THE HIGH COURT

[2021] IEHC 858

[Record No. 2017/10139 P]

BETWEEN

BRIDGET BROGAN

PLAINTIFF

AND

THE DUBLIN AIRPORT AUTHORITY

DEFENDANT

JUDGMENT of Ms. Justice Murphy delivered on the 21st day of December, 2021.

1. The Plaintiff's claim is for damages for personal injury allegedly sustained in the course of her employment with the Defendant.

2. Essentially the Plaintiff's claim is that she suffered a psychiatric injury in April 2016, because of the presence on her personal file, since 2009, of a confidential investigation/surveillance report, carried out on her, at the request of the Defendant. She further claims that this injury was exacerbated by her treatment by the Defendant on her return to work in August 2016; by a disciplinary incident which occurred in November 2016; and by the Defendant's failure to permit her to return to work in October 2017, at a time when her G.P. had certified her fit for work.

3. An initiating letter of claim was sent by the Plaintiff's solicitors on the 28th July 2017, in which the only wrong alleged was a breach of the Plaintiff's constitutionally protected right to privacy. However, when the personal injuries summons issued on the 10th November 2017, a much wider range of wrongs was pleaded.

4. The wrongs alleged are set out at para. 2 of the personal injuries summons and are pleaded as follows: -

(a) Negligence and breach of duty including statutory duty, and a breach of contract;

(b) the Defendant company acted negligently and in breach of its duty and in breach of its contract of employment with the Plaintiff; did not adhere to the Plaintiff's statutory entitlement; acted in breach of the relationship of trust and confidence; subjected the Plaintiff

to ill-treatment which undermined her dignity at work alongside a broad range of harmful acts which caused the Plaintiff to sustain severe personal injuries;

(c) the Defendant acted in breach of its express duty pursuant to the Data Protection Acts, including in relation to the use of surveillance against the Plaintiff; and

(d) the Defendant breached the Plaintiff's constitutional right to privacy.

Pleadings and proceedings

The Claim

5. The Plaintiff initiated her claim by personal injury summons dated 10th November, 2017. The summons consists of rather broad brush strokes in which the Plaintiff sets out what she contends were the express and/or implied terms and/or warranties and/or representations contained in her contract of employment with the Defendant. The pleaded terms/condition/warranties number 26 in total, all of which the Defendant is alleged to have breached.

6. The particulars in a very general way allege a failure to comply with the Safety Health and Welfare at Work Acts 1989 and 2005 and the regulations made thereunder, but do not identify any specific breach. Similarly, a breach of the Defendant's duty of care to the Plaintiff pursuant to the Data Protection Acts is pleaded, but no specific breach of any section of the Acts is identified. The only factual basis advanced for such a plea is the commissioning by the Defendant, and the retention on her personal file, of a confidential investigation/surveillance report.

7. A number of the particulars of alleged failures by the Defendant are overlapping and repetitive but one can discern complaints about the Defendant's disciplinary processes which are pleaded as being oppressive and unfair; allegations of unfair treatment, aggression, bullying, intimidation, victimisation and the intentional and/or negligent infliction of mental and emotional suffering. Thirdly, the Plaintiff complains about the fact that the Defendant mounted surveillance upon her without notification to her, or agreement with her, and this she alleges amounts to a breach of her constitutional right to privacy.

8. The factual pleas underpinning the Plaintiff's claim are limited. They start with the commissioning of the confidential investigation report on the Plaintiff, in February 2009. The Plaintiff complains that that report was wrongfully commissioned and wrongfully retained on her file, unused, up to the commencement of proceedings. Somewhat ironically, having regard to the complaint that a surveillance report was wrongfully retained on the Plaintiff's personal file, on the commencement of proceedings, the Plaintiff's lawyers insisted that the investigation report not be

removed from the file pending the determination of the proceedings. The second factual matter pleaded, which the Plaintiff alleges exacerbated her psychiatric injury, was her treatment by the Defendant on her return to work in August 2016. The gist of her complaint in this regard is that she received no meaningful support from the Defendant in adjusting to new work structures and systems, despite request for support. This she claims heightened her anxiety that she might still be under surveillance. The third event relates to an incident which occurred on 25th November, 2016, in which the Plaintiff was suspended for alleged "gross misconduct" and was escorted from the Airport and had her security clearance removed.

9. At the commencement of the hearing, the Plaintiff's lawyers sought to include particulars of a further incident which they maintain exacerbated the Plaintiff's psychiatric injury. On 2nd October, 2017 the Plaintiff sought to return to work pursuant to a medical certificate from her G.P. certifying her fit to resume work, but was denied access to the workplace on the basis of the contents of a report from a Dr. McNamara of Corporate Health Ireland. The Plaintiff relied on a letter from her solicitors of the 16th November, 2017 containing details of this incident as in effect, a notice updating particulars.

The Defence

10. The Defendant did not raise particulars on any of the matters pleaded in the personal injuries summons and having entered an appearance, delivered a defence on 9th April, 2018. The description of the parties and the fact of the Plaintiff's employment with the Defendant were admitted as was the authorisation issued by PIAB. The Defendant put the Plaintiff on full proof of:

a) The 26 alleged express or implied terms of the Plaintiff's contract of employment;

b) The negligence, breach of duty, breach of statutory duty alleged;

The Plaintiff was put on strict proof of;

c) Ill-treatment or inappropriate behaviour including acts of unfair treatment, aggression, bullying, harassment, intimidation, victimisation and wilful or negligent infliction of mental and emotional stress as pleaded at para. 2(b) of the personal injuries summons;

d) Personal injuries, loss, damage, inconvenience or expense allegedly suffered by reason of the alleged acts of unfair treatment as set out at para. 2(b) of the personal injuries summons;

e) The Defendant's alleged breach of statutory duty pursuant to the Data Protection Acts as pleaded at para. 2(c) of the personal injuries summons;

f) The Defendant's alleged breach the Plaintiff's constitutional right to privacy as pleaded at para. 2(d);

g) The personal injury suffered, as alleged, in the manner alleged, and finally that the Plaintiff suffered special damage as alleged.

11. The Defendant positively pleaded:

a) That it was not liable for any breach of contract, negligence, breach of duty and/or breach of statutory duty;

b) That any personal injuries suffered by the Plaintiff were not caused or contributed to by any act or omission of the Defendant its servants or agents; that any injury suffered by the Plaintiff arose by reason of pre-existing personal stressors in the Plaintiff's personal life and by reason of the Plaintiff's own acts, conduct and omissions.

12. Alternatively, the Defendant pleaded:

a) That if the Plaintiff suffered the alleged or any injury the same was not foreseeable.

b) In the further alternative, the Defendant pleaded :

c) That any injury which may have been suffered occurred notwithstanding the exercise of all reasonable care on the part of the Defendant;

d) That the Defendant had complied with its common law duty of care and its statutory duty under the Safety Health and Welfare at Work Acts 1989 and 2005;

e) That the Plaintiff had failed to put the Defendant on notice at any relevant time that she was experiencing alleged work related anxiety and depressive symptoms and/or alleged subjection to bullying and harassment.

Discovery

13. At some point, voluntary discovery was agreed between the parties in which the Defendant produced its workplace policies and the Plaintiff produced her medical records dating from 2008.

The hearing

14. At the hearing it was agreed that the court could treat all of the discovered material as evidence without formal proof being required.

15. The party's schedule of witnesses indicated that the Plaintiff intended to call Dr. Patrick John Watson, her G.P., Dr. Ann Leader, Consultant Psychiatrist and Steve Tweed HR & Employee Relations Consultant to give evidence, in addition to the Plaintiff herself. The Defendant's schedule had indicated an intention to call Mr. David Gormley, Retail Operations Manager with the Defendant, as well as Aoife Henley, HR Retail Business Partner as witnesses to fact and Dr. Paul O'Connell, Consultant Forensic Psychiatrist as an expert medical witness.

16. On the morning of the hearing the court was informed that neither party now intended to call medical evidence and that the medical reports of the witnesses could be received by the court as evidence of the matters contained therein. The court expressed some surprise at this development as the medical reports are not *ad idem* and without examination and cross-examination how was the court to evaluate the evidence of each particular witness? As matters transpired only two witnesses were called by the Plaintiff, the Plaintiff herself, and Mr. Steve Tweed the HR and employment consultant Only one witness was called for the Defendant Ms. Aoife Hennelley who had no direct evidence to offer in relation to the commissioning or retention of the surveillance report, of which the Plaintiff complained.

The Evidence and Findings of Fact

Bridget Brogan and the DAA

17. In order to fully understand this claim and indeed to assess the Defendant's defence that any psychological/psychiatric injury suffered by the Plaintiff was due to personal stressors rather than workplace issues, it is necessary to understand the Plaintiff's complaint in the context of her overall history with the DAA.

18. The Plaintiff was born on 2nd June, 1977 and is now 44 years of age. She grew up and went to school in North County Dublin. After her Leaving Certificate she did a course in travel and tourism in Whitehall and at the conclusion of that course she got a job with USIT International, in their head office in Dame Street. While there, her first son was born in 1996. In May 1997, she began working for the Defendant as a sales assistant in Dublin Airport. Initially, she was assigned to the alcohol/cigarette department, but following the abolition of duty free within the EU in 1999, sales assistants could be, and were, deployed to any of the multiple retail areas. Her job was full-time shift work. She had a second son in late 2000, and following his birth she worked a four-day week on shift duty.

2002-2006

19. A number of significant events occurred to the Plaintiff starting in 2002. The first major event appears to have been the breakdown of her relationship with her partner and father of her two sons. This appears to have been an extremely acrimonious breakup, which led to a protracted period of abusive behaviour from her ex-partner, which lasted for many years. The abusive behaviour included threats of physical violence, including a threat to life. At one point the Gardaí had to intervene to confiscate a legally held shotgun from her former partner. The threats and difficulties and disputes with her former partner persisted for many years and as the evidence will

show, spilled over into her work environment in 2011,2012. In addition to the stress of the abuse, the Plaintiff also had to cope with being a single mother of two young children who at the time of the separation, were aged six and two. Her former partner did not provide her with financial support which resulted in the Plaintiff being placed under considerable financial pressure in the ensuing years.

20. Adding to the Plaintiff's already difficult and stressful existence were the fact of two road traffic accidents, which appear to have occurred in 2002. The first accident was a single vehicle collision in which the Plaintiff's motor vehicle struck a pole. In the second collision which occurred on 20th November 2002, the Plaintiff's vehicle was in effect, sandwiched between two other vehicles, when her motor vehicle was struck from behind.

21. The court has not seen any medical records from this time, but it appears from later medical records, that the Plaintiff sustained soft tissue injuries to her back. These events coincided with the Plaintiff's first significant absences from work. Between February 2003 and April 2004, the Plaintiff missed a total of 214 days of work. According to the agreed chronology provided to the court, the Plaintiff appears to have returned to work in April 2004, approximately eighteen months after the collision of the 20th November 2002. During this absence, her wages were paid by the Defendant, on the understanding that her employer would be reimbursed from the proceeds of her claim. Having returned to work in April 2004, the Plaintiff continued working until the 18th of May 2006. During this period, she initiated a Circuit Court claim for damages arising from the road traffic accident of 2002. The claim included a claim for loss of wages, due to the Defendant, who had paid her wages while she was absent from work. While the court has not seen any medical reports from this period it is clear from later reports that the injuries sustained were soft tissue in nature. The fact that proceedings, which included a significant claim for special damages, were brought in the Circuit Court, supports the view that the injuries were soft tissue in nature. The Plaintiff's claim was resolved sometime late in 2006, which is the date on which the Defendant was repaid for the wages paid to the Plaintiff during her absence from work in 2003/2004.

