THE SUPREME COURT

[Appeal No. SAP IE 2018/37]

O'Donnell J.
MacMenamin J.
Dunne J.
Charleton J.
O'Malley J.

IN THE MATTER OF THE EMPLOYMENT EQUALITY ACT, 1998 – 2011

AN APPEAL PURSUANT TO S.90(1) AGAINST DETERMINATION EDA 1430 BY THE LABOUR COURT, DATED 12TH AUGUST, 2013

BETWEEN:

NANO NAGLE SCHOOL

RESPONDENT

V.

MARIE DALY

APPELLANT

AND

IRISH HUMAN RIGHTS & EQUALITY COMMISSION

AMICUS CURIAE

Judgment of Mr. Justice John MacMenamin dated the 31st day of July, 2019

1. The appellant, Marie Daly, began work as a special needs assistant ("SNA") in the respondent school in the year 1998. She is also a qualified nurse. The Nano Nagle School in Killarney ("the school") caters for children on the autistic spectrum, and those with mild to profound disabilities. In July, 2010, Ms. Daly sustained very serious injuries in an accident whilst on holiday. As a result, she was paralysed from the waist down. Since then she has had to use a wheelchair. She undertook an extensive course of rehabilitation. By the beginning of 2011, she was anxious to resume her employment. The school, as her employer, initiated an assessment process for this purpose. The job of an SNA is a challenging one, and has a significant physical aspect. Ultimately, following a process described in this judgment, the school board refused the appellant permission to return to work.

The Equality Officer
2. Advised and assisted by her trade union, the appellant brought an application (DEC-E 2013-161) under s.83 the Employment Equality Act, 1998 - 2011 ("the Act"), to the Equality Tribunal, now merged into the Workplace Relations Commission (See, now, Workplace Relations Act, 2015). She claimed that the school's decision constituted unlawful discrimination under s.6, s.8, and s.16 of the Acts, and that the employer had failed to comply with its statutory duty under s.16(3) and (4) of the legislation, to provide "*reasonable accommodation*" or "*appropriate measures*", to accommodate her disability, which would have allowed her to return to work. The claim was first heard by an Equality Officer appointed under the Act. His decision, dated the 3rd December, 2013, determined the appellant was no longer fully competent and available to undertake, and no longer fully capable of undertaking, the duties attached to the position. He concluded the school had given consideration to the provision of what are called under s.16 of the Act "*appropriate measures*" to enable the appellant to return to work, but that these measures gave rise to "*a cost other than a nominal cost*", and the school was entitled to rely on s.16(3) of the Act as a defence. It appears that, referring to *nominal cost*, the officer was under a misapprehension as to the applicable law; the *nominal cost* test had been removed by s.9 of the Equality Act, 2004; and replaced by amendment outlined later. This was not the sole basis of his decision, however, as he held the school had a good defence on the basis of incapacity, that there was no discrimination, and the appellant was not entitled to any remedy under the Act.

The Labour Court
3. The appellant appealed to the Labour Court, which reversed the decision. It held there had been a failure to comply with s.16(3) of the Act, and held that, in making its decision on the question of reasonable accommodation, the school had failed to consult with the appellant, who was awarded €40,000 in compensation.

The High Court and Court of Appeal
4. The school appealed to the High Court on points of law. There, Noonan J. upheld the decision of the Labour Court. The school then appealed to the Court of Appeal, (Ryan P., Finlay Geoghegan J.; Birmingham J. concurring in both judgments), which upheld the school's appeal, and reversed the decision of the High Court in two judgments, delivered by Ryan P., and by Finlay Geoghegan J. on

the 31st January, 2018, (A:AP:IE:2016: 000067; [2018] IESC DET 103). The appellant then applied for leave to appeal to this Court, which application was granted in a determination dated the 6th July, 2018, [2018] IESC DET 103.

The Leave Determination
5. In the leave application, the appellant submitted that the decision of the Court of Appeal introduced significant qualifications to the obligations on employers to consider the redistribution of tasks to facilitate persons with disabilities in the workplace. The panel of this Court pointed out that the application appeared to raise the issue of a tension between the *duties* involved in a particular post, and the *tasks* which may be distributed or redistributed by way of reasonable accommodation.

6. The issues which arise are, undoubtedly, of significant importance, not only to the appellant, but in the broader field of disability law. The appeal has been elaborately argued on agreed facts, and counsel have helpfully provided extensive and welcome academic commentary, as well as the normal material required for compliance with the practice directions of this Court. Counsel for the Irish Human Rights & Equality Commission, as *amicus curiae*, also made helpful written and oral submissions. While the issues turn largely on the interpretation and application of s.16 of the Employment Equality Act, 1998 (as amended), other ancillary questions also arise from the Labour Court's determination.

This Appeal

The Act – General Background
7. A general overview of the legislation may be helpful as a starting point. The purpose of the 1998 Act is, *inter alia,* to promote equality between employed persons, and make further provision with respect to discrimination in, and connection with, employment. The Act outlaws discrimination in connection with work related activities on nine distinct grounds, including disability. Whether Ms. Daly, an employee with a disability can be "*reasonably accommodated*" with what are called "*appropriate measures*" is a core issue arising from s.16 of the Act. The difficulty arises with the identification of what are the duties of a position? The section undoubtedly requires that tribunals, and courts, should decide what are those duties. But, even before the original 1998 Act was enacted, scholars expressed concern that the then-proposed legislation was insufficiently specific, as it lacked a clear definition of what were the "*essential*" and "*non-essential*" duties of a work-position. It was suggested this lack of clarity raised the possibility that the provisions of the 1998 Act might be interpreted "*narrowly*", so that it would be necessary for an employee with a disability to demonstrate that they could undertake *all* the duties of the position, whether with or without reasonable accommodation. (c.f. Quinn & Quinlivan, "Disability Discrimination: The Need to Amend the Employment Equality Act 1998 in Light of the EU Framework Directive on Employment", and "Equality in Diversity: The New Equality Directives", Costello & Barry Eds. Vol 29 (Irish Centre for European Law, 2003), at pages 24 and 25). The appellant submits that the Court of Appeal so interpreted s.16, as it now provides, so as to render it necessary for a disabled person, on reasonable accommodation, to be able to perform *all* of what were seen as the core duties of a position of employment. The appellant and the *amicus curiae* submit that such an interpretation is unwarranted by the words of the section and would defeat the Act's purpose. Counsel for the school stands over the Court of Appeal judgments, submitting that, when properly interpreted, they express the true meaning and effect of s.16 of the Act.

8. The 1998 Act, later amended by the Equality Act, 2004, repealed the Anti-Discrimination (Pay) Act, 1974, and the Employment Equality Act, 1977, although re-enacting parts of that legislation with amendments. Insofar as relevant, the purpose of the 2004 amendments was to give effect to those provisions of Directives 2000/43/EC, 2000/78/EC and 2000/73/EC, which still required to be implemented in the State. At the time of the amending enactment in 2004, there was some renewed concern that the new provisions of the 2004 Act did not go far enough in transposing the three Directives.

The 1998 Act, as now amended
9. Section 2 of the 1998 Act defines "*disability*". The definition includes a *partial absence of a person's bodily function*. (s.2(a)). There is no doubt the appellant comes within this category. Section 6 defines "*discrimination*". It provides that, for the purposes of the Act, discrimination shall be taken to occur where, on any of the grounds defined in sub-section 6(2), a disabled person is treated less favourably than another person would be treated. This is referred to as the "*disability ground*". Section 8 deals with discrimination by employers. It provides, in relevant part, that an employer shall not discriminate against an employee in relation to access to employment, conditions of employment, access to employment, or classification of posts. (See s.8(1)(a), (b) and (e) of the Act). Under s.8(4)(b), an employer is prohibited from having rules or instructions which would result in discrimination against an employee, or class of employees, including in relation to access to, or conditions of, employment, or in the classification of posts. The prohibition therein contained also relates to a "*practice*" which results, or would be likely to result, in such discrimination. Section 8(6) provides that, without prejudice to the generality of subsection (1), an employer shall be taken to discriminate against an employee in relation to conditions of employment if, on any of the "*discriminatory grounds*", the employer does not afford to that employee (a) the same terms of employment (other than remuneration and pension rights), (b) the same working conditions, and (c) the same treatment in relation to overtime, shift work, short time, transfers, lay-offs, redundancies, dismissals and disciplinary measures, as the employer offers or affords to another person or class of persons.

10. Section 8(7) provides that, without prejudice to the generality of subsection (1), an employer shall be taken to discriminate against an employee in relation to training or experience for, or in relation to, employment if, on any of the "*discriminatory grounds*", that employer refuses to offer or afford to that employee the same opportunities or facilities for employment counselling, training, and work experience as the employer offers or affords to other employees, where the circumstances in which that employee and those other employees are employed are not materially different. It is unnecessary for a claimant to prove there was an intention to discriminate.

Section 16 of the Act
11. Section 16 of the Act deals directly with disabilities in the context of work. As amended by s.9 of the Equality Act, 2004, s.16(1) now provides that nothing in the Act is to be:

> "*… construed as requiring any person to recruit or promote an individual to a position,* ***to retain an individual in a position****, or to provide training or experience to an individual in relation to a position, if the individual -*
>
> > *(a) will not undertake (or, as the case may be, continue to undertake) the duties attached to that position or will not accept (or, as the case may be, continue to accept) the conditions under which those duties are, or may be required to be, performed, or*
> >
> > *(b) is not (or,* ***as the case may be, is no longer) fully competent and available to undertake, and fully capable of undertaking, the duties*** *attached to that position, having regard to the conditions under which those* ***duties*** *are, or may be required to be, performed.*

…" (Emphasis added)

Seen in isolation, these emphasised words might convey that an employer does not have to retain an individual who is no longer capable of performing the duties in that position. But the section must be read in its entirety. An important issue arises from the word "*duty*" or "*duties*". The same word is not used throughout s.16. Later, the drafter used the word "*tasks*". (See s.16(4)(b)). Do the words "*duties*" and "*tasks*" have the same meaning, or not? The Court of Appeal held that the law permitted, and required, the distribution of "*tasks*", but that there was no obligation to remove from a disabled employee, or distribute to other employees, what were referred to as the "*main duties*", or "*essential functions*" of a position. The appellant submits that the section does not contain any words such as "*core duties*", or "*essential functions*". Counsel for the school argues the words "*tasks*" and "*duties*" have different meanings, the first connoting peripheral features of a job; the second the central or core elements.

12. Section 16(2) is not material. But s.16(3)(a) then provides:

> *"(3)(a) For the purposes of this section, a person who has a disability is* ***fully competent to undertake, and fully capable of undertaking, any duties*** *if, the person would be so fully competent and capable on* ***reasonable accommodation (in this subsection referred to as "appropriate measures")*** *being provided by the person's employer.*
>
> *(b) An employer shall take* ***appropriate measures****, where needed in a particular case, to enable a person who has a disability –*
>
> *(i) To have access to employment*
>
> *(ii) To participate and advance in employment,*
>
> *(iii) To undergo training,*
>
> *unless the measures would impose a* ***disproportionate burden*** *on the employer. …"* (Emphasis added)

The words emphasised above are also keys to understanding the section. The section then identifies criteria for identifying what is a "*disproportionate burden*". Section 16(3)(c) therefore provides:

> *"(c) In determining whether the measures would impose such a burden account shall be taken, in particular, of –*
>
> *(i) The financial and other costs entailed*
>
> *(ii) The scale and financial resources of the employer's business,*
>
> *(iii) The possibility of obtaining* ***public funding or other assistance****. …"* (Emphasis added)

The issue of "*public funding or other assistance"* is considered later.

The Main Issue

13. In a sense, the fundamental issue arises because of the way in which s.16(1) and s.16(3) are sequenced. The Court of Appeal held that s.16(3) of the Act must be seen as being subject to what is contained in s.16(1). In standing over that decision, counsel for the school submits this must mean that a court or tribunal should look first to s.16(1), in order to assess the main duties of a position, and thereafter determine whether, on reasonable accommodation under s.16(3), an employee was fully competent or capable of undertaking these main duties. On this reading, main duties form the starting point for consideration. As reflected in the decision of the Court of Appeal, the school's case is that, if it is shown that an employer has formed a *bona fide* belief that an employee with disabilities was not fully capable of performing the *duties* for which he or she was employed, there is a complete defence to a claim of discrimination. Thus, it is argued, the first stage of any analysis requires identification of the duties required for any job based on an assessment of the structure and needs of the particular organisation, and the role required to be performed. Once these main duties of a role are identified, a disabled person should be assessed in accordance with those duties in order to determine their capacity to perform the job. If they cannot perform these duties, then the next question is whether an employer can undertake any reasonable accommodation to render the employee capable of performing those duties. But, if the disabled employee remains unable to perform these main duties after reasonable accommodation, then there is a full defence. The school submits that it arranged to have the duties associated with an SNA assessed by an expert, Ms. Ina McGrath, who identified sixteen duties attached to the position. Ms. Daly could wholly or partly perform nine duties, but was unable to perform seven. Counsel for the school submits that the Court of Appeal correctly held that no adaptation or accommodation could make the appellant able to carry out the job. She submits that there is no requirement to "strip away" some duties associated with a particular job, as this is not required by the section. Counsel submits this would be to create an entirely new position, which is not mandated at either national or European level. But counsel acknowledges that a distribution of "*tasks*" is acceptable. But these "*tasks*" are to be seen as those peripheral to the main duties; that is, that they would be secondary or marginal in nature.

14. Rather confusingly, s.16(4) contains two sets of sub-paragraphs, both identified as "(a)", "(b)" and "(c)". The first set relates to the identification of an "*employer*" and is immaterial. But s.16(4) then provides that the words "*appropriate measures*", to be found in s.16(3)(a) and (b) "*in relation to a disability*", are to be interpreted as meaning:

> *"… (a) effective and practical measures, where needed in a particular case, to adapt the employer's place of business to the disability concerned,"*

Then the sub-section first mentions the word "*tasks*" in these terms:

> *"(b) without prejudice to the generality of paragraph (a), includes the adaptation of premises and equipment, patterns of working time,* ***distribution of tasks*** *or the provision of training or integration resources, but*
>
> *(c) does not include any treatment, facility or thing that the person might ordinarily or reasonably provide for himself or*

herself;" (Emphasis added)

The Court of Appeal felt that the word "*tasks*" had a different connotation to "*duties*", and that an employer's obligation was to consider only the distribution of tasks, but not core duties, which were essential to the job.

15. It is necessary then to touch on the provisions for redress. Section 75 provides that investigations by an Equality Officer are to take place under the aegis of the Director of Equality Investigations. It sets out the forum for seeking redress, the appeals procedure to the Labour Court, and further appeal, on a point of law, to the High Court. Section 82 of the Acts sets out the forms of redress that can be awarded. These include an order for compensation in the form of arrears of remuneration for a limited period; and that a successful claimant may receive an order for compensation for the effects of acts of discrimination or victimisation, that occurred not earlier than 6 years before the date of the referral of the case under s.77. The Act also allows for an order that an employer be directed to take a particular course of action satisfied, or an order for reinstatement or re-engagement, without an order for compensation. The level of compensation is subject to a maximum of 104 week's pay, or €40,000. (s.82 of the Act). The practice of the tribunal in determining the level of compensation is to place the complainant in the position he or she would have been in had the discriminatory treatment not taken place. (*A v. Public Sector Organisation*, DEC-E 2006-026).

The E.U. Background
16. Counsel for the appellant, and counsel for the *amicus curiae*, submit that, by interpreting s.16(3) as being subject to s.16(1), the Court of Appeal erred. The primary argument is based on the wording of s.16. They also place reliance on E.U. legal instruments and case law. The E.U. law is undoubtedly a useful point of reference. But whether it is even necessary to resort to E.U. law is a point to be determined. It is true that the amending 2004 Act put in legislative form, and reflected, the provisions of Council Directive 2000/78/EC, referred to as the "Framework Directive". It is also true that the Recitals of that Directive identify measures intended to play an important role in combating discrimination on grounds of disability. But counsel for the school argues that the mere fact that the Oireachtas used some of the terms employed in the Recitals does not, itself, elevate those words to anything beyond guidance for the Framework Directive itself.

The Framework Directive
17. Recital 17 of the Framework Directive sets out:

> *"This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available* ***to perform the essential functions of the post concerned*** *or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities."* (Emphasis added)

18. Recital 20 provides:

> *"Appropriate measures should be provided, i.e. effective and practical measures to* ***adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources."*** (Emphasis added) It will be seen, therefore, that the Recital expresses the precept that an individual's workplace must be adapted to the disability and not vice versa.

19. Recital 21 reflects some of the wording of s.16(3)(c) of the Act. It provides:

> *"To determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance."*

20. Article 5 mandates that there must be provision to facilitate persons with disabilities to obtain, and to participate as fully as possible in employment:

> *"Article 5*
>
> *Reasonable accommodation for disabled persons*
>
> *In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take* ***appropriate measures****, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a* ***disproportionate burden*** *on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned."* (Emphasis added)

Article 5 undoubtedly contains terminology similar, if not identical to, what is to be found in s.16.

Section 16: A Summary
21. To summarise, looking to s.16 itself, the term "*reasonable accommodation*" was defined by statute as including "*appropriate measures*". (See s.16(3)(a) and (b)). The question of "*disproportionate burden*" under s.16(3)(b) is to be evaluated by taking into account *financial and other costs, the scale and financial resources of a business, and the possibility of obtaining public funding or assistance.* (s.16(3)(c)). Section 16(4)(a) defines "*appropriate measures*" as meaning effective and practical measures "*where needed*" in a particular case to adapt the *employer's place of business* on the basis of the disability concerned. Section 16(4)(b) provides that, "*without prejudice*" to the generality of paragraph (a), this duty would also include the *adaptation of premises and equipment, patterns of working time, distribution of tasks,* or the provision of training or integration resources.

The Directive: A Summary
22. Turning then to the Directive, Recital 17 states that the Directive does not require the "*maintenance in employment*" of an individual to perform the essential functions of the post concerned, but "*without prejudice*" to Article 5 of the Directive, which provides that employers shall take appropriate measures where needed in a particular case to enable a person with a disability to have access to, or participate in, employment, unless such measures would place a disproportionate burden on the employer. Such measures shall not be deemed "*disproportionate*" when sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.

The CRPD

23. At this point it is necessary only to advert to one other feature of the legislative background. The United Nations Convention on the Rights of Persons with Disabilities ("CRPD") was approved by the European Community by Council Decision 2010/48/EC of the 26th November, 2009. (OJ 2010/L23/P35). The Convention was ratified by Ireland on the 20th March, 2018, two months after the Court of Appeal judgment.

24. Article 1 of the CRPD recites that the purpose of the Convention was to:

> *"… promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity. …"*

25. Article 2 provides that discrimination on the basis of disability means *any* distinction, exclusion, or restriction on the basis of disability that has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms in the political, economic, social, cultural, civil, or any other field. This includes all forms of discrimination, including denial of reasonable accommodation. It defines reasonable accommodation as being necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

26. Article 5 deals with the equality and non-discrimination. Article 5(2) provides, insofar as material:

> *"States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities* ***equal and effective legal protection against discrimination on all grounds.****"* (Emphasis added)

27. Article 5(3) provides that:

> *"In order to promote equality and eliminate discrimination, States Parties shall take* ***all appropriate steps to ensure that reasonable accommodation is provided."*** (Emphasis added)

CJEU Case Law: *H.K. Danmark*

28. In *HK Danmark, acting on behalf of Jette Ring (Applicant) v. Dansk almennyttigt Boligselskab (Respondent)* (Case C-335/11 and Case C-337/11 [2013] IRLR 571, the Court of Justice considered the meaning to be ascribed to the term "*disability*" for the purposes of the Equal Treatment Framework Directive 2000/78/EC. The issue which arose in that case was the distinction between "*disability*" and "*illness*". But the CJEU also made significant observations on whether the obligation under the Directive to provide a disabled worker with reasonable accommodation included an obligation to reduce her working hours, in circumstances where she was unable to work full-time due to her disability. The court considered the extent of the duty imposed on employers to provide a disabled worker with reasonable accommodation. It addressed whether that duty included an obligation to offer a disabled worker a facility to work part-time? But the CJEU pointed out that the E.U. had ratified the United Nations Convention on the Rights of Persons with Disabilities in 2010, and observed that, in accordance with Article 216(2) TFEU, where the European Union had pronounced that international agreements were binding on its institutions, and therefore prevailed over Acts of the European Union. (See Case C-366/10, *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change* [2012] ALL.ER EC 1133). As a consequence, the CJEU held that the primacy of international agreements concluded by the European Union meant that instruments of secondary legislation of the European Union were to be interpreted, insofar as possible, in a manner consistent with those agreements. Thus, it followed that Directive 2000/78/EC, insofar as it related to disability, thereafter to be interpreted in harmony with the U.N. Convention.

29. Referring to Article 5, the Court held an employer was required to take appropriate measures in particular to enable a person with a disability to have access to, participate in, or advance in employment. It referred to Recital 20 in the preamble to the Directive which gave a non-exhaustive list of such measures, which may be "*physical, organisational and/or educational*." It concluded that, in accordance with the second paragraph of Article 2 CRPD, reasonable accommodation was to be understood as being necessary and appropriate modification and adjustments, not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms. Thus, it held:

> *"****It follows that that provision prescribes a broad definition of the concept of 'reasonable accommodation'****."* (para. 53) (Emphasis added)

30. The court continued:

> *"54. Thus, with respect to Directive 2000/78, that concept must be understood as referring to the elimination of the various barriers that hinder the full and effective participation of persons with disabilities in professional life on an equal basis with other workers. …"*

At paragraphs 55 and 56, it went on to hold that, as Recital 20 in the preamble to Directive 2000/78 and the second paragraph of Article 2 of the UN Convention envisaged not only material but also organisational measures. It noted the term 'pattern' of working time must be understood as the rhythm or speed at which the work is done. The court concluded, therefore, that a reduction in working hours may constitute one of the "*accommodation measures referred to in Article 5 of that directive*". (para. 55). It pointed out that the list of appropriate measures to adapt the workplace to the disability in recital 20 in the preamble to Directive 2000/78 was not exhaustive. Consequently, even if it were not covered by the concept of 'pattern of working time', a reduction in working hours could be regarded as an accommodation measure referred to in Article 5 of the directive, in a case in which reduced working hours "*make it possible for the worker to continue employment, in accordance with the objective of that article*." (para. 56).

31. While the court referred to Recital 17 of Directive 2000/78 as not requiring the recruitment, promotion or maintenance in employment of a person who was not competent, capable and available to perform the essential functions of the post concerned, it held this was "wi***thout prejudice to the obligation to provide reasonable accommodation for people with disabilities, which includes a possible reduction in their hours of work."*** (para. 57) (Emphasis added) What is in question, therefore, is a balancing process identifying what is reasonable and proportionate.

32. Having pointed out that, in accordance with Article 5 of that Directive, the accommodation persons with disabilities are entitled to must be reasonable, but that it must not constitute a disproportionate burden on the employer, the court went on to hold that it was for a national court to assess whether a reduction in working hours, as an accommodation measure, represents a disproportionate

burden on the employers.

33. The passage must be read as a whole. Seen in this way, it conveys that a principle laid down in para. 57 must be seen as being without prejudice to the obligation on employers to provide reasonable accommodation for people with disabilities.

34. In his opinion in *Z v Government Department and Anor.,* Case 363/12, Advocate General Wahl described the judgment in Ring as marking a "paradigm shift" in CJEU case law, whereby, departing from a narrower definition, the E.U. concept of disability was explicitly aligned with the UNCRPD (para. 88), noting that the court's definition of disability only covered professional life, as opposed to society at large. While not referred to in Ring, Article 27(1)(b) CRPD provides that:

> *"States Parties shall safeguard and promote the realization of the right to work, including* ***for those who acquire a disability during the course of employment****, by taking appropriate steps, including through legislation, to, inter alia: …*
>
> *b) Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, …"* (Emphasis added) (c.f. Opinion of Advocate General Wahl in Z, para. 117).

The Facts

35. The factual description which now follows is taken from the agreed facts, but must also refer to the Labour Court determination. But counsel for the appellant criticises the fact that the Labour Court failed to resolve an important evidential issue. This concerned contacts between the school principal and the NCSE about the appointing the appellant as a "floating SNA". She submits this was an important point, and could have been easily resolved. But counsel for the school submits that, while recording much of the testimony, the Labour Court omitted any reference to what is said to be highly important evidence which could have had a direct bearing on the outcome of the claim. She submits that this evidence raised serious question marks as to whether, even with the most extensive appropriate measures, the appellant could perform the duties of an SNA. These questions can only be answered by consideration of the evidence before the Labour Court.

36. One can only be conscious of the fact that the following description of the evidence is lengthy, but one can only understand the objections to the determination, and the judgments of the Court of Appeal and the High Court, when set in their full factual context.

The School

37. The school is situated near Killarney in County Kerry. It operates under the aegis of the National Council for Special Education (NCSE), a State Agency which is the funding authority. At the relevant time, there were seventy-three children attending the school. These were divided into ten classes. Each class contained between six and eight pupils. The school employed twelve teachers and twenty-seven SNAs. It also employed ancillary therapy workers, bus staff, a caretaker, a secretary, as well as receiving volunteer help. Two of the classes in the school were designated for pupils with severe or profound difficulties. The pupils in the other classes were classified as having more moderate disability, though the school principal testified that the challenges facing staff members were nonetheless significant, even with those pupils.

The Work

38. Each SNA worked in tandem with a teacher. In general, two SNAs, plus one teacher, were assigned to each classroom. But in three classrooms, graded on the basis of pupils' disabilities, the teacher was accompanied by three SNAs. Prior to her accident, the appellant worked in one of these classes. The role of an SNA was described in a Departmental Circular SP.ED.07/02. Those duties were of a non-teaching nature. They included preparation and tidying up of classrooms; escorting pupils in alighting and using school buses; providing them with special assistance; helping physically disabled pupils engaging in typing or writing; helping with clothing, feeding, toileting, and general hygiene; assisting in out-of-school visits, walks, and similar activities; supplementing teachers in the supervision of pupils with special needs during assembly, recreational, and dispersal periods; accompanying individuals or small groups who might have to be withdrawn temporarily from the classroom; providing general back-up to the class-teachers; and, where necessary, assisting in catering for the needs of a specific pupil. As the appellant was a qualified medical nurse, she fulfilled a number of roles in the school, and also undertook some secretarial duties from time to time.

Consideration of Return to Work

39. By late 2010, the appellant had completed her five-month period of rehabilitation in the National Rehabilitation Centre (NRC). She was assessed there by a senior occupational therapist, who formed the view that she could return to work as an SNA on a phased basis. The appellant was discharged from the NRC on the 19th December, 2010.

40. Ms. Daly contacted the school in January, 2011 to discuss resuming work. She met the school's occupational physician, Dr. David Madden of Medmark, which is a medical consultancy. Dr. Madden himself is a general practitioner, and a consultant in occupational health. He informed the school principal that the appellant had agreed to a possible return to work on the 8th March, 2011. During the month of February, 2011, the school asked the appellant to assist on a number of days in carrying out secretarial and administrative duties. Dr. Madden furnished a report to the school board on the 1st March, 2011. He confirmed the appellant had completed a satisfactory recovery, and that, despite her ongoing injury, she was fit to return to many of the duties of an SNA. But he expressed the reservation that the school should commission an assessment to ensure that the appellant could carry out the work safely, and to identify potential work-activities which might prove challenging to her. In March, 2011, the school arranged for an excursion for some of the children to Florida. The appellant was asked to go on this trip in order to assist the teachers and other staff. However, she declined this request due to having been away from her own children for a considerable period during her stay in the NRC.

The Southern Safety Risk Assessors' Report

41. The school organised a risk-assessment later in the month of March. This was performed by Southern Safety Risk Assessors on the 14th to 15th March, 2011. The report recommended that, in order to accommodate a return, the appellant's work practices should be re-arranged so that her role would be less challenging; that she should rotate from room to room so as to assist in generally less intensive tasks; and that a system be implemented so that she was not alone with children and, where, when necessary, she could call for assistance. It recommended the appellant should not have to carry out challenging or lifting activities. It proposed an occupational therapist be engaged in order to assess the tasks which the appellant could perform, and to assist in setting up a suitable system of work. The report recommended that the occupational therapist should carry out fortnightly, and then monthly, assessments. The report concluded that the Principal, Deputy Principal, and staff members would all have to work together in order to accommodate the appellant, in a process which would require the full commitment of all school staff. It recommended that the school management, as well as the Department of Education, should facilitate the principal and her staff in the process of re-introduction.

42. In the light of later evidence on this issue, it is worth nothing that this report proposed that, if recommended, extra resources be obtained from the Department of Education to maintain the level of care for the children whilst accommodating the appellant's re-integration, that the appellant should be consulted in all of these matters and fully included in the process. These recommendations acquire a greater significance when the whole picture is considered later.

43. The consultants proposed all this should be carried out on a trial basis, and then reviewed. The school board considered this report, and thereafter reverted to Dr. Madden recommended a further report. The appellant, too, requested a different risk assessment be carried out.

Ms. Ina McGrath's Report
44. Subsequently, Ms. Ina McGrath, who was qualified as an occupational therapist and in ergonomics, was asked to carry out a second assessment following on that conducted by Southern Safety. Her report, based on assessments on 2nd and 9th September, 2011, was sent to the school on the 29th September, 2011. The appellant was present on the second day, but not the first. The report contained a description of the broad range of activities which staff members undertook, and the way in which the students progressed through the school. Ms. McGrath's report, which assessed the appellant in the school environment, is one of the evidential keystones of the case. Some of what follows is set out in paras. 38 to 48 of Ryan P.'s judgment in the Court of Appeal. But what is contained in the report must be set out here in a little more detail. Ms. McGrath noted that the appellant had already passed her driving test as a wheelchair user. She had good extremity range of motion and strength. She was able to pick up items from the floor. She could lean to one side but not forward, as there was a risk of unbalancing. She was independent with her own care needs. She needed assistance with getting items from higher shelves which were outside of her reach, and in using sinks which were all at standing height.

45. The report compels admiration for the valuable work carried out in the school, both by staff and students. But it also showed the extent to which the job of an SNA had a significant physical aspect to it. The report must be considered in detail. Without that detail, there is a risk that the determination and judgments of this and other courts will be misunderstood. Ms. McGrath assessed the position in relation to the suitability of each of the classes. The "reception class", which catered for new pupils needing considerable physical assistance, was ruled out. Classes where the students had autism were also ruled out as unsafe, as there was the potential for students who would regularly need to leave the classroom, or might "act out", possibly needing physical hands-on care in the event of what were called "outbursts". A senior special class was also seen as off-limits, as it was a step-up from the junior special class, where again the children would require a high level of physical assistance.

46. Two senior classes were ruled out completely as the children were by then older, and were being taught skills to help them become independent in the community. The students in those senior classes went into Killarney to use facilities to go shopping and to participate in work-experience activities in the community. But Ms. McGrath considered Ms. Daly would not have the ability to self-propel her chair for such long distances. Additionally, there were "very strong" young adult males in those classes, which might not be a safe environment for Ms. Daly.

47. Ms. McGrath identified the junior and middle two classes as those with the greatest classroom and bathroom accessibility, and the least amount of safety-risk for the appellant and students. The appellant was asked to come in and spend half a day in each of those classes. She had not assisted in any of those classes previously.

The Junior Class
48. The average age of the students in the junior class chosen was 9 years. Three of the students had been diagnosed with autistic spectrum disorder (ASD). Many of the students had been in the class for three years. They could walk independently, although two of them required supervision. One child required assistance with toileting. Another child needed close supervision secondary to "acting-out". One child had dyspraxia, resulting in the risk of accidents and falls. Ms. McGrath described that a new child who had joined the class engaged in serious "acting-out" behaviour, and tried to make physical contact with another child. In order to stop this conduct, the SNA permanently working in that class had to remove the newly arrived student to the sensory integration room. There was a further such incident later in the morning. The teacher and the other SNA had to intervene to prevent injury to staff and to other students. Two SNAs had to remove the student from the classroom. Some of the staff members involved reported that, on the previous week, they themselves had had to move out of the way when a shelf was pushed over.

49. Ms. McGrath found that accessibility did not pose an insurmountable problem. The appellant was able to engage in adequate supervision of four of the children. However, she would not have been able to assist with the child who required assistance in toilet-hygiene, or with the child with ASD, as the conduct of that child was said to be "inconsistent" and "physical".

50. Ms. McGrath had earlier described the student who had created a problem in junior class being brought to a sensory integration room. The appellant brought one of the other students with dyspraxia into the same room to work on therapy exercises. The other SNA worked with the student with ASD at all stages, while the appellant focused on the child with dyspraxia. The appellant was able to give directions to the child she was assisting on using some specific toys, but was limited to minimal physical assistance. Whilst she was able to verbally prompt the child to use other facilities, she was unable to herself demonstrate correct use of these pieces of equipment. She was able to provide verbal prompts. Ms. McGrath pointed out that, on occasions, with some children, an SNA might, occasionally, have to lie or kneel on a mat to complete a therapy activity. She also pointed out that the appellant could not turn her wheelchair quickly if a child ran behind her or towards the door. Children removed their shoes in the room, and there was a risk of the wheels of the wheelchair going over a child's foot. When returning to the classroom, Ms. McGrath asked an SNA who had worked with the child with ASD if she had felt safe at the time going to, from, and during, her time in the sensory integration room. The SNA "honestly" felt that the child she was supervising needed two physically able SNAs as there was a potential the child might act out physically.

The Middle Class
51. In the middle class there were eight children, one teacher and "2.5 SNAs". The "0.5", or "half-SNA", was a person shared with the reception class. Three of these children required assistance with mobility. One had epilepsy and needed physical assistance when walking. Two SNAs escorted this child to the bus. One child with ASD needed to be escorted to a quiet room. Another child with gait difficulties, needed physical assistance. The other five children were independently mobile. The appellant was able to assist another SNA with two children who needed assistance with toileting. She provided "good assistance" with one child who was able to assist her in divesting clothing in the course of toileting, but had difficulties with another child who, for physical disability reasons, could not provide the same assistance. Some of the children needed hygiene supervision. The appellant could provide the verbal cues and physical prompts to complete these tasks. The appellant was able to carry out many, but not all, of the functions in that classroom. Suitable adaptation would have required the sinks to be lowered, but this, in turn, would have created difficulties for a person normally standing. The appellant was able to assist children with taking out books and working on a one-to-one activity; however, was unfamiliar with the children and their programmes of care, which made it difficult for her to get involved. Of the three children in

the middle class who needed physical assistance, one was having difficulties, and walking about in a disruptive manner, although not aggressively. The teacher asked the SNAs to take her to a quiet area as the other children were being disruptive. Ms. McGrath stated that the appellant could not assist with escorting this child.

The Jobs Demand Analysis

52. Ms. McGrath also carried out an assessment in tabular form in a Jobs Demand Analysis. The first column of the table, set out below, lists the duties an SNA performed in the school. Again, in hindsight, it is significant the second column broke down the "*duties*" into "*tasks*". The third column identified "*tasks*" which Ms. McGrath saw as a "*best fit*" for the appellant. The last column described any environmental or equipment-changes that could facilitate the appellant in her role. A classification process, and an interpretation, of s.16, in the light of "*core duties*", on the one hand, and "*tasks*", on the other, formed an important part of the Court of Appeal's approach. Whether such categorisation was either required or permitted by s.16, or any other provision of the Act, is considered later. The table must also be considered in light of Ryan P.'s conclusion in the Court of Appeal that, in fact, the appellant was regrettably unable to carry out many of the core elements attached to the position of an SNA. The appellant is, of course, referred to in the table as "Ms. Daly".

TABLE 1

SNA Duties	**Task Demands**	**Fit with Ms. Daly**	**Adaptations/ Equipment Required**
Assist on/off bus	Physically get on bus and assist child with mobility limitations off the bus	Not a suitable duty for Ms. Daly	
	Walk with child from bus to assembly providing physical assistance Carry bag while physically supporting student		
Supervision in assembly	Walk with students to assembly	Provide verbal direction or physical prompt in direction of assembly with children who are independently mobile and who are not at risk for absconding.	
SNA Duties	**Task Demands**	**Fit with Ms. Daly**	**Adaptations/ Equipment Required**
	Sit with student group in assembly Say prayers with group and sing with group	Ms. Daly can sit with and encourage input from children. She can lead independently mobile children to top of assembly to say prayers, celebrate birthdays, etc.	

	Physically assist with dancing Prevent hitting out and acting out behaviour	Ms. Daly would be limited in self-propelling as many children throw off their shoes She could not assist and would be advised to move back if any acting out behaviour occurred	
Prepare and tidy classroom Moving tables and chairs	Bending, reaching, laying out equipment on desks Lifting, pushing and pulling	Ms. Daly could complete these tasks with minor changes to where and how equipment is laid out Not suitable duty for Ms. Daly	Minor modifications to where frequently used items are stored
Assist with on/off clothing	Assist with taking off outer garments and putting on outer garments Take off trousers, underclothes and nappies/pads Put on new pad, underclothes and nappies/pads	Can assist the more physically able child and child who have less behavioural issues Can assist children that require verbal or physical prompt by herself and with another SNA for children who require physical assist	Provision of step more frequently used nappies or extra clothes to wheelchair accessible shelf

SNA Duties	**Task Demands**	**Fit with Ms. Daly**	**Adaptations/ Equipment Required**
Change nappies/menstruation pads		Can assist independently if bathroom permits access for higher functioning kids, i.e. those that do not require physical assist	Move menstruation pads and nappies to accessible shelves
Toilet hygiene	Clean soiled child Remind child to wipe self Assist with washing hands Remind child to wash hands	Can help wipe child if can access toilet from the side in her chair Can provide supervision, and verbal cues	Remove panel from toilet cubicle on right in Junior Remove bath in Middle 2
Use of school equipment, school chairs, hoists, changing tables, baths	Requires pushing, pulling, use of hi-lo function, use of brakes	Not suitable for use by Ms. Daly	

Mobilise with children in school	Walk with children from assembly to class or room to room on site. Stairs: Work with children on use of stairs as part of therapy activity.	Only with independently mobile children who will not run off and who can follow instructions. Stairs are not accessible for Ms. Daly	
	Escort children on lift	Children are not encouraged to use lift unless they are in a wheelchair and only one wheelchair will fit in the lift.	
SNA Duties	**Task Demands**	**Fit with Ms. Daly**	**Adaptations/ Equipment Required**
Escort to other school/college in town/shops/coffee shops, etc.	Requires ability for close supervision, assisting children with community skills, long distance mobility	Ms. Daly reports she has difficulty with thermo-regulation and cannot self-propel for long distances. Therefore, not suitable duty for Ms. Daly	Powered mobility was offered as option to increase mobility in community but Ms. Daly declined at this time.
Safety with kids who hit out, run off, become aggressive	Hands on intervention to prevent a child from hitting other children/staff Escort child who is acting out to sensor integration room or quiet room	Not suitable Not suitable	
	Calming exercises requires sitting on mat, brushing child or rolling children in weighted blankets, vestibular roll, etc.	Not suitable	
PE/Therapy Activity	Escort to sensory integration room	Ms. Daly cannot access some parts of room because of floor mats, bean bags, therapy equipment, body rollers, and sensory balls	
SNA Duties	**Task Demands**	**Fit with Ms. Daly**	**Adaptations/ Equipment Required**

	Sit on mat and facilitate brushing, rolling in balls on sensory balls, body rollers, etc. Escort to OT *, SLT +, Physiotherapy	Unable to demonstrate equipment or transfer on/off mats. Cannot turn fast in wheelchair and needs large turning area. Not suitable at this time. Ms. Daly could escort children who walk independently and are not a flight risk. However, staff report that the children who attend therapies do not fit in this category.	
Set up and assist with feeding	Hand out lunches, cut up and prepare lunches and drinks Clean up	Ms. Daly with some minor changes can set up and assist with feeding. She cannot access sinks for wash up and cleaning of utensils.	Minor change to classrooms layout and where food/ utensils etc. are stored.
Yard duty	Supervise and work with kids when in playground or gardening outside Assist on/off swings, etc. Push on swing	Not good fit, as Ms. Daly cannot regulate changes in temperature well	

* Occupational Therapy
+ Speech Language Therapy

SNA Duties	**Task Demands**	**Fit with Ms. Daly**	**Adaptations/ Equipment Required**
Attend on trips and tours	Assist with children on buses when on day trips or tours	Ms. Daly reports she will not travel on a bus as she gets travel sickness on buses – not suitable activity.	
Set up classroom activity – books, pencils, DVD's, paper tasks, homework, etc.	Empty items from school bags, pack bags with children Reach shelves, cupboard, etc.	Suitable duty for Ms. Daly	Minor changes to where items are stored and layout of tables
Desk top activity	Encourage children and assist with turn pages or homework, etc.	Suitable duty for Ms. Daly	May need some room change to allow Ms. Daly access to desk top

53. The sixteen "duties" in the Jobs Demand Analysis were broken into a number of "task demands". It concluded that the appellant could do all, or part of, nine out of the sixteen duties identified, but could not perform seven of them.

54. Ms. McGrath commented that because the appellant was in a wheelchair, she was in a more vulnerable position than other staff members, perhaps in instances where a child was "acting-out" by throwing items. She could not move as quickly to get herself out of the way if required, or to intervene to protect a child or a staff member. Students who acted-out or who required physical assistance needed two physically able SNAs. Ms. McGrath expressed concern that the appellant would not be able to support the other SNA in the instance of a physical outburst that puts that SNA at risk. There might also be a concern regarding division of labour.

55. The report concluded that it was clear the role of the appellant was limited in assisting with children with physical care needs; and that safety was a main concern for the appellant, staff, and students. Both of the classes assessed had students who could act-out and needed hands-on intervention and escorting. This suggested that these classes would need two physically able SNAs to assist with these children. Accessibility was not a limitation, although some adjustments might be required to toilet facilities. Ms. McGrath recommended, therefore, that the appellant could act as a "floating" SNA. She would be able to work with children in certain categories, and could perform SNA duties with children who needed verbal or physical prompts. The report recommended against the appellant working with children who could act-out physically. Ms. McGrath expressed a hope that the school would have resources to support the appellant, as it was evident that she was very motivated to return to work.

56. Ms. McGrath's report went to Dr. Madden. The appellant was not given sight of the report. Following further conversations with the school principal, Dr. Madden then took the view that, whilst the appellant might be fit for some categories of work, such as a floating SNA, no such position existed in the school. He stated that the assessment confirmed that Ms. Daly had difficulty in completing many of the more challenging aspects of her role as a Special Needs Assistant. He stated that it confirmed that she was not suitable to complete a series of routine work tasks safely. He, too, observed that she was not suitable to work with children who might act-out physically, or with physically able children that might run off. Typically, two physically able SNAs were deemed suitable to meet the demands of such roles. The appellant would not be suitable to carry out such routine work tasks, with one other able-bodies SNA.

57. Referring to the report and conversation with the Principal, Dr. Madden pointed out that, while the report suggested that the appellant might be suitable for the position of a floating SNA, no such position existed. He had reviewed the risk assessment, and shared the view that Ms. Daly could not participate in many tasks. He understood from discussions that it was not possible to meet the level of accommodation required in order to ensure the safety of all those involved. He acknowledged that the number of roles where Ms. Daly would need accommodation was significant. He concluded that Ms. Daly was not medically fit for the position of a Special Needs Assistant.

Consultation
58. At the Labour Court hearing, the principal of the school testified that she did not consider allocating the appellant's duties among other SNAs. In her view, it would be difficult to relieve the appellant from some of her duties, and the appellant could return to work only if she was able to perform all the duties of an SNA, with assistance or otherwise. She expressed this view to Dr. Madden.

The Areas of Concern
59. At this point, it is convenient to re-address the two areas in the determination where the parties express concern with the Labour Court's general approach. The appellant's concern is shorter and may be addressed first.

(a) Contact with the NCSE
60. The minutes of the school board of 15th December, 2011 indicated that, as part of the process, the School Principal telephoned the Department of Education, and then the NCSE as funding authority, to enquire about "the feasibility of funding for a floating SNA". The minutes stated that, in this phone call, Marie Clifford, the NCSE official, stated the authority would not approve funding for an SNA, because "*the NCSE appoints staff for pupils with disabilities, and not for adults*". Thereafter, the board sent a letter to the appellant dated the 27th December, 2011, informing the appellant that she was medically unfit for the position of special needs assistant, and declining her request to return to work.

61. The school principal accepted that the decision was made without any consultation or input from the appellant. In turn, the appellant accepted that her disability would prevent her from undertaking every one of the tasks normally associated with an SNA. After the school's decision was made known, and after she brought a claim to the Equality Tribunal, the school agreed to provide her with inspection facilities for an expert, but no such inspection took place.

An Unresolved Issue?
62. In its determination, the Labour Court recorded that it had difficulty in discerning the meaning of the evidence concerning the NCSE. Counsel for the school makes the case that Ms. Clifford must have understood and appreciated the questions she was being asked. The appellant submits otherwise. But the Labour Court which heard the evidence noted that the official, Ms. Clifford, had not been called to give evidence, and considered the minuted record of the board meeting as "somewhat puzzling", and that there was never any suggestion that the appellant should work with adults. (p.32 of the determination). The Labour Court went on to hold that, in fact, it was for the Board of Management to make its own assessment of the reasonableness and proportionality of the form of accommodation that was needed. It concluded that apart from seeking an opinion of the NCSE, there was no evidence that the board had ever independently considered that question. The determination found that the Board was influenced in its decision by Dr. Madden's conclusion that the appellant was medically unfit to return to work on the understanding that the school would not, or could not, make the necessary adjustments in work organisation to accommodate the appellant, and to allow her to return to work part-time in a part-time secretarial role.

63. In the Court of Appeal, Ryan P. commented that the Labour Court and High Court appeared to have some difficulty in "*deciphering*" the "*shorthand message*" conveyed by the official, whom the judgment erroneously identified as a male. The meaning of this minute was obviously a significant issue. But its true significance could have been explained if Ms. Clifford had been available to explain what her response meant. There might have been some significance in that the phone call did not appear to have been preceded by, or followed up with, any letter making a formal case to retain the appellant as a floating SNA, or in one or other of the capacities she had previously fulfilled. Seen in isolation, this might have possibly raised a question as to whether, under s.16(3)(c) of the Act, the school had, in fact, taken real steps to identify "*the financial and other costs*" entailed by taking the "*measure*" of employing the appellant as a floating SNA, or "*the possibility of obtaining public funding or other assistance*" for such a *proposal*. (c.f. s.16(3)(c)(i) and (ii) of the Act).

64. In my opinion, this was potentially an issue of some importance, and, ideally, should not have been left without clarification. There was no evidence that Ms. Clifford was unavailable, or that documents from the NCSE were unobtainable. The issue went to the

question as to whether the school had, in fact, explored the possibility of obtaining public funding, or other assistance. (c.f. s.16(3)(c)(iii)). |But, ultimately, this view must be seen in light of the observations later in this judgment as to legal duties on employers under the section, and also in the light of the questions a *bona fide* employer should explore and resolve prior to making a decision.

(b) Omitted Parts of Ms. McGrath's Evidence

65. But counsel for the school submitted that the Labour Court had failed to outline, or address, important evidence from Ms. McGrath. It is correct to say she had conducted the more comprehensive of the only two risk-assessments which dealt with reasonable accommodation. Prior to the appeal to the High Court on a point of law, the school applied for discovery of documentation relating to the record of evidence given during the course of the Labour Court hearing. It did not accept that the determination accurately reflected Ms. McGrath's oral evidence. The Labour Court voluntarily provided notes taken by the Registrar's Secretary.

66. The Labour Court determination recorded Ms. McGrath as testifying, first, that she never considered furnishing Ms. Daly with a draft report for comment before it was presented to the school; second, that the school should consider re-allocating or reorganising tasks among SNAs so as to relieve Ms. Daly from the requirement of the tasks she could not perform; and, third, that Ms. Daly could "work with moderately disabled children".

67. But the school's case is that this was a selective recounting of the evidence which, taken out of its context, suggested that the position was capable of being reorganised, and that the appellant would have been capable of working in the school in such a reorganised position. Counsel submits that, by recording only part of Ms. McGrath's evidence, to the effect that Ms. Daly *could* work with more moderately disabled children, the determination conveyed the erroneous impression that this was all Ms. McGrath had to say in relation to Ms. Daly's ability and capacity to work as an SNA in the school. What follows is not disputed by the appellant.

68. Counsel for the school submits the Labour Court determination did not record the fact that Ms. McGrath already knew the appellant, and was familiar with the situation prior to being engaged with the school, despite the fact that this had been outlined at the outset of her evidence. It is said that, when Ms. McGrath indicated she had not appreciated prior to the assessment how demanding the role of an SNA was, she had also said that to perform the tasks associated with the role, a person needed to be able bodied. Counsel points out that, after she observed the appellant in the sensory integration room, Ms. McGrath approached the other SNA who expressed concerns to her that the appellant would not be able properly to assist the other SNA whilst in the room. Counsel submits that, in considering whether or not the appellant was suitable to perform the role of an SNA, Ms. McGrath had concluded that a person performing that role needed to be physically able, and that, having considered everything, she did not believe that the environment in the school was safe for the appellant, and that it was not possible to allow her to perform the role of SNA. It appears that, in response to the Chairman's question, Ms. McGrath had, in fact, testified that it was not possible to accommodate the appellant within the school, and had said that the level of dependency of the children in the school was too high, so that the appellant would be unable to manage. Furthermore, it is said the Labour Court did not accurately reflect Ms. McGrath's views in relation to the issue of a "*floating SNA*", a position which she acknowledged did not exist. Counsel submits that, in fact, Ms. McGrath certified that, having considered the matter, Ms. Daly was not suitable for this type of role within the school either.

69. Counsel submits that no account had been taken of the evidence that Ms. McGrath gave that the appellant was no longer capable of taking on the role of an SNA, and that the role of an SNA in the school was a most physically demanding role. Finally, it is said that, again in response to questioning, Ms. McGrath had testified that the appellant could not work as an SNA in an reorganised environment with the school, and that the role could not, in fact, be reorganised to accommodate the appellant.

70. Counsel for the school points out that the appellant did not adduce any contradictory expert evidence. She submits that the determination did not record that Ms. McGrath had listed a series of "core functions" which the appellant was not capable of performing, irrespective of adaptations or specialist equipment being provided by the school. It is said this, too, was at odds with the account of Ms. McGrath's evidence set out in the Labour Court's determination.

71. The school's objection in principle therefore, was that highly relevant uncontradicted expert testimony was omitted, and had not been reflected in the Labour Court findings of fact. Counsel submitted this error was so egregious that no reasonable administrative tribunal could ever have come to the same conclusion when faced with the same testimony.

72. Counsel for the school refers to the fact that, on the appeal, the High Court tended to be dismissive of the documentation which was provided in order to demonstrate the discrepancies in the Labour Court determination, and of the notes of the omitted evidence.

(c) The Effect of the Omitted Evidence

73. The Labour Court and its members perform a service of huge public value. The determination in this case is, in many respects, extremely thorough and meticulous. It contains an impressive outline of the developing case law, by highly experienced panel members, who drew the attention of the parties to the CJEU judgment in *Ring*. But there is no doubt significant and relevant evidential material was not recorded or evaluated.

74. A tribunal, or other decision-maker which is under a duty to give reasons for its decision, should, as part of this process, give some outline of the relevant facts and evidence upon which the reasoning is based. This does not in any sense, mean that a determination must set out *all* of the evidence; but it should set out such evidential material which is fundamentally relevant to its decision or determination; still more if such relevant evidence is not disputed. Obviously, the test as to the issue of materially must be fact-specific, and dependant on the circumstances.

75. There is already a rich and evolved jurisprudence on the duty of deciding bodies to give reasons, developed from the early days of *Pok Sun Shun v. Ireland* [1986] ILRM, High Court; to *The State (Daly) v. Minister for Agriculture* [1987] I.R.; *International Sea Fisheries v. Minister for Marine* [1989] I.R. 149; and *Mallak v. Minister for Justice, Equality & Law Reform* [2013] I.R. It is also necessary to consider the statutory provision in question, and the general context. The statutory duty under which the Labour Court operated provides that, on request, it should set out a statement of "*why*" it reached its determination. (c.f. s.88(1) of the Act). The omission to set out the omitted details of Ms. McGrath's evidence has added significance, not least because of the otherwise comprehensive nature of the Labour Court determination. Parties to a decision are entitled to know why they have won or lost, as a matter of fair procedure, and in order to decide whether to appeal. But parties are also entitled to be assured that, in making a decision, an administrative or curial tribunal has had regard to very relevant evidence which arguably had the potential to be potentially determinative of an issue, if not the claim, before it.

76. It is abundantly clear that not part, but all, of Ms. McGrath's evidence played a significant role in the Court of Appeal decision. What was omitted was relevant. Evidence to the effect that the appellant was unable to perform any of the core functions of the job, that she could not work as an SNA in a re-organised environment, and that the role could not be re-arranged to accommodate the appellant, should have been recorded and addressed. I do not say this would have determined the outcome. But alone, or taken

in conjunction with the unresolved NCSE issue, this unfortunate omission can only lead to the conclusion that the determination did not fulfil its primary statutory role, and did not determine the complaint in accordance with relevant evidence. Put simply, by not addressing this relevant evidence, the Labour Court did not fulfil its statutory duty. How, in my view, this should be remedied is discussed later.

(d) The Decision of the Labour Court: Further Observations
77. The determination included an outline of evidence from the appellant, her husband, the school principal, and deputy principal, and the principal of another special school, as well as Dr. David Madden, as well as what was included in the account of Ms. McGrath's evidence. The determination considered legal analysis, based on Irish, English and E.U. judgments, including *Ring*, which was considered in order to resolve any ambiguity in s.16, by reference to the Directive. There is reference, too, to the well-known decision of Case C-106/89 *Marleasing*. The Labour Court considered the Recitals in the Directive had been taken into account by the drafters of the statute, and, therefore, assisted in the process of interpretation. There was considerable focus on decided case law, perhaps in preference to a more straightforward and precise process of applying the words of s.16 of the Act. As the judgment seeks to explain, the meaning of s.16 can be seen within its own terms, and simply by legislative intention, rather than by having to resort to a more sophisticated approach.

(e) A Free-Standing Obligation?
78. The Labour Court ultimately concluded that the appellant was entitled to succeed on the basis that the board of management had failed to discharge a statutory duty under s.16 to take adequate measures to provide the appellant with reasonable accommodation so as to allow her to continue in employment. The determination did not find that the appellant was competent to carry out the duties of a Special Needs Assistant. It concluded, rather, that the school had a duty fully to consider the viability of a re-organisation of work and a redistribution of tasks among all Special Needs Assistants, so as to relieve the appellant of those duties which she was unable to carry out. It observed that it might have transpired that it was not possible to make the necessary adaptations.

79. However, it concluded that, in circumstances where the school had failed to carry out such exploration, this, in itself, constituted a failure in its statutory duty. The determination observed that the school's response to the position was based on the belief that its duty was confined to providing the appellant with such accommodation as might enable her to undertake the full range of tasks expected from an SNA. But it observed that, regrettably, no amount of accommodation could produce that result. The determination concluded that the school had construed its duty too narrowly, and taken a mistaken view of what the law required in the prevailing circumstances, including the viability of a re-organisation of work, and distribution of tasks.

80. Referring to *Humphries v. Westwood Fitness Club*, Dunne J. [2004] 15 ELR 296, the Labour Court also observed that the school might reasonably have sought input from the appellant herself and her trade union before making its decision. Consideration might have been given to returning the appellant with modified duties for a trial basis. The determination held that the school had not given any real consideration to those possibilities, and that it was impossible to speculate as to what the outcome might have been if the school's board of management had given proper and adequate consideration to these or any other options that the appellant might have advanced if given the opportunity to make submissions in defence of her position. The school might have concluded that these were or were not viable or reasonable and proportionate in the circumstances prevailing. The determination also observed that it was significant that the school had not considered offering the appellant a renewal of her secretarial role.

81. In the Court of Appeal, Ryan P. strongly criticised the Labour Court's conclusion that there could be a "free standing" obligation on an employer to carry out an evaluation of all the available options, irrespective of the fundamental question of whether the employee is actually capable of doing the job. He held there was a duty on the Labour Court to answer this fundamental question in the context of the facts of the case as adduced in evidence, not as what he termed "*an abstract proposition*". As this judgment seeks to explain later, put in this way, the criticism has some force. This is a case brought under s.16 of the Act. The purpose of the Act is to promote equality between employed persons, and to remove discrimination connected with employment. An obligation is not free-standing, and failure of compliance will not, in itself, give rise to a right to compensation. The effect of a "failure in that obligation" must be considered within the framework of s.16 of the Act seen as a whole. Insofar as the appellant's case might suggest there is a free-standing obligation in this situation, I must reject that proposition as a matter of law. I expand on my reasons later.

(f) The Basis for the Compensation Award
82. There is a further issue: the appropriate form of redress was compensation in the maximum sum of €40,000. But how or why this particular sum was arrived at is unclear. The determination does not specify under which subheading of s.82(4) it comes. The reasoning in the determination moves from a heading "Outcome" to that of "Redress", five lines later, without any explanation as to how this particular compensation sum was arrived at. In my view, as a matter of fair procedures, parties are entitled to be provided with appropriate level of reasoning and definitions for the level of compensation. This is a protection against any accusation of an arbitrary or capricious decision-making. I do not say that the decision here comes within that category, but there should be some established, rational, connection between the level of compensation awarded, and the circumstances of the case, including the outcome. This is, *a fortiori*, true in the highly unusual circumstance here where, apparently, as the Labour Court determination recited, at page 6, the appellant had never actually received a P45 from the respondent, and that she had been informed that the Department of Education still regarded her as being employed. This incongruity, and its possible consequences for the claim, were not explored.

Conclusions on the Determination
83. For all these reasons, I am unable to conclude that the determination by the Labour Court, as it stands, complies with s.88(1) of the Act. Justice must be seen to be done. Part of that process must be that a deciding tribunal is seen to engage with the relevant evidence, and, in its decision, address it one way or another within the prism of the applicable law. When an award is made, there should be some explanation of the basis for the award, as compared to any other sum.

Interpretation and Application to this Case
84. Reduced to its essentials, the interpretation issue as applied here could, at one level, be characterised as to whether s.16(1) is to be seen as subject to s.16(3), or *vice versa*? The terms of the section have been set out earlier. Section 16(1) sets out a premise. This is, that an employer is not required to retain an individual in a position, if that person is no longer fully competent, and available to undertake the duties attached to that position, having regards to the conditions under which the duties are to be performed. But the effect of the terminology of s.16(3) is unavoidable. It carves out an exception. It provides that, for the purposes of the "*section*", that is, the *entirety* of s.16, a person with a disability is to be seen as fully competent to undertake *any duties*, if they would be so competent on reasonable accommodation. Thus, if a person with a disability can be reasonably accommodated, they are to be deemed as capable of performing the job as if they had no disability; subject to the condition that reasonable accommodation should not impose a disproportionate burden on the employer; including an assessment of the financial and other costs involved, the scale and financial resources of the employer, and the possibility of obtaining public funding or other assistance. But s.16(3)(b) explicitly identifies the mandatory primary duty of an employer. He or *she shall take appropriate measures* where needed in a

particular case to enable a disabled person to have access to employment, to participate and advance in employment, and to undergo training, unless these measures would impose a disproportionate burden. Section 16(4) then goes on to identify what appropriate measures should be taken. Although the definition is somewhat repetitive and circular, what is identified are effective and practical *measures*, where needed in a particular place, to adapt the employer's place of business, including the premises, equipment, patterns of working time, and *distribution of tasks*, or the provision of training or integration resources, but does not include any treatment facility or thing that the person might ordinarily or reasonably provide for himself or herself.

85. In my view, the term "*distribution of tasks*" must be read in a manner which is consistent with the entirety of s.16, and the purpose of the Act. If it is arguably ambiguous, it should be given an interpretation that reflects the plain intention of the Oireachtas, which can be determined from the Act as a whole. (Section 5, Interpretation Act, 2005). Seen from the perspective of legislation, it could not have been the intention of the legislature to create a situation where, by deploying the term "*tasks*" to divide up the term "*duties*", an employer could effectively render an employee's duty incapable of performance. That would defeat the purpose of the Act, which is to achieve equality. It is arguable also that this would allow an employer to unlawfully "classify" a post in a discriminatory way. (See s.8(1)(e)).

86. The Court of Appeal reversed the High Court judgment, and set aside the Labour Court determination, thereby allowing the decision of the Equality Officer to stand. The court did not consider it necessary to remit the case to the Labour Court, which is the forum charged with evaluating evidence. Both judgments of the Court of Appeal make references to the term "*core duties*", but no such distinction is to be found in the Act. One would have thought that, if it was the intention of the legislature to identify the words "*core duties*" as creating some form of separate category, it would have been simple to do so. Similarly, the term "*essential functions*" does not occur in the section.

87. Moreover, the distribution of some of the appellant's duties, in order to require her to do more of that which she could do, would not necessarily mean that she was not performing the duties of an SNA. The term "*where needed*" in a particular case, to adapt the employer's place of business to the disability (s.16(4)(a)) must be read in the context of s.16(4)(b), which provides that, *without prejudice* to the "*generality*", (that is, to adapt the place of business where needed), there are also specific duties which include adapting premises, equipment, working patterns, or *task distribution*. The limitation contained in these sections is only that of disproportionally.

88. But to imbue the word "*tasks*" with an artificial value, or as some form of interpretative "trump card", defeats the purpose of the section and the Act. At any level, to seek to distinguish between tasks and duties would pose real problems, as to how the distinction is to be made, and who should make it? In the case of Ms. Daly, how many of the "*task demands*" set out in the table can be seen as entirely divorced from duties? In my opinion, very few, if any, of them.

Limitation

89. This does not, of course, mean that the duty of accommodation is infinite, or at large. It cannot result in removing all the duties which a disabled person is unable to perform. Then, almost inevitably, it would become a "*disproportionate burden*". If no real distinction can be made between tasks and duties, there is no reason, in principle, why certain work duties cannot be removed or "*stripped out*". But this is subject to the condition it does not place a disproportionate burden on the employer. But to create a new job will almost inevitably raise the question as to whether what is in contemplation is a disproportionate burden. It is necessary to ensure that, even with reasonable accommodation, proper value is imported to the words of s.16(1), to ascertain whether an employee is, or is not, "*fully capable of undertaking the duties*" attached to the position. But it is hard to see there would be any policy or common good reason why simply the distribution of tasks, or their removal, should be confined only to those which are non-essential. The test must be one of fact, to be determined in accordance with the employment context, instances of which are as illustrated in s.16(3). The test is one of reasonableness and proportionality: an employer cannot be under a duty entirely to re-designate or create a different job to facilitate an employee. It is, therefore, the duty of the deciding tribunal to decide, in any given case, whether what is required to allow a person employment is reasonable accommodation *in the job*, or whether, in reality, what is sought in an entirely different job. Section 16(1) of the Act refers specifically to "*the position*", not to an alternative and quite different position.

90. But I am forced to agree with counsel for the appellant: he is correct in saying the Court of Appeal "*read-in*" words and intent to s.16, which are simply not to be found there. Thus, when Ryan P. observed that the fundamental proviso in s.16(1) "*must be respected …*" (para. 54), this was, to my mind, to misunderstand the section. Neither the Act, nor the Directive, (were it necessary to refer to it), requires full competence, seen in isolation. Ryan P. was of the view that s.16 required that there be full competence as to the tasks that are the essence of the position, otherwise subsection (1) [of s.16], is rendered ineffective. I differ from this view: to the contrary, full competence is, rather, to be assessed as contingent upon there having been reasonable accommodation and appropriate measures.

91. It is unnecessary to resort to the judgment of the CJEU in *Ring*, or the Framework Directive, though all of these support the interpretation. But the analysis can be confined to the words of the section. The words of s.16(3) provide that a person will be seen as fully competent *