly with no amount of adaptation or provision of equipment is now unable to perform.

27. That question must be resolved by the wording of the section when considered in the context of its purpose to implement Article 5 of the Directive. On behalf of Ms. Daly particular reliance is placed upon the inclusion amongst the "effective and practical measures" referred to in the definition of appropriate measures in s.16(4) "patterns of working time and distribution of tasks". Again in this definition it appears that the Oireachtas had regard to Recital 20 of the Directive which describes appropriate measures as "effective and practical measures to adapt the workplace to the disability" and then states "for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources".

28. As appears from the decision of the Labour Court and judgment of the High Court and submissions made on behalf of Ms. Daly reliance is also placed upon the judgment of the CJEU in *Ring* in which it decided that "a reduction in working hours may constitute

one of the accommodation measures referred to in [Art. 5 of Directive 2000/78]".

29. By parity of reasoning it was contended and held that the School as employer on the facts herein was obliged to consider a distribution of tasks as one of the appropriate measures to enable Ms Daly return to work in the position of an SNA.

30. My conclusion on the interpretation of s.16 is that it is correct to construe the obligation placed on an employer to take appropriate measures as potentially including an obligation to consider a distribution of certain tasks. However, whether it is obliged to do so in any given situation will depend upon the facts and in particular whether the tasks in question are or are not all the tasks demanded of a particular duty attached to the position in question. The School was not, in my judgement obliged to consider a distribution of tasks on the facts herein for the reasons next stated.

31. The obligation imposed on an employer by s.16 (3)(b) in the context of the limitation in s.16(1) means that an employer is only obliged to retain in a position a employee with a disability who is fully competent and capable of performing all the duties (subject probably to such duties being properly considered as essential functions) of the position concerned. However, in accordance with s.16(3)(a) the employee is considered as fully competent to undertake, and fully capable of undertaking, any duties if, the employee would be so fully competent and capable on appropriate measures being provided by the employer. Hence the employer is obliged, where an employee with a disability is unable or not competent or capable of performing certain duties attached to a position to consider whether there are appropriate measures which may be taken which would enable the employee be considered as fully competent and capable of performing the duty or duties in question attached to the position. That consideration, depending on the duty involved might include the distribution of one or more tasks associated with the duty to another employee.

32. Put simply the obligation imposed by section 16 of the 1998 Act (as amended) in relation to a particular position or job is to consider appropriate measures including, a redistribution of tasks associated with one or more duty or duties attached to the position such that it enables the disabled person be fully competent or capable of undertaking the duties attached to the position. However it does not extend to considering the removal from a position or job a duty or duties which may properly be considered as a main duty or essential function of the position concerned by the redistribution of all tasks demanded by that duty.

33. On the facts of this appeal, regrettably from Ms. Daly's point of view, it was not in dispute that there were seven main duties attached to the position of an SNA in the School, which she had previously occupied and to which she sought to return, which she was no longer competent and capable of undertaking even with appropriate measures. It was never contended that a redistribution of one or more tasks demanded of those seven duties would render Ms. Daly competent or capable of undertaking those duties. For the reasons stated, the section falls short of obliging the School to remove from the existing position of an SNA in the School those main duties, which Ms. Daly is, regrettably no longer capable and competent to undertake and redistribute them to others or in effect create a new position in the School to which Ms. Daly may return. It follows that if the School is not under an obligation to do so it cannot be under an obligation to consider doing so.

34. Mr. Quinn, S.C. on behalf of Ms. Daly submitted that if the Court were to so construe s.16 that it would enable employers in effect create positions and specify duties attached thereto which persons with a disability would be unable to perform and thereby preclude their employment. I do not accept that submission. As indicated the limitation imposed in s.16(1)(b) that a person be "fully competent" or "fully capable" of

undertaking the "duties attached to that position" must be construed and interpreted, as far as possible, in the light of the wording and purpose of the Directive. As decided by the CJEU in *Ring* the Directive itself must be interpreted taking into account the recitals and as far as possible in a manner consistent with the United Nations Convention on the Rights of Persons with Disabilities which was approved on behalf of the European Community by Council Decision 2010/48/EC of 26 November 2009. If challenged, an employer may have to justify the inclusion of any duty which an employee with a disability cannot be considered fully competent or capable of performing regardless of appropriate measures as being an essential functions or main duty of the position concerned. No such challenge was made at any stage in these proceedings to the identified main duties of an SNA in the School. I simply draw attention to this in relation to the perceived consequences of my conclusion on the interpretation of s. 16 of the 1998 Act (as amended).

**Relief**

35. It follows from the above that the Labour Court erred in law in the obligation it considered that s.16 of the 1998 Act (as amended) imposed on the School as employer and that the High Court erred in upholding that decision. The appeal must be allowed and the order of the High Court vacated. The next question is what order should be substituted therefore.

36. The Labour Court in its decision determined that Ms. Daly was entitled to succeed in her appeal to it from the decision of the Equality Tribunal. The only basis it did so was the School's failure to discharge an obligation under s.16 of the 1998 Act (as amended) which this Court has now decided did not exist. The Labour Court set aside the decision of the Equality Tribunal, substituted its determination and granted as redress an award of compensation in the amount of €40,000. The School appealed that decision to the High Court as an error of law. It appears to follow that the further order of this Court should be to substitute for the order of the High Court an order to set aside the determination of the Labour Court and vacate the award of compensation in the amount of €40,000.