Medical issues from 2007-2010

22. Having worked for two years from April 2004 until May 2006 the Plaintiff again went absent on 18th May, 2006 and remained out of work until 4th December, 2007 a total of 566 days. At this point the Plaintiff had full responsibility for the care of her two boys aged eleven and seven. In addition she still had to cope with a violent and abusive ex-partner, who was making no contribution to the maintenance of the children. It appears that in these circumstances in 2007, the

Plaintiff negotiated a return to work on a part-time basis. Thereafter her working hours were 10am to 2pm Monday to Friday. This was apparently expressed as an arrangement to facilitate her family life. The Plaintiff worked from December 07 to July 08 when once again she went absent from work. That absence persisted from July 08 to December 2010, a period of approximately two and a half years.

23. In 2008, the Plaintiff's G.P. practice was the Balbriggan Medical Centre where she appeared to be primarily under the care of Dr. James Doody. The Plaintiff appears to have left that practice and begun attending Dr. P. Watson of Deerpark Medical Centre in Ashbourne in June 2012. A referral letter from Dr. Doody dated 2nd February, 2009 to Mr. John Byrne, Consultant Orthopaedic Surgeon in Beaumont Hospital suggests that the Plaintiff's absence from work from May 2006 to December 2007 resulted from a lifting injury at work which caused a recurrence of dorso-lumbar back pain.

24. Dr. Doody refers to a long course of rehabilitation and physiotherapy which allowed the Plaintiff to return to work in early 2008. Her return to work only lasted six months or so and she again left work in July 2008 with an alleged recurrence of her symptoms. An MRI scan in July 08 did not provide an explanation for the Plaintiff's ongoing symptoms. Dr. Doody expressed his surprise "*at the chronicity of this patient's symptoms and I feel it is disappointing and worrying that she is unable to return to work, apparently long term*". While Dr. Doody was referring the Plaintiff to Mr. John Byrne, Consultant Orthopaedic Surgeon in Beaumont Hospital, Medmark had examined the Plaintiff on behalf of her employer the Defendant in January of 2009 and had reported that the Plaintiff was unlikely to be fit for work for a further period of three months and offered to review the Plaintiff at that time.

Surveillance Report

25. While Medmark had certified her unfit for at a least a further three months and her G.P. Dr. Doody had referred her to Beaumont because he was perplexed by the *chronicity* of her symptoms, the Defendant, through Mr. Brian Lennon, (a person still employed by the Defendant but who did not give evidence in the case), commissioned a report from a private investigator Edward Moore and Company. An email string discovered by the Defendant reveals that on 2nd of February, 2009, Brian Lennon, Employee Relations Manager, emailed Eddie O'Moore asking him to call to discuss another case that we would like you to look into. The email states "this lady works in our retail division and is on sick leave with a back pain issue." No further documents relating to the commissioning of the report have been discovered. At this stage, with the exception of

approximately six months in 2008, the Plaintiff had been out of work since May 2006: That is an absence of two years and three months out of a total period of two years and nine months.

26. The Plaintiff gave evidence that in subsequent dealings with the Defendant, after proceedings were issued, she was told that the company had been informed that she was conducting Irish dancing lessons while out on sick leave. Surveillance was carried out on five days being Tuesday 10th, Wednesday 11th, Thursday 12th Friday 13th and Monday 16th February, 2009. The Plaintiff was observed outside her home going about her activities of daily living, driving to and from various locations. Photographs and DVDs were taken of these outings. The Plaintiff was noted to carry out various tasks including driving, shopping, bending and loading messages into her car.

27. The private investigator engaged in a subterfuge to ascertain whether the Plaintiff was engaged in teaching dancing. The investigator contacted the Plaintiff by mobile phone on Tuesday 17th February, 2009 and asked her whether she was interested in giving set dancing lessons in a local GAA club on Friday nights for an hour. According to the private investigator's report the Plaintiff said that she was very interested in doing them and suggested to the caller that a fee of €5 per adult, per class, should be charged. She indicated that she could do a mix of Irish dancing and set dancing for the hour. The Plaintiff discussed her sons and their success at Irish dancing, in particular, that of her elder son who had apparently won All-Ireland medals. In reply to a direct question as to whether she gave Irish dancing classes herself the Plaintiff is stated to have replied that she did not teach dancing at the moment, but that it is something that she is looking into.

28. According to the report she indicated that there is more money in children's classes than adults and that she is waiting on an opening in some of the schools of Irish dancing in the Ashbourne area. The report concludes with the investigator's opinion that there is nothing wrong with the Plaintiff and that "*it would suit her to get a lump sum from Dublin Airport Authority rather than having to pay large amounts for child care etc. She appears dedicated to putting a lot of time into her two sons and she spends a good deal of time bringing them to Irish dancing and GAA with Fingal Ravens as well as bringing and collecting them from school".*

29. The investigator's report dated 18th February, 2009 was sent to Dublin Airport Authority for the attention of Brian Lennon, together with a VAT invoice. The letter indicates that photographs had been sent by separate email. That email has not been discovered. The letter further suggests that a DVD would be sent by ordinary post. That DVD has not been discovered.

Post Surveillance Report

30. The Plaintiff's then G.P. Dr. Doody, continued to certify the Plaintiff as being unfit for work throughout 2009. He also filled in forms for an insurance company as to the Plaintiff's ongoing disability. There was an issue in July of that year when the Plaintiff asked her doctor to forward-date certs because she was going on holiday. The doctor records that she was angry when he advised her that he could not do so. She is recorded as being persistent in trying to get him to change his mind, to the extent that he had to call another colleague to confirm that it was not permissible to forward-date medical certs. The doctor made it clear in his notes that he wasn't questioning her honesty or integrity when advising her that he was not in a position to supply her with forward-dated certs.

31. The Plaintiff was not re-examined by Medmark throughout 2009. However, the uncontroverted evidence of the Plaintiff is that a Ms. Denise Brett who was Employee Relations Manager, was in contact with her in September 2009 to discuss the voluntary severance scheme. This scheme would have provided the Plaintiff with a lump sum payment, such as that referred to by the private investigator in his report. It appears that post the financial crash the D.A.A. were reviewing and restructuring their entire retail operation.

32. On the basis of Ms. Brogan's evidence there appears to have been numerous meetings between September 2009 and February 2010 concerning restructuring within the retail business at the airport During discussions between the company and the Plaintiff from September 2009, the Defendant suggested to the Plaintiff that because of the restructuring of the business her options were, either to go back full-time or to accept the voluntary severance scheme. These conversations continued until February of 2010 according to the Plaintiff's evidence.

33. Meanwhile, on 12th February, 2010 the Plaintiff was seen by the Orthopaedic Department in Beaumont Hospital in relation to her ongoing complaint of back pain. A report was sent to her G.P. Dr. Doody on 16th April, 2010. According to the report of the registrar to Mr. Tor Melander "*examination showed good straight leg raise bilaterally with normal myotomal and dermatomal examination. Reflexes are positive and she has no upper motor neuron signs. Radiological findings showed a minimum disc bulge at the L5/S1 level with some degenerative disc disease but significantly no exit foraminal narrowing*." In view of her symptoms, the decision was taken to initially treat the Plaintiff with conservative measures including anti-inflammatory gels, glucosamine sulphate and hydrotherapy for relaxing muscles. Dr. Doody noted that the Plaintiff

slipped and fell on her bottom on 10th April, 2010 which led to a short-term exacerbation of her lower back pain but no radiation. She appears to have been prescribed Diazepam Difene and Zoton.

34. In June 2010 the Plaintiff was asked by the Defendant to attend for a functional capacity evaluation by the Irish Centre for Assessment Rehabilitation and Ergonomics. The Plaintiff was found fit for the physical demands of her job and was deemed fit to return to work. The examiner, Robert Ryan, specialist in occupational medicine, expressed the view that the Plaintiff was poorly motivated to return to employment because of the symptoms she perceives, but the test conducted indicated that she was fit for employment despite her reservations. Mr. Ryan expressed the view that it was for the Plaintiff now to decide whether she wished to return to work or leave employment. In the event that she expressed a wish to return to work, Mr. Ryan suggested that the process might be facilitated by allowing her a phased resumption of duty over the first six to eight weeks. The Plaintiff gave evidence that throughout the first half of 2010 her G.P. continued to certify her as unfit. However, the notes of Dr. Doody suggest that his last certification was given on 7th December, 2009 and extended to 1st March, 2010 and was issued on the basis that she had an orthopaedic appointment on 2nd of February, 2010. The court can see no further certs referred to in Dr. Doody's notes for 2010.

35. In any event, on the Plaintiff's evidence the certification of her fitness for work following the occupational health assessment which occurred on 26th June, 2010 led to a further round of negotiations with the HR department with a view to her returning to work. There was correspondence which was not produced to the court between the parties. What is notable, however, is that when the Plaintiff did return, she returned to her previously agreed half-day roster, from 10am to 2pm, a position which she had been told was no longer available in September 2009, in light of the restructuring of the retail section of the company.

36. On the date of her return to work on 7th December, 2010 the Plaintiff had been absent from work for 28 months and in the entire period from 18th May, 2006 she had been out of work for a total of 46 months. Put another way, between 18th May, 2006 and 7th December, 2010 the Plaintiff had only worked for a period of six months. It should be remembered that throughout this period the Plaintiff had had the significant pressures of dealing with a violently abusive ex-partner and the pressure of having sole responsibility for two young children for whom she was expected to provide care and shelter, without support, financial or otherwise, of her ex-partner. In addition, the Plaintiff was under considerable financial pressure. Because of her straitened financial

circumstances the Plaintiff was only able to discharge the interest on the mortgage on her home. She was unable to make repayments against the capital loan.

Health Problems between 2011-2014

37. On 8th February, 2011 shortly after she returned to work, the Plaintiff was diagnosed with varicose veins, for which she was referred to Austin Leahy, Vascular Surgeon and for which condition she was successfully treated on 21st January, 2013 in relation to the right leg and on 7th October, 2013 in relation to the left leg.

38. From the medical records there appear to have been no work absences during 2011. In November 2011 the Plaintiff was involved in a row with a manager at her workstation. This incident is not pleaded as part of the Plaintiff's claim, but the court permitted the questioning on the basis that it assisted the court in understanding the overall picture of the Plaintiff's relationship with her employer, and not as any part of her claim against her employer. In November 2011 the Plaintiff had a row with a duty manager who she had to call to the till area. A customer had queried the amount of change that had been given, and the protocol apparently was that the sales assistant would call the manager on duty to do a spot check on the register in the presence of the passenger to ensure that the correct change was given. The manager who was called happened to be the uncle of her estranged partner and grand uncle of her two sons.

39. According to the Plaintiff he became very irate and agitated to the point that he lost his temper and shouted at her on the shop floor in front of the passengers and staff which the Plaintiff found upsetting and humiliating. The Plaintiff described him as being *"in a bit of a rage shouting to the point of spitting in my face with anger*". As her shift was nearing its end the Plaintiff removed herself from the situation and subsequently made a complaint in writing to the then retail manager. Though this dispute took place at work its genesis was personal. The manager in respect of whom she complained was an uncle of her estranged partner and grand uncle of her two children, in respect of whom court proceedings were ongoing. The Plaintiff feels that her employer was slow to investigate her complaint. It wasn't fully investigated on her evidence until April 2012, at which point she received a letter stating that her complaint had been upheld and that the manager's account of the incident was not credible. The court has not seen this letter.

40. The Plaintiff continued at work during the course of this investigation. The Plaintiff attended Dr. Doody of the Balbriggan Medical Centre with what appears to have been a complaint of sinusitis. He certified her unfit for work on 5th March, 2012 when he prescribed Penicillin,

eardrops and Solpadine capsules to treat her condition. The Plaintiff returned to work on 15th March, 2012 and the doctor notes that she had taken a further three days off work above and beyond that which had been certified and that he had reluctantly certified same. The doctor's notes shows that the Plaintiff complained of a muscle strain to the right lower trapezius. She denied being stressed. An examination of the trapezius showed no abnormality. The Plaintiff requested muscle relaxers and the doctor's note indicates that she was insistent on same. Her medication chart shows that on that date she was prescribed five different medications including Difene, Losamel and Diazepam.

41. The Balbriggan Medical Centre notes indicate that after that date, 15th March, 2012, the Plaintiff ceased to attend the Balbriggan Medical Centre, though she does not have appear to have formally withdrawn from their service. Various letters in connection with other routine matters, continued to issue from that practice in 2012, 2013 and 2014. From the point of view of the court this change of G.P. in mid-2012 adds to the difficulty of assessing the effect of the discovery of the surveillance report on her mental health. Dr. Doody had been her G.P. throughout the period of her acrimonious breakup and was perhaps best placed to assess its effect on the Plaintiff's mental health. The court notes that among the documents listed in his notes is a letter from the Probation Service Family Law on 29/9/2010.

42. Despite a disciplinary finding in her favour in April 2012 the Plaintiff has given evidence that a further incident occurred with her estranged partner's uncle in or about mid-June 2012. She again complained and according to her, on this occasion her employer retained a mediator from Shannon Airport to attempt to resolve the issues between the parties. According to the Plaintiff, within minutes of the commencement of the mediation, the manager/uncle of her estranged partner, began challenging her in relation to her personal life and the acrimonious breakdown of her relationship, which according to the Plaintiff was going through the Family Law Courts at the time. Given his attitude, the Plaintiff declined to continue with the mediation. It was at this point that the Plaintiff attended Dr. Watson of Deerpark Medical Centre in Ashbourne for the first time. Her initial attendance was on 25th of June 2012.

43. There is no evidence in Dr. Watson's notes that he took any history in relation to what appears to have been a new patient. The first entry in his notes states "*stress, being bullied and harassed at work by manager since November 2011, hearing has been held and patient's complaint has been upheld but DAA have done nothing about it but still feeling intimidated by this manager at work – he is invading her personal space – not being verbally aggressive now, has been in touch*

with HR but nothing done yet – upset re same as she has to follow it up, union are involved, not sleeping well".

44. On the basis of this report from the Plaintiff, Dr. Watson certified her as being unfit for work and prescribed an anti-depressant, "Mirtazapine". Dr. Watson saw the Plaintiff again on 6th July, 2012. His note states "*no change – meeting HR manager next week, sleeping better with Mirtazapine".* She was certified unfit from work for a further two weeks and a prescription of Mirtazapine was given for a month. Thereafter Dr. Watson saw the Plaintiff on a two-week basis and certified her unfit for work until 23rd November, 2012.

45. It is noteworthy that the medical notes of Dr. Watson for this period contain nothing of medical significance, but are rather a commentary on the Plaintiff's ongoing interactions with the HR department of her employer. For example, the note of 20th July, 2012 records "*has met HR at work with union rep and awaiting letter re recommendations".* Plan of action is then stated to be "*certificate follow-up two weeks".* Occasionally stress is mentioned, but generally speaking, the medical notes are a recording of the Plaintiff's reported ongoing interactions with HR. After the first two visits, the notes do not record any drugs prescribed.

46. In August 2012, the Plaintiff having been out of work since June, the Defendant requested that an occupational health assessment by Medmark be conducted in respect of the Plaintiff. The stated reason for the assessment is that "*Bridget has been absent since 26th of June due to stress.* Under the heading "*issues to be addressed*" the request states "*we would like Bridget assessed as to her current state of health and a potential return to work date*". The assessment was carried out on 22nd of August, 2012 and was reported to the absence management coordinator of the Defendant company on 24th August, 2012.

47. The Plaintiff was assessed as sufficiently fit to return to work and she was advised that she contact the Employment Assistance Services in order to support her in her return to work. The Plaintiff had indicated that she was due to have discussions with the Human Resources Team and Medmark advised that Ms. Brogan was fit to attend any such meetings. The Plaintiff gave evidence that throughout her absence she had liaised with her union and a woman called Maria Moran, in the Defendant's HR department. Her issue with her colleague/uncle of her abusive partner, was resolved by an agreement that the manager in question be directed to stay away from her and to have no dealings with her on a one-to-one basis.

2013-2015 and the Discovery of the Surveillance Report

48. The records indicate that the Plaintiff worked her half-day roster throughout 2013. During that year she also had successful treatment for her varicose vein issues. According to Dr. Watson's medical notes the Plaintiff did not attend him at all in 2013 and 2014 and only attended him once in 2015 and that was on 30th September, 2015 when she complained of a cough and congestion and he certified her unfit for work for one week.

49. In August 2014 the Plaintiff decided that she wanted to return to a full-time position rather than continuing in the half-time position which she had had for seven years. There was a number of factors in her decision, but on her evidence, the main one was financial. For years, she had been paying interest only on her mortgage and in her own words "*the banks had put huge pressure on me to return to work full-time and to pay my full mortgage*". It is the Plaintiff's case, that when she was facilitated to do part-time work in late 2007, there was an agreement made with a Maria Power of HR that this would be a temporary arrangement and that at the conclusion of the arrangement the Plaintiff would revert back to her original contract. The Plaintiff maintains that she was told by a Maria Moran of the HR department that there was a letter/agreement to that effect on her file. As it transpires, there is no such letter on the Plaintiff's file. One would expect that if there were a written agreement of the nature contended for by the Plaintiff, the employer would have one copy and the employee another. The Plaintiff has produced no written agreement and none appears on her file.

50. In any event in August 2014 the Plaintiff approached the then Retail Operations Manager, Dave Gorman, to arrange her return to full-time employment. According the Plaintiff, Mr. Gorman indicated that he would look into the matter and come back to her. The Plaintiff approached him again in October, but he still had no decision for her. According to the Plaintiff she met Jackie McDonagh head of retail operations, on or about 13th November, 2014. The Plaintiff states that she explained her position to Ms. McDonagh, that she wanted to return to her original contract, on the basis of the terms and conditions set out in that original contract. That contract was made in 1997 and its terms and conditions were far more favourable than the terms and conditions of employee contracts entered into after the 'post-crash' restructuring of the retail operations of the company. According to the Plaintiff she told Ms. McDonagh that there was a written agreement that had been put in place in 2007 when she went on part-time work and that agreement was made with Maria Power who was HR manager at the time.

51. The Plaintiff had a further meeting with Ms. McDonagh in 27th November, Ms. McDonagh had alternative proposals for the Plaintiff. The first was to offer her the voluntary severance scheme, whereby, as the court understands it, she would be paid a lump sum. Her second proposal was to offer the Plaintiff an extra twenty hours based on the terms and conditions then applying to contracts of employment in the retail sector of the airport. As already noted, these terms and conditions were less favourable than the terms and conditions contained in the Plaintiff's original contract, for example, the Plaintiff would have had to work nine hour shifts and would not be paid for breaks. Had the Plaintiff accepted the proposal she would have had in effect, two contracts, one for the twenty hours, covered by her original contract of employment and another for the additional twenty hours covered by the new less favourable terms and conditions. The Plaintiff's evidence is that years earlier when new contracts were being introduced her union had agreed with the Defendant that there would not be split contracts, in which an employee performed part of their duties under their original terms and conditions and the remainder under the less favourable new terms and conditions. The Plaintiff stated that she was given until 20th December to decide on which of the two options offered by Ms. McDonagh, she wished to accept. The Plaintiff sought the advice and assistance of her union and in the course of other contacts with Ms. McDonagh she asked to see her personal file. In the pleadings this is portrayed as a routine inquiry while in her evidence she states that she was looking for the alleged written agreement with Maria Power, made in 2007.

52. In any event, an arrangement was made for the Plaintiff to view her employment file and the appointment took place on 10th December, 2014. The Defendant has offered no evidence as to what transpired at the meeting and the Plaintiff's evidence in this regard is uncontroverted. By arrangement, the Plaintiff went to a room on the third level. In the room was a desk and a round table on which her employment file had been placed. There were two people from HR in the room, one the Plaintiff knew to be Jane Hughes. She didn't know the name of the second person. They offered her assistance in going through the file, which the Plaintiff declined. The Plaintiff's file is a very thick file, dating back as it does to 1997. She started at the rear of the file and in the course of her examination she came across a photograph of herself which at first she didn't recognise, but gradually realised that it was a photo of her with a different hairstyle, taken in her housing estate. On turning the page, she discovered the investigation report marked private and confidential. She started to read the report and realised that it was a report about her, and referred to the subject living at her address with her two sons. The Plaintiff was shocked at the presence of such a report on her file and found that she was unable to continue reading. She asked Jane Hughes of the HR

department for a copy of the investigator's report. Jane Hughes agreed to have a copy ready for her at the conclusion of her shift. When the Plaintiff returned later that day to collect a copy of the report she was informed that there were procedures to be followed, in order to access the information.

53. The Plaintiff described her state as she left work on 10th December as one of "*complete and utter shock. It was quite terrifying to think that somebody was after sitting outside my home and carrying out surveillance on me and my family."* As she had only read the preliminary part of the report she was concerned as to what level of detail the DAA had compiled on her, which had been on her file unknown to her for nearly six years.

54. On the following day she contacted her union representative who in turn brought the matter to the then head of the union, Mr. Brendan O'Hanlon. The union formulated a data access request in accordance with s.4 of the Data Protection Act 1988 as amended. The request appears to have been directed at obtaining the Plaintiff's full personal file with specific reference made to the investigative report and the pictures and DVD referred to therein. The data access request was sent on 20th December in the Plaintiff's name and on 22nd December the data protection officer in the DAA, Orla Lynch, sent an email to the Plaintiff asking her to confirm that she in fact, was the party requesting the data, because no contact details and no return address had been supplied. There were some further contacts as to whether work surveillance CCTV was being requested. That issue having been clarified the data access request was complied with within the 40-day period allowed by statute. The Plaintiff's entire personal file including the investigation report was furnished to her. An examination of the investigation report and the invoice in respect of same indicated that not all of the photographs referred to in the report had been furnished to the Plaintiff, nor did she receive a copy of the DVD referred to in the report. It was subsequently confirmed to her by the data protection officer in the DAA that these items had been lost.

55. As it happens, just as the Plaintiff received the copy of her personal file, including the surveillance report, the Plaintiff with the assistance of her union, secured a return to full-time work on the favourable terms and conditions of her original contract.

56. Having received her personal file and the investigation report the Plaintiff took no further steps to inquire and/or require the Defendant to comply with the provisions of the Data Protection Act 1988-2003, until a breach of the Act was pleaded in a Personal Injuries Summons issued two years and nine months later.

57. On receipt of her file from the Defendant, the Plaintiff immediately contacted her union and complained to the union about the fact of the investigative report on her file. She also complained that not all material referred to in the report, had been furnished. The Plaintiff acknowledged that she made no complaint to the company or any member of management about these two matters.

58. The Plaintiff was asked on a number of occasions throughout the hearing why she had not complained to her employer about the presence on her file of a confidential investigation report. Her answer on each occasion was that she had placed the matter in the hands of her legal advisors. On her evidence, having discussed the matter with her union representatives, on their advice, she placed her file in the hands of her legal advisors. She did so in February 2015, immediately following the disclosure to her of her file. It is noteworthy that her legal advisers did absolutely nothing for almost a year. The court has no idea why that is so. One must assume that those advisers were fully aware of the Plaintiff's rights under s. 2, 3, 4, and 6 of the Data Protection Act 1988-2003. She was entitled to be informed of the purposes for which the investigation report was commissioned so as to show, if such was the case, that it was obtained for a legitimate purpose s.2(c) She was entitled to know the purposes for which the information was kept on her file (s. 3(b)). She was entitled to seek to have the data erased pursuant to s. 6, on the grounds that its retention on her file amounted to a contravention of s. 2(1) of the Act. She was entitled in default of appropriate action by her employer, the data controller, to make complaint to the Data Commissioner. None of these rights/remedies was invoked.

59. Meanwhile, the Plaintiff returned to full time work on the favourable terms of her original contract, in or about February 2015. While her initiating letter of claim dated the 28th July 2017 states that no specific injury was occasioned to the Plaintiff by the knowledge that the investigation report was on her file, her evidence to the court contradicted this. She told the court that the discovery of the file had a huge effect on her "*I lay awake many nights with the concern that there could be people around my home, there could be people carrying out surveillance, and not just me, my family entirely as a whole"*. She told the court that she was under significant pressure at the time to discharge her mortgage payments to the EBS "*there was a lot of pressure riding on me at that time".* There is nothing in the pleadings about distress or upset occasioned by the fact of the report on her file in 2015 and the court notes that there were no medical attendances in that year apart from one on the 30th September for a cough and sinusitis. In the whole of that year she appears to have missed only three days at work.

60. On the 27th of January 2016, almost a year after they had been retained by the Plaintiff, the Plaintiff's solicitors sent a data access request pursuant to s. 4 of the Data Protection Acts 1988 – 2003 to the DAA. The access request was complied with. The court doesn't have the date of compliance, but allowing the 40 days for compliance specified in the Act, the file would have been delivered to the Plaintiff's solicitors by Mid-March 2016. The Plaintiff continued to work throughout this period.

61. On or about the 28th March 2016, the Plaintiff suffered a fall on stairs in Killarney, and sustained an injury to her coccyx. She attended her G.P. three days later complaining of intense pain over the coccyx. She was found to be tender over the coccyx but it was noted that the muscles were not tense. From the 31st of March 2016, for a period of six weeks, she was certified unfit for work due to the effects of the coccyx injury. In the middle of this period, on the 27th of April 2016, she attended Dr. Watson with another concern. Dr. Watson's note of that attendance reads: -

> "*Depressed mood, tearful, anxious, stressed, issue with work also – saw personal file and saw personal file/pictures of herself and her children from 2009 when a PI was hired to follow her, she had a back injury at the time, very, very upset re same, came to light in 2015 but has now found out that is still on file and has not been destroyed, legal involvement now, not sleeping well, family pressures also, paranoid feeling now that she is being watched, (work full time, feels unable to cope with work at present, at counselling)".*

62. At this time, the Plaintiff's legal advisers would have had her personal file for more than a year. Confirmation that her file had not been altered since 2015 by compliance by the Defendant with the solicitor's data access request of the 27th of January 2016. While the Plaintiff refers to the fact that there is legal involvement now, in fact her legal advisers did nothing. There was no follow up to the data access request notwithstanding that the Plaintiff's express concern in April 2016 was that the private investigator's report was still on file. It was open to them to invoke her rights under the Data Protection Act, 1988– 2003, but for reasons best known to themselves they did not do so. From the medical records, it appears that the Plaintiff's unfitness for work changed from a coccyx injury to work–related stress. The entry in the medical notes for the 13th May 2016 reads: -

> "*Doing OK, tolerating meds OK, waiting for word from solicitor re: destroying documents at work".*

63. It is notable that the Plaintiff's legal advisers had at that stage, had taken no steps to seek the erasure of the private investigator's report from the Plaintiff's file, even though that is expressed

to have been the Plaintiff's main concern at that stage. On the 27th of May 2016 Dr. Watson's note states: -

> "*Still no word re work, speaking to solicitor, stressed re whole procedure, wishes to go back to work but not comfortable with same until personal files destroyed".*

64. Despite the fact that the Plaintiff's primary concern appears to have been the destruction of the private investigator's report, her legal advisers had still not taken any of the available steps to ensure that that occurred.

65. Two weeks later on the 10th of June 2016, her medical notes record: -

> "*No change in conditions, still waiting for word from her legal people, stressed re whole situation, sleep interrupted".*

66. Approximately five weeks later on the 20th of July 2016, the medical note of Dr. Watson records: -

> *"No resolution in work issue, has to go back to work though – financially and for her own sanity to get out of house, feels walls closing in, will leave it with her solicitor to sort out the work issue".*

67. Notwithstanding the Plaintiff's clear and repeated statement that her priority was to have the private investigator file removed from her personal file and destroyed, her legal advisors remained silent and did nothing to pursue that goal.

Return to Work in 2016

68. The Plaintiff returned to work in late July/early August 2016. Aoife Hennelly from the Defendant's HR department who gave evidence in the case had dealings with the Plaintiff on her return. The Plaintiff gave evidence that she had at this stage, availed of employee assistance counselling, which is provided by the Defendant to employees who need it. The Plaintiff gave evidence that she had some teething problems settling back into work. Apparently there had been alterations in structures and procedures during her period of absence. Ms. Hennelly gave evidence that having spoken to Ms. Brogan she was aware that she was somewhat fragile and Ms. Brogan had explained to her that she had difficulties at home and was concerned about her two sons. It is common case that Ms. Brogan did not tell Ms. Hennelly or any other member of management of her concern about the presence of the private investigator's report on her file. Again it is common case

that Ms. Brogan had frequent contact with Ms. Hennelly and other members of management in the retail area at that time. In order to support the Plaintiff, she was rostered with a colleague whom she knew, for a long time. It appears that in September the Plaintiff had an anxiety attack on the shop floor and was extremely distressed. It appears that it was related to issues with her son(s) This resulted in a referral to Medmark Occupational Healthcare in October 2016.

69. The Plaintiff appeared to be coping with the assistance of what she described as "a safe colleague", however, another incident occurred on Friday the 25th November 2016. It was "Black Friday", a significant day in the retail calendar. In the morning, the Plaintiff had requested a half day to visit her doctor. She was told in the afternoon that the request could not be facilitated. There was a verbal altercation between the Plaintiff and the manager who had informed her that her request could not be facilitated. The upshot of this is that she was suspended for gross misconduct. The alleged misconduct was verbal abuse directed at her manager. The process when suspension occurs is that the suspended person must surrender their security ID badge which allows them access to the airport. The Plaintiff stated that she was distressed and humiliated by the event. As somewhat of an aside, the court notes that though the root of the altercation which had occurred, was the Plaintiff's request for time off to visit her doctor, the Plaintiff did not in fact go to her doctor on the 25th of November 2016. His records suggested she didn't attend him until the following Wednesday, the 30th of November 2016.

70. In any event, statements of the allegations of gross misconduct were forwarded to the Plaintiff on Tuesday 29th November 2016 and a preliminary investigation meeting was held on the 2nd December 2016. The Plaintiff was accompanied by the head of her union, Mandate. It appears that there was a want of fair procedures in and about the suspension, in that one of the complainants of gross misconduct, had in fact been the person who suspended the Plaintiff. As a consequence, the Plaintiff was reinstated as of the 5th of December 2016. She was notified of this verbally and it was later confirmed by a letter of the 13th of December 2016. Though the suspension was lifted, the Plaintiff was informed that the investigation would remain ongoing and that it was hoped to conclude it within the following fortnight. It was not possible to conclude the investigation within that timeframe because following the incident the Plaintiff did not return to work until the 23rd of December 2016. She attended her doctor five days after the incident on the 30th of November complaining of sleep disturbance and she was noted to be "*very very upset and tearful re what has happened, felt had been settling back into work and felt was getting some support at work but now all changed again*". She attended her doctor again on the 6th of December 2016 when she complained of being unable to return to work because of stress and anxiety. The Plaintiff returned to work for one day on the 23rd December 2016, and thereafter she was rostered for two week's

holiday. Apparently, had she not turned up for work on the 23rd she would have been ineligible for Christmas leave the following year. In any event, when her two weeks' holidays expired on the 6th January 2017, she did not return to work. The note on the file is incomplete but that which can be read states: -

> "*General malaise, feels unwell, work and thought of same, went back for one day before Christmas but told that the 9 to 5 shift would go – upset re same anxious + +".*

A certificate was apparently issued for two weeks.

71. That in effect concludes the medical notes of Dr. Watson provided to the court. However the evidence is that the Plaintiff submitted six sick certs citing respiratory tract infection for the months of January and February 2017. On the 13th of March 2017, the Plaintiff was referred to Medmark Occupational Health by the Defendant company. The Medmark assessment recommended that she be facilitated on a 9 to 5 roster which is something she told Dr. Watson on the 6th January was being ended. The report suggested that Ms. Brogan should be fit to return to work on the 3rd of April 2017.

72. Meanwhile, Dr. Watson furnished a medical report dated the 17th of March 2017 to the Plaintiff's solicitors. The report essentially recites the contents of the medical notes, most of which have been set out above. He indicated that he had been prescribing antidepressant medication and anxiolytic medication and occasionally sleeping tablets, for the eleven months since April 2016. Again, he stresses that she was deeply upset by the fact that her personal file had not been destroyed as it should have been, at her place of work. She told Dr. Watson that the file was meant to be destroyed but it had not been destroyed.

73. Dr. Watson's medical report and the medical notes from which it is culled, suggests that the Plaintiff's primary concern was the destruction of the private investigator's report, which remained on her file. At this point, her legal advisers had had her file for more than two years and had taken no steps to procure the Plaintiff's stated primary objective, which was the removal of the private investigator's report from her personal file. One might have thought that on receipt of Dr. Watson's report, the Plaintiff's solicitors might have reviewed their strategy, whatever that strategy was, and have put their client's welfare ahead of the goal of substantiating a claim. This is the first personal injury claim which the court has encountered in which the injury is alleged to have occurred more than a year after the Plaintiff consulted a solicitor.

Dr Leader Report

74. On the 27th of March 2017, the Plaintiff's solicitors received a report from Dr. Anne Leader, who had carried out an assessment of the Plaintiff on the 20th of March 2017. Dr. Leader sets out the history given to her by the Plaintiff. It places considerable emphasis on the financial stress the Plaintiff was under in 2014, when she needed to return to full–time work in order to make her mortgage payments. She sets out the Plaintiff's account of seeing her file in December 2014 and her shock and dismay at the discovery of the private investigator's report, on her file. She notes that the Plaintiff consulted her union and consulted her solicitors. She notes that the Plaintiff was relieved to be able to return to work under the terms of her original contract. She states that in 2016 when she was out of work on sick leave the Plaintiff felt vulnerable and insecure and was concerned that her employers might be watching her unlawfully. She records that the Plaintiff became depressed and that her anxiety and vulnerability at that time reactivated earlier painful recollections in her life. These are recorded in a subsequent paragraph as being that "*Her ex-partner was abusive violent and jealous. He threatened to shoot her. She lived in fear of him. She was very stressed during this period. Feelings of embattlement and fear resurfaced when she read her file".*

75. She records her return to work in August 2016 and the incident during which she was suspended on the 25th of November 2016. She noted that since that incident the Plaintiff had been out of work. The Plaintiff felt demoralised and humiliated and has financial problems. She is concerned about her youngest son. The report states "*She experiences classical symptoms of depression – low mood, sleep disturbance, poor self – esteem, lack of confidence, negative pessimistic thinking, guilt and a sense of failure*". She was tearful when describing how she fel,t and told Dr. Leader that she is afraid to return to work.

76. Reading Dr. Leader's report of March 2017, one gets the impression that the Plaintiff's issues and anxieties are multifactorial and include the stresses financial and otherwise, of the responsibility of two young sons; the history of violent abuse suffered at the hands of a former partner over a long period of years, in addition to the issues which she encountered in her workplace. In this first report Dr. Leader does not link her then depressive state to any one factor. Dr. Leader's view that the commissioning and retention of the PI report on the Plaintiff's file had reactivated earlier painful memories, chimes with the view of Dr. Paul O'Connell, the Defendant's medical expert.

77. Though Dr. Leader considered that she was unfit for work, the Plaintiff returned to work in April 2017. It appears that she recommenced work on the 5th of April that year and according to the evidence of Ms. Hennelly, which the court accepts, there was an initial meeting attended by Dave Gorman, who was a senior member of the retail management team, Ms. Hennelly and the

Plaintiff's union officer, Brendan O'Hanlon. The purpose of the meeting was to offer her support. She was returned to a roster of 9 to 5 and according to Ms. Hennelly, the Plaintiff had frequent meetings with Mr. Gorman as part of her bedding back into work. At the time she returned to work, the investigation into the disciplinary incident that had occurred on the 25th November 2016 was still open. The investigation could not be concluded while the Plaintiff was out on sick leave. At the return meeting, Ms. Hennelly discussed the investigation and said, "*Let's draw a line in the sand, there is no conclusion, it's not ongoing*". A letter to that effect was sent to the Plaintiff on the 9th May 2017.

78. Ms. Hennelly was aware that the Plaintiff had a number of personal stressors in her life which the Plaintiff discussed with her. However, at no point did the Plaintiff raise any issue about the fact of a private investigation in 2009; nor the retention of the private investigator's report on her file; nor the fact that documents or DVDs or photos which were part of the original report might be missing; nor that she was dissatisfied with the data access request complied with in February 2015; nor that she had a fear that she would be subjected to further surveillance.

79. The Plaintiff continued to work from April until September 2017. The next event of note was the initiating letter of claim sent by the Plaintiff's solicitors on the 28th July 2017. It alleged that the monitoring of the Plaintiff's activities by a private investigator was unlawful and constituted watching and besetting of the Plaintiff. The letter then sets out the circumstances in which the Plaintiff discovered the existence of the private investigator's report on her file and expresses the extreme concern of the Plaintiff, given the contents of the report, that it continues to remain on her file to date without any justification or reasonable basis for holding such information.

80. The letter of claim next outlines the physical injuries allegedly suffered by the Plaintiff in or about March 2016 and alleges that the Plaintiff became paranoid, concerned, distressed and suffered a psychiatric injury in anticipation of a further investigation report being directed by the Defendant.

81. The letter of claim next alleges that the Plaintiff was badly treated on her return to work in 2016. The letter then sets out the Plaintiff's account of the events of the 25th of November 2016 and claims that an investigation arising out of that incident was ongoing, even though the Plaintiff had been notified of its termination in May of that year. On the basis of these factual matters the letter claimed that the Plaintiff suffered a severe psychiatric reaction further to the commission by the Defendant its servants or agents of an investigation report, which was a breach of the Plaintiff's constitutional right to privacy, and as a consequence of same and her treatment at work, the Plaintiff suffered a psychiatric injury. The injury is stated to be the result of the Defendant's deliberate breach of the Plaintiff's constitutional right to privacy. There is no claim in the initiating letter of

negligence or breach of duty, statutory or otherwise, or of a breach of contract, or of bullying and harassment, all of which materialised in the personal injuries summons which was ultimately issued in November 2017.

82. Having called on the Defendant to admit liability for the breach of the Plaintiff's constitutional right to privacy, the Plaintiff's solicitors required that the Defendant retain "*any real or movable property relevant to the accident (sic) in your power possession or control in its unaltered state pending an examination or inspection by such experts as might be advised for the purposes of any proceedings as may be issued against you".*

83. Rather than ask for the removal of the offending report under the Data Protection legislation the Plaintiff's solicitors required its preservation pending proceedings.

84. By letter dated the 31st of August 2017 and stamped received on the 4th of September 2017, solicitors for the Defendant denied liability in respect of the matters raised in the letter of claim and reserved its position fully in respect of all matters raised therein.

Leave in 2017

85. Meanwhile, the Plaintiff continued to work her 9 to 5 shift in Terminal 1 of the airport. In September 2017, serious issues arose concerning the mental health of one of the Plaintiff's sons which need not be set out in this judgment, but which are dealt with in the evidence. The situation required that the Plaintiff take some time off. In her evidence she explained that by September 2017 "*My employer was very much aware that I was having difficulties, they were very much aware of my mental state. They knew I was a single mother with two children. So how I dealt with that would be if a situation arose at home that needed me, I would have to take a day out of work to take care of that situation".* On occasion, the Plaintiff would take a holiday day but on other occasions, it would be taken as emergency leave.

86. In September 2017, the Plaintiff estimated she needed a week off work to deal with her son's issues. However, despite her evidence as to the arrangement with her employer, she took leave on the basis of work – related stress, which was certified by her G.P., Dr. Watson. She returned to work on the 2nd of October 2017 and had in her possession a note from Dr. Watson certifying her as medically fit to resume work on the 2nd of October 2017. She was not allowed to return to work because of a report which her employer had from Corporate Health Ireland, advising that she was not fit for work. Her solicitors in a letter sent on the 16th November 2017, six days after her personal injuries summons issued, characterised this refusal to allow her to work, as an aggravation of the psychological injury pleaded in the personal injuries summons.

87. The court is satisfied that the facts of the matter surrounding this event are more complicated than portrayed by the Plaintiff and her solicitor. The court is satisfied that the situation was as follows: - The Plaintiff went on sick leave based on work – related stress on or about the 12th of September 2017. Despite the fact that on her own evidence, the issue she needed to deal with was more of a personal stressor relating to her son's mental health. While on certified sick leave, she was referred by the company to Corporate Health Ireland and she attended for assessment on the 22nd of September 2017, as requested. The assessment noted that she had been absent for work on sick leave for ten days following an anxiety/panic attack at work. She told the assessor, Dr. Niall McNamara, about her grievance in relation to the private investigator's report. He noted that in addition to that grievance, the Plaintiff has a significant personal stressor which was impacting on her overall coping ability. The clinical assessment of Dr. McNamara was that the Plaintiff's condition was in his view, consistent with an ongoing psychological illness. He found that the Plaintiff was currently unfit for work and noted that he had made some suggestions to her that she should discuss with her G.P., and which he hoped would be of benefit to her. He then recommended that she be reviewed again in four weeks' time to assess her progress. The review date given was the 20th of October 2017 at 12 noon.

88. The Plaintiff chose to interpret that report as leaving it up to her G.P. to certify her fit or unfit, notwithstanding the existence of a review date of the 20th of October. When she turned up to work on the 2nd of October it was explained to her by Mr. Gorman, that the company had a report which contradicted that of her G.P. On the 5th of October Dr. McNamara wrote to the Plaintiff repeating that following his assessment, he felt that the Plaintiff needed follow up with her G.P. and that she was unfit for work until review on the 20th of October. He noted that he had heard from the Defendant company, that her G.P. is happy for her to return to work. In those circumstances, he asked for her permission to contact her G.P. to discuss her fitness to work. The Plaintiff did sign the consent note and Dr. McNamara did contact her G.P. Unfortunately, the Plaintiff did not attend the appointment on the review date of the 20th of October.

89. A further assessment date was set for the 2nd of November. On that date, the Plaintiff informed Dr. McNamara that there had been some significant developments in her personal life in the intervening period and that these in turn had been a significant source of stress for her. At that date, she felt unable to return to work as a result of personal stressors. Dr. McNamara hoped there would be improvement in the following two weeks and arranged a follow up on the 17th of November at 3 p.m. to assess her fitness to work at that stage.

90. At the assessment on the 17th of November 2017, Dr. McNamara reported a significant improvement in her personal stressors and a consequent improvement in her psychological

wellbeing. Dr. McNamara canvassed with the Defendant the possibility of her working a shorter day, but having been informed by the company, that it would not be possible to facilitate that, he recommended that she remain out on sick leave for three weeks from the 17th of November. He asked that the Defendant HR department arrange an appointment for the Plaintiff in approximately three weeks to assess her position. There appears to have been a mix up within the HR department and on the 5th of January 2018, the Plaintiff was sent a medical appointment for Friday the 12th of November 2017. Having regard to her vulnerability, this was particularly unfortunate. On contacting the HR department, she was assured that it was an error and that an appointment had been made for her. Ultimately she contacted Corporate Health Ireland herself and an appointment had been made for her for the 12th of January 2018. On assessment on that date, Dr. McNamara noted that the Plaintiff stated that there had been a very significant improvement in her overall well – being. She gave an account that "Everything is great", and that she is very keen to return to work. She told him that her personal stressors had abated. Clinical assessment that day was unremarkable. On the basis of that assessment, he confirmed that the Plaintiff was medically fit to return to work. He noted one issue of slight concern, in that the Plaintiff denied having attended Corporate Health Ireland on the 17th of November 2017. He pointed to the fact that she had been under considerable stress and that that that may explain her failure to remember her attendance. He advised that if there were any concerns about her performance or memory at work, that it would be appropriate to have her reviewed once more. Following this assessment, the Plaintiff returned to work on the 9th of February 2018.

91. On the 14th August 2019, the Plaintiff was further assessed by Dr. Ann Leader. Her report repeats much of the history provided by the Plaintiff at her earlier assessment in March 2017. At review the Plaintiff's main concern related to the mental health of her younger son. Suffice to say that this was a well- founded concern. The Plaintiff was back at work and was working on a 10.00 to 5.30 shift. The Plaintiff remained very stressed. Dr Leader then quotes from the 2017 report of the Plaintiff's G.P. Dr. Watson, and appears to endorse his diagnosis of severe psychological illness, ie anxiety and depression, secondary to the fact that her personal file at work was not destroyed and contained very private and disturbing information. Dr Leader gives no explanation for her adoption of the diagnosis of the Plaintiff's G.P. Further she doesn't factor in the multiple other stressors both financial and personal of which she was clearly aware, and which had impacted and continued to impact the Plaintiff's life.

92. In the final sentence she provides an opinion. She states:

"*In my opinion, Bridget will continue to feel chronically stressed and depressed of varying severity until her legal action is completed."*

93. This suggests to the court that certainly, as of August 2019, it was the litigation rather than any alleged wrong that was fuelling the Plaintiff's stress and anxiety. As neither Dr Leader nor Dr Watson were called to give evidence, these issues were unfortunately, not teased out before the court.

Evidence of Steve Tweed

94. Steve Tweed is an Employee Industrial Relations Consultant. Mr Tweed was a trade union official for in excess of twenty five years. In 2017 he obtained an M.A. in Industrial Relations and Human Resource Management from Keele University in Staffordshire in the U.K. He now operates as a consultant in the area of industrial relations.

95. In his evidence, Mr. Tweed accepted that upon discovery of the confidential investigation report on her file, the Plaintiff had a number of remedies available to her under the Data protection Act 1988-2003. He assumed, wrongly, that the Plaintiff had sought the removal of the report from her file. Mr Tweed had prepared his report based on a paper review of documents furnished to him by the Plaintiff's solicitors. He did not interview the Plaintiff, nor did he ask any questions of the Defendant. He had the pleadings and most of the personal file, which had been disclosed twice on foot of Data Access requests. He had medical reports, both the occupational health reports of the Defendant and the Plaintiff's reports from Dr. Watson and Dr. Leader. He subsequently sought and was provided with the Defendant's Dignity and Respect at Work policy.

96. Mr. Tweed prepared his report on the basis of two understandable, but erroneous assumptions. First of all, he wrongly assumed that the Plaintiff had sought to have the Defendant remove the Confidential Investigation report from her file and that the Defendant had failed to do so. Second, he wrongly assumed that the Defendant was on notice in 2016, that the Plaintiff's workplace stress, from April to July of that year, was attributable to the continued presence on her file of the Confidential Investigation Report.

97. It appears that the source of Mr. Tweeds erroneous assumptions were the medical notes of Dr. Watson which he collated into a report, furnished to the Plaintiff's solicitor in March 2017. In the body of that medical report Dr. Watson states that the Plaintiff attended him on the 27th April in a very distressed state complaining of depressed mood, anxiety and sleeplessness which she claimed was work related. She told Dr Watson that a Private Investigator had been hired

to follow her in 2009 to see whether she was telling the truth about symptoms and signs relating to a back injury. Dr Watson then records:

"She stated that the issue in relation to the personal file was known about in the year 2015 and she stated that it was meant to be destroyed but it had not been destroyed up until the date that she came to see me on 27th April 2016. She was deeply upset by the fact that her personal file had not been destroyed as it should have been at her place of work."

98. In her medical notes for that period, Dr Watson records on the 13th May,

"…… *waiting for word from solicitor regarding destroying documents at work."*

99. Later in the medical report of March 2017, Dr. Watson records:

"*On review on 27th May 2016, Ms Brogan stated that she had not heard any further information in relation to the work issue. She felt very stressed in relation to the work issue. She stated that she would like to return to work full time but that she would not feel comfortable working in the work place until the personal file had been destroyed.*

100. Throughout this period Dr. Watson was certifying the Plaintiff as medically unfit for work due to work related stress. Later again, in the same medical report Dr. Watson records:

"On review on 20th July 2016, Ms Brogan stated that there had been no resolution in the work related issue.

101. There is no doubt that the report of Dr. Watson of March 2017, conveys the impression that the Defendant had agreed to destroy the Confidential Investigation report which had been on the Plaintiff's file since 2009, but had failed to do so. It also conveys the impression that there was ongoing interaction with the Defendant, in 2016, about the removal of the report in the context of the Plaintiff's ongoing stress being caused by its retention on her file. Neither impression is accurate. Before the letter of claim of the 28th July 2017, neither the Plaintiff nor her advisers had ever raised an issue with the Defendant about the destruction of the confidential investigation report, on her file. Similarly, when certifying her absence between April and July 2016, as being due to workplace stress, neither Dr. Watson nor the Plaintiff, notified the Defendant that the Plaintiff attributed her workplace stress to the fact of the Confidential Investigation Report being retained on her file.

102. Mr Tweed accepted that in the context of absence management policy it may be legitimate for an employer to retain the services of a private investigator. As a matter of probability, he concluded that this report had been compiled in such a context. He stated that in 2009, there were no guidelines as to when it might be appropriate to retain a private investigator. More recent Data Protection Commission guidelines have suggested that employers should have a policy in place outlining the circumstances in which a private investigator might be used.

103. In terms of the investigation report in this case, Mr. Tweed had three main criticisms. His first was the fact that there was a photograph of one of the Plaintiff's minor sons attached to the report. The image wasn't pixelated as one frequently sees when children are captured in a photograph. While there was only photo attached to the disclosed report, there is reference to other photographs and a DVD which were sent by separate mail. These have been mislaid and are no longer available. The court has no evidence as to what the Defendant did with this material, nor when it last had possession of it. Nor does the court have any evidence as to any attempts made by the Defendant to locate the missing material. As, the purpose of the surveillance was the monitoring of the Plaintiff's movements as she went about daily tasks such as shopping, dropping and collecting her children from school and extra-curricular activities, the court considers it likely that there were more images of one or other or both of her minor children in the DVD footage and the stills taken. Asked by the court whether a complaint concerning the taking of photographs of minors without parental consent was the minor's complaint, Mr. Tweed agreed that it was so and referenced a recent case in which a minor had taken a case for invasion of privacy under Article 8 of the European Convention on Human Rights.

104. Mr Tweed's second criticism of the report is the fact that the investigator expresses a subjective evaluation based on his observations. The investigator states:

> "*There is nothing wrong with this lady and it would suit her to get a lump sum from Dublin Airport Authority rather than having to pay large amounts for childcare etc".*

105. Mr Tweed considers it unacceptable that a person would provide a report containing what he considered a *"damning medical assessment"* without referencing any medical examination or findings to support the remarks.

106. Mr Tweeds third criticism relates to the retention of the report on the Plaintiff's personal file. Citing S.2 of the Data Protection Act 1988 as amended by S.3 of the Act of 2003, and in particular S.2(1) Mr Tweed pointed out that data of this nature shall only be obtained for one or

more specified explicit and legitimate purposes; shall be adequate relevant and not excessive in relation to the purposes for which they were collected and shall not be kept for longer than is necessary for that purpose or purposes. Accepting as a matter of probability, that the report was obtained as part of the Defendant's absence management policy Mr Tweed points out that it wasn't used for that purpose.

> "*It wasn't used to pursue a disciplinary case or a case under absence management and therefore, in my opinion it should have been destroyed because it wasn't being used for a purpose…. (the material) shouldn't have been available for any other purpose."*

The Defence Evidence

107. The Defendant was rather coy in its defence. It chose not to call any evidence as to the circumstances in which, and the purpose or purposes for which, the report was commissioned. This is despite the fact that the person who commissioned the report is still employed at a high level in the Defendant company. No evidence was offered as to how the report came to be placed on the Plaintiff's file. No evidence was offered as to the number of people who had had access to the investigation report between 2009 and December 2014 when the Plaintiff discovered its presence on her file. The Court notes that in that period four people had acted as HR Manager in the retail section. In addition, the evidence is that Central HR which had overall control of HR issues within the Defendant company, a member of which had commissioned the report, also had access to the report. No evidence was called from the Data Compliance Officer who dealt with the Data Access requests of the Plaintiff in 2014 and that of her solicitor in 2016. She is the person who could have given evidence as to any inquiries and searches made for the missing DVD and the still photos. More importantly, she is the person who could explain to the court why the investigation report was not removed from the Plaintiff's file at the time of the first Data access request in December 2014 or at the time of the second request in January 2016. The court must assume that the Data compliance officer was familiar with the statutory obligation on a Data controller not to retain material for longer than was necessary for the specific purpose for which it was obtained. No explanation has been offered for its failure to do so

108. The Defendant proffered one witness and a medical report prepared by Dr. Paul O'Connell, Consultant Forensic Psychiatrist, in July 2020, based on an examination conducted in June 2020. Dr. O'Connell's report runs to 25 pages. The report sets out details of the Plaintiff's birth and early development; her education and occupation; her relationship history; her medical history and habits. In recounting her relationship history, the Plaintiff told Dr O'Connell that *"...*

that there was no violence in their relationship and the Gardai were never involved.". She did not disclose the fact that following the breakup of her relationship, she was subjected to years of abuse by her former partner in which she was threatened with violence and in respect of which there was Garda involvement. In her evidence, the Plaintiff explained that she thought that Dr O'Connell was asking whether there had been abuse during the course of the relationship, which there hadn't been. Dr O'Connell later in his report opines that the discrepancy between the Plaintiff's account to Dr Leader in which she disclosed the abuse suffered at the hands of her former partner and her denial of it to him, may be due to a tendency to avoid cues which bring back memories of trauma, which is common in people who are suffering post-traumatic stress disorder.

109. In any event, at section 5 of his report, Dr O'Connell explored with the Plaintiff her alleged workplace stress. In section 6, he conducts an in depth review of the pleadings and the Plaintiff's medical history as disclosed in her notes from Balbriggan Medical Centre which she attended until mid-2012, Dr. Watson of Deerpark Medical Centre which she attended after 2012. He also reviewed the correspondence from Corporate Health Ireland and Medmark who had examined the Plaintiff on numerous occasions, on behalf of the Defendant.

110. Dr. O'Connell has made, an admittedly tentative, diagnosis of PTSD. Since the Plaintiff denied abuse by her partner to him, he did not have the opportunity to explore this issue during his assessment of her. He notes that Dr. Leader records the exposure of the Plaintiff to abuse, violence, jealousy and a homicidal threat. This raises for Dr. O'Connell *"the possibility that Ms. Brogan has experienced a psychologically traumatic incident(credible threat of death) and/or cumulative trauma such as jealousy, harassment or stalking, sufficient to meet diagnostic criteria for PTSD."*

111. According to Dr. O'Connell, there is a considerable diagnostic overlap between PTSD and depression. In his view the background information tends to support a diagnosis of PTSD. That condition predates the issue of the commissioning and retention of the confidential investigation report on the Plaintiff's personal file, and did not result from any actions of the Defendant. In his view, there was insufficient information available to raise clinical enquiry about PTSD until Dr Leader provided her report to the Plaintiff's solicitors in March 2017. That report only became available to the Defendant in the context of the Plaintiff's proceedings.

112. Dr. O'Connell concludes that the fact and discovery of the private investigation report on her file, would not have caused a new onset mental disorder, but could have acted as an exacerbating factor on a pre-existing disorder.

113. The court repeats, that as the parties chose not to call any medical witnesses, such differences as exist between the Plaintiff's and the Defendant's medical advisers were not explored or tested by cross-examination. In these circumstances, the court finds itself more persuaded by the view of Dr. O'Connell, whose opinion is arrived at following an extensive and detailed analysis of the Plaintiff's medical history and her surrounding circumstances. The court notes that his view accords with Dr. Leader's initial view in her report of March 2017 that the issue relating to the Private Investigation report had reactivated earlier painful recollections in her life.

114. The only *viva voce* witness called by the Defendant was Aoife Hennelly, who is the senior HR business partner in the Defendant's retail section. She took up that position in 2016 and therefore had no direct evidence to offer on the events giving rise to the Plaintiff's claim. She set out the Defendant's Absence Management policy and its sick pay arrangements which the court notes are particularly generous. The Plaintiff's level of absence far exceeded the acceptable level of absence under the absence management policy. She gave evidence that the measures now in place to comply with the requirements of GDPR, are far more rigorous than those which applied in the period 2009-2015.

115. She gave evidence of her engagement with the Plaintiff on the Plaintiff's return to work in July/August 2016 (set out above). She was aware that the Plaintiff had significant personal stressors arising from issues with both her sons, as well as financial pressures. The Plaintiff did not disclose to her any concern arising from the presence of the investigation report on her file. Ms. Hennelly gave evidence of the incident which had occurred on the 25th November 2016 in which the Plaintiff had been suspended. She stated that the date in question was 'Black Friday', one of the most important days in the retail calendar and that it was not possible to facilitate a request made on the day, for time off. The verbal altercation between the Plaintiff and the two floor managers was reported to her as was the allegation of abusive language used by the Plaintiff. She maintains that when there is a serious incident on the floor, it is not unusual that a party would be suspended, as the Plaintiff was. She conducted the subsequent investigation which included the lifting of the suspension a number of days later. However, the investigation couldn't be concluded within the normal two week period because the Plaintiff remained out on sick leave until April 2017.

Ultimately, the investigation was terminated without any conclusion being reached and the Plaintiff was notified of that fact in May 2017.

116. In cross-examination, Ms. Hennelly conceded that proper procedures had not been followed in the suspension of the Plaintiff on the 25th November 2016, in that one of the persons who made complaint about the Plaintiff's conduct, actually effected the suspension. Ms. Hennelly also conceded that the P.I. report should not have been left on the Plaintiff's file for a period in excess of six years. Ms. Hennelly essentially agreed with the assessment of the Plaintiff's witness, Mr. Tweed, that the P.I. report should have been used for a disciplinary purpose or else destroyed. Finally, Ms. Hennelly also agreed that the viewing of the report could cause distress and upset.

Analysis and Decision

117. Brigid Brogan is a woman who has been subject to unremitting stress for the best part of twenty years. As a twenty five year old, in 2002, her relationship with the father of her children broke down. She was left with full responsibility for the care, support and maintenance of her two sons, who were then aged 6 and 2. Not only did the father of her children fail to provide any material support, he actively engaged in abuse of the Plaintiff. He was violent, jealous and he threatened to kill her. On numerous occasions, the Plaintiff required the assistance of the Gardai. This abusive conduct persisted on the evidence, for a period of ten years. In 2011/2012 she had a row at work with a manager who was her former partner's uncle, relating to her failed relationship, in respect of which there were then ongoing court proceedings. Throughout this period, she lived in fear of her former partner, according to the report of Dr. Leader of the 23rd March 2017.

118. Her work at the time was shift work which despite the help of her family, must have created additional pressure in relation to the care of her children. Added to all of this, she had two car accidents in 2002. The first was a single vehicle collision. In the second, her car was sandwiched between two other cars. She sustained soft tissue injuries in both collisions. This led to her first sustained absence from work, during which she was paid by the Defendant, on the basis that she would reimburse them from the proceeds of her Circuit Court action. She was out of work from February 2003 until April 2004.

119. Having returned to work in April 2004, the Plaintiff worked for two years until May 2006. In May 2006, she again went absent from work with a reported recurrence of back symptoms. She remained out of work on this occasion until December 2007.

120. In late 2007 she negotiated a part time working arrangement with the Defendant. She was permitted to work 10am to 2pm Monday to Friday. She began the new schedule in January 2008. This facilitated her family situation by allowing her to work while her children were at school. While this arrangement was helpful for her family circumstances, it meant a significant drop in earnings and placed the Plaintiff under financial pressure. She had a mortgage with EBS in respect of which she arranged to make interest only payments.

121. Despite the favourable hours facilitated by the Defendant, the Plaintiff again went absent from work, six months later, in July 2008. This was stated to be due to a recurrence of back symptoms following a lifting incident at work. On this occasion the Plaintiff was out of work until December 2010.

122. In February 2009 the Defendant commissioned a private investigator to conduct surveillance on the Plaintiff. At that point the Plaintiff had been absent from work for 3 years and two months out of the previous 6 years. Her employer was restructuring its retail sector in the aftermath of the financial crash and had a voluntary severance scheme available for suitable candidates. The Plaintiff was subsequently told in the course of a mediation, referred to in both parties medical reports, that the catalyst for her employer's decision to retain a private investigator was information received by it that she was giving Irish dancing classes while out on sick leave. While the court received no direct evidence to that effect, the assertion is supported by the content of the PI report. During the course of the surveillance, an investigator telephoned the Plaintiff to enquire whether she was interested in giving dancing lessons. The Plaintiff said that while she wasn't currently giving lessons, she was interested in doing so. As it happens, unknown to her employer, at the same time that the P.I report was compiled, the Plaintiff's then G.P. in Balbriggan Medical Centre was expressing his surprise at the 'chronicity of her symptoms'. That surprise arose because of the long course of rehabilitation and physiotherapy the Plaintiff had undergone, which had facilitated her return to work at the beginning of 2008 and the fact that an MRI scan done in July 2008 provided no explanation for her ongoing symptoms.

123. The court is satisfied that the Plaintiff's employer was justified in retaining a Private Investigator to carry out surveillance on her, in February 2009. Despite the fact that she was still suffering abuse at the hands of her former partner and despite the fact that she had sustained physical injuries, her absence record was frankly appalling. A specific facility was afforded to her, at the beginning of 2008, to work half days Monday to Friday. Despite this reduced workload she again went absent from work in July 2008. Her complaints of ongoing back problems, while

certified, were rather non- specific. Her own G.P. was somewhat mystified by the chronicity of her problems. Information that she was conducting dance classes certainly suggested the possibility that she was malingering. The type of surveillance that was in fact carried out is precisely the type that one would have expected. The Plaintiff was observed in her activities of daily living; driving her children to and from school; driving her children to and from extracurricular activities; going shopping; loading and unloading shopping from her car. All of these tasks she performed without any apparent restriction or difficulty.

124. At the end of the five days of surveillance, the investigator, not having found any direct evidence of the Plaintiff conducting Irish dancing classes, engaged in a subterfuge by telephoning her, pretending to enquire on behalf of a G.A.A club, whether she was available to give classes. While the court is somewhat uncomfortable with the use of a ruse to elicit information, it is interesting to note that this is not the subject of any complaint from the Plaintiff's expert, Mr. Tweed. Of definite significance is the fact that the Plaintiff expressed an interest in such work and further stated that she was waiting on an opening in some of the schools of Irish dancing in the Ashbourne area. The fact and content of this conversation was not disputed by the Plaintiff. It seems to the court, axiomatic that a person capable of teaching Irish dancing, is also capable of work as a retail assistant for four hours a day, Monday to Friday.

125. A breach identified by Mr. Tweed, the Plaintiff's expert, was the photographing of the Plaintiff's two sons, in the course of the surveillance. The P.I. should not have taken photos capable of identifying the Plaintiff's children. While the children may have been integral to the Plaintiff's day to day activities and as such were likely to be caught on camera, steps should have been taken to ensure that they were not identifiable. While the fact of their being photographed without her permission was no doubt a source of distress to the Plaintiff, any potential action arising from a breach of the Data Protection Acts 1988-2003, enures to the benefit of the children.

126. The court is not persuaded by Mr. Tweed's view that it was inappropriate for the investigator to conclude his report by offering his view that

> "*there is nothing wrong with the Plaintiff and it would suit her to get a lump sum from Dublin Airport Authority rather than having to pay large amounts for childcare etc. She appears dedicated to putting a lot of time into her two sons and she spends a good deal of time bringing them to Irish dancing and GAA with Fingal Ravens as well as bringing and collecting them from school*."

Having observed the Plaintiff for five days going about all the tasks of daily living without any visible physical difficulty, and having ascertained that the Plaintiff was open to teaching dancing, the view expressed is not an unreasonable one. The court considers that the reference to a lump sum arises from the fact that this report was compiled in the context of the development of the Defendant's voluntary severance scheme. On the evidence that scheme was urged on the Plaintiff on a number of occasions in the following years.

127. The enduring mystery in this case is the failure of the Defendant to take any action on foot of the P.I. report. According to the Plaintiff's evidence there were multiple discussions with Employee Relations between September 2009 and February 2010 about the restructuring of the Defendant's retail section. It was indicated to her that her choice was either to return to fulltime work or accept the voluntary severance scheme. The contents of the report were not deployed during these discussions. She remained on sick leave and as we have seen, did not return to work until December 2010. When she did return, it was to her half time position.

128. The Plaintiff had no significant absences in 2011. In June 2012, she changed G.P. and thereafter went on the first of her absences attributed to workplace stress. This arose from disagreements in the workplace with the uncle of her estranged, abusive partner. She was absent from the 25th June until the 23rd November 2012.

129. By 2013 the years of stress caused by the abuse by her former partner had abated, but other pressures were looming. Her mortgage provider began to put her under pressure to recommence full payment of her mortgage. She told Dr. Leader that by 2014, the ownership of her home was in danger. In August 2014 the Plaintiff requested a return to full time work. She had a number of meetings with HR. She was once again offered the voluntary severance scheme. She was advised that a return to full time work would mean that half her working time would be subject to her original terms and conditions and that the balance would be subject to the new restructured conditions, which were far less favourable. The Plaintiff was not prepared to work under the new restructured terms and conditions and consulted her union. It is interesting to note that the Plaintiff was successful in negotiating a return to full time employment on her favourable original terms and conditions and returned to work on that basis in early 2015. Throughout 2013, 2014 and 2015, the Plaintiff had no significant absences. According to Dr. Watson's medical notes, the Plaintiff did not attend him at all in 2013 or 2014, and only attended him once in 2015 and that was on the 30th September 2015 when she complained of a cough and congestion and he certified her unfit for work for one week.

130. In the course of her negotiations for a return to fulltime work, the Plaintiff sought access to her personal file, ostensibly in search of a written agreement as to her entitlement to return to fulltime work on the terms and conditions on which she had originally been employed in1997. Her file was made available to her for inspection, in the presence of Jane Hughes, the then HR manager, and an unidentified second person, on the 10th December 2014. She discovered the investigation report marked 'private and confidential'. She was shocked at the presence of such a report on her file and was unable to continue reading. She asked for and was promised, a copy of the report. When she called to collect it, she was told that there were procedures to be followed in order to access the information.

131. With the assistance of her union, the Plaintiff formulated a Data access request in accordance with s.4 of the Data Protection Act 1988-2003. This request was complied with within the forty day period, provided for by statute. On receipt of her file in February 2015, it was clear that material was missing, namely still photographs and the DVD. On the advice of her union the Plaintiff immediately put the file in the hands of her solicitors and according to her evidence, acted thereafter on their advice.

Events post disclosure

132. In the aftermath of the disclosure of the Plaintiff's file, both parties made poor decisions. The Defendant was now on notice of the presence on the Plaintiff's file of a six year old, confidential private investigator's report. They knew the specific purpose for which the report had been commissioned. They were aware that no action had been taken on foot of the investigation. They knew that their employee who was the subject of the report, was now aware of its presence on her file. They had a data compliance officer who, though not called to give evidence, must be taken to have known that they were under a legal obligation not to hold data for longer than was necessary for the specified purpose for which it had been obtained. The Defendant also had available to it an in-house legal team, had it required advice on its legal obligations.

133. The Defendant should have taken steps in 2014/2015 to remove the report from the Plaintiff's file and to notify the Plaintiff that it had done so.

134. The Defendant had a further opportunity to comply with its legal obligations in January 2016, when the Plaintiff's solicitor submitted a further Data Access Request. It did not

avail of that opportunity either. The Defendant has chosen not to call evidence from any of the relevant witnesses to explain why it chose not to comply with its obligations under the data protection legislation and the court can only surmise that the Defendant took a decision to 'let sleeping dogs lie', out of an apprehension that an admission of wrong might provoke a claim from the Plaintiff.

135. Unfortunately, the Plaintiff too, or more particularly the lawyers to whom she entrusted her interests, took poor decisions in the aftermath of the disclosure. The Plaintiff consulted solicitors immediately on receipt of her personal file from her employer. She did so on the advice of her union. The Plaintiff's solicitors took no external action for almost a full year. At that point, in January 2016, they submitted a Data Access request for the Plaintiff's personal file, which had already been in their possession for almost a year. On receipt of the file, which, allowing for the statutory period of forty days for compliance, the court estimates occurred by mid-March 2016, they still took no action. In the following months while the Plaintiff complained repeatedly to her doctor about the presence of the confidential report on her file, her solicitors still did not act. It was during this period of inactivity by her solicitors, that the Plaintiff claims to have suffered a psychiatric injury. The Plaintiff's reporting to her doctor at this time, gives the impression that the Plaintiff's lawyers were actively seeking the removal of the report from her file. This is a significantly misleading impression. Not merely had they taken no steps to have the report destroyed, but according to the Plaintiff's evidence, she withheld information from her employer as to the cause of her workplace stress in the period from April to July 2016, because "*she had instructed a legal team*". The Plaintiff accepted in cross-examination that she had had many opportunities to bring her grievance about the investigation report to the attention of HR.

Duty to Mitigate Loss

136. Every injured party has a duty both at common law and pursuant to the Civil Liability Act, to mitigate loss. In the case of the Data Protection Acts 1988-2003, a range of rights and remedies are provided to any person aggrieved by the actions of a data controller. Upon receipt of her file and in particular, the investigation report contained therein, the Plaintiff was entitled to ask her employer, the data controller, the purpose for which the report was obtained so that she could assess whether or not the purpose was legitimate. In addition, she was entitled to an explanation as to why the investigation report was still on her file almost six years after it was commissioned. She was entitled to have identified any individual who had processed the material while it was on her file. It was open to the Plaintiff to ask the Defendant/data controller to remove the report from her

file, if they had no valid reason for holding it. In the event that the Plaintiff and/or her advisers, were dissatisfied with the response of her employer/data controller to any such requests, she had the right to make complaint to the Data Protection Commissioner. The Data Protection Commissioner is the supervising authority in this jurisdiction for the purpose of ensuring compliance with the European Union Data Protection Directive 95/46/EC. To discharge that supervisory function, the Data Commissioner is conferred with specific powers in s. 10 of the Act, to investigate potential contraventions of the Data Protection Act as well as powers to enforce any decision that the Commissioner might arrive at pursuant to any such investigation.

137. The Plaintiff's solicitors did not invoke any of the Plaintiff's rights or remedies under the Data Protection Acts. It was as if, they put the Defendant's wrong in their back pocket to be deployed at a later more suitable time. The evidence suggests that the Plaintiff and her lawyers were more interested in substantiating a claim than in vindicating her rights.

Consequences of failure to mitigate loss

138. The Plaintiff's failure throughout 2015, 2016 and up to July 2017, to invoke the specific remedies provided by the Data Protection Acts constitutes contributory negligence of the highest order. Indeed, the court goes so far as to hold on the balance of probabilities, that had the Plaintiff's lawyers invoked her rights under the Data Protection Acts when she first consulted them in 2015, the report would not have been on her personal file in April 2016, when she claims that she suffered a psychiatric injury. This, as noted earlier, is the first personal injuries case that this court has encountered where a Plaintiff suffered her injury after she consulted lawyers rather than before.

139. Further, the court is satisfied that in the absence of any complaint about the retention of the investigation report on her file, such injury as she suffered in April 2016 was not reasonably foreseeable by the Defendant. An employer must be given a reasonable opportunity to address an employee's grievance, before it can be held liable for any damage resulting from that grievance. On the facts of this case, the Defendant was given no such opportunity. In fact, in 2016, the Plaintiff deliberately withheld from her employer information as to the cause of her stress, because "*she had instructed a legal team*." The inference the court draws from this is that the Plaintiff didn't want to damage her claim, by giving her employer the opportunity to remedy her concerns.

The Injury

140. As already stated, the court prefers the detailed analysis of Dr. O'Connell who prepared a report for the Defendant, to that of Drs Leader and Watson who prepared reports for the Plaintiff. Though his diagnosis of PTSD is tentative in circumstances where the Plaintiff did not disclose to him the abuse she had suffered for the best part of a decade at the hands of her ex-partner, the diagnosis makes sense in the overall circumstances of this case and in fact is consistent with the analysis of Dr. Leader in her first report of March 2017, in which she expressed the view that the upset occasioned by the discovery of the Private Investigators report reactivated earlier painful memories and recollections. His opinion is that the discovery of the private investigation report on her file" *would not have caused a new onset mental disorder, but could have acted as an exacerbating factor on a pre-existing disorder."*

141. The court accepts that when the Plaintiff was absent with a coccyx injury in April 2016, she may have developed a genuine concern that the Defendant would place her under surveillance once more. However, her claim that she suffered a psychiatric injury which was exacerbated by her treatment on her return to work in July/August 2016; her suspension in November 2016; and the Defendant's failure to allow her to return to work in October 2017, is unproven and unsustainable.

142. On the evidence the court is satisfied that the Plaintiff was well treated on her return to work in July/August 2016. She was given extra counselling sessions under the Employee Assistance Programme. She was assigned to work with a friend as a safe colleague. She had access to senior management in the event of difficulties.

143. The suspension of the Plaintiff in November 2016 while undoubtedly distressing, followed allegations by two managers that the Plaintiff had used abusive language to them. It was acknowledged by the Defendant, within days, that proper procedures were not followed and the Plaintiff's suspension was lifted pending investigation of the allegations. Investigation was not possible because the Plaintiff in effect remained out of work until April 2017. At that juncture, as part of the return to work arrangements it was agreed to abandon the investigation. This was a decision which was in ease of the Plaintiff.

144. The Plaintiff's complaint that she was not permitted to return to work in October 2017 despite being medically fit to do so, has been analysed above and the court is satisfied that her complaint is unfounded. On the medical evidence available to it, the Defendant was entitled to deny the Plaintiff access to the workplace at that time.

145. The court accepts that between 2016 and 2017 the Plaintiff was again under significant stress, but does not accept that it was attributable to the continued retention of the private investigator's report on her file. The Plaintiff was under considerable financial pressure, particularly following her absence from March to July 2016. That pressure is mentioned in Dr. Watson's 2017 report as a factor in her decision to return to work. More significantly, the Plaintiff had serious stress around the mental health of her sons, most particularly her younger son, at that time. Details of those difficulties are contained in the evidence and do not need to be set out in a public judgment. Suffice to say that those concerns would certainly dwarf any worries that the Plaintiff may have had about a P.I. report on her file.

Allegation of Ill-treatment and bullying

146. For completeness sake, the court finds the Plaintiff's complaints of ill-treatment and bullying are unfounded. During the period of fifteen years from 2002 to 2017, when she was under constant personal stress of one type or another, she was treated decently by her employer. Her employer tolerated a level of absence that would be unacceptable in most workplaces. She was facilitated in 2007 to work part time. She was facilitated in 2015, admittedly with the involvement of her union, to return to fulltime work on the very favourable terms and conditions of her original contract**.** She was given counselling over and above the norm to assist with a return to work in 2016. It is true that over the years she had a number of conflicts with work colleagues, but such is life and work. Nothing which she experienced could be said to meet the legal definition of bullying set out by the Workplace Relations Commission:-

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

147. In summary therefore, the court is not persuaded that the Plaintiff suffered a psychiatric injury in 2016. At most, the probability is that she suffered an exacerbation of a pre-existing mental disorder resulting from years of violent abuse at the hands of her former partner. Such damages as that exacerbation of a pre-existing condition might attract, are entirely extinguished by the contributory negligence of the Plaintiff in failing to mitigate any potential loss, by availing of the specific remedies provided to her by the Data Protection Acts 1988-2003.

Wrongdoing by the Defendant

148. While the Plaintiff was not entitled to sit on her rights and await developments to substantiate a claim, it is the case that the evidence establishes that the Defendant knowingly decided not to comply with its legal obligation to remove the private investigation report from her file, either in 2015, when it complied with the Plaintiff's data access request or in 2016, when it complied with her solicitor's data access request. The Defendant chose not to call any evidence to explain its actions. In these circumstances the court has surmised that it took a deliberate decision to 'let sleeping dogs lie' rather than admit its error in allowing the report to remain on the file for a period of almost six years. Its approach was cynical, unworthy of a semi-state body, and unlawful. The court considers that the failure of the Defendant to acknowledge its error and its failure to comply with its legal obligation to remove the private investigator's report, did potentially constitute negligent infliction of emotional distress. While the court is not satisfied that the Plaintiff suffered a psychiatric injury as alleged, in 2016, the court accepts on the evidence, that the Plaintiff suffered emotional distress and hypervigilance in the immediate aftermath of the disclosure of the report. She told the court that the knowledge that her employer had conducted surveillance on her and had a P.I. report on her file, "*had a huge effect on me. I lay awake many nights with the concern that there could be people around my home, there could be people carrying out surveillance, and not just me, my family entirely as a whole."* She gave evidence that the presence of the report on her file damaged her trust in her employer. She had concerns about the fact that her children were photographed without her consent and that much of the material gathered had gone missing. While the Plaintiff did not seek medical assistance for her distress, the court accepts that her distress in the immediate aftermath of the discovery of the P.I. report on her file, was genuine and entirely foreseeable.

149. The Defendant could have alleviated that distress by complying with its legal obligation to remove the report and by notifying the Plaintiff that it had done so. It chose not to do so. The failure of the Defendant to acknowledge its error in retaining the report on her file, added to the Plaintiff's distress.

150. The Plaintiff is entitled to be compensated for the wrong perpetrated by the Defendant which caused her emotional distress. The Plaintiff did not seek any medical assistance for her distress throughout 2015 and so the court has no medical evidence to assist it in evaluating the Plaintiff's claim. Taking the attitude of the Defendant into account, and the worry and anxiety which was occasioned to the Plaintiff by it's the deliberate failure to acknowledge and remedy its

error, but also taking into account, the fact that the Plaintiff had legal advice from the outset, and could also have mitigated her loss in respect of her emotional distress, the court considers it appropriate to compensate her for emotional distress for a period of one year following the disclosure of the presence of the P.I report on her file. The court assesses the damages arising from the Defendant's negligent infliction of emotional distress to be €25,000. The court therefore awards the Plaintiff €25,000 for the negligent infliction of emotional distress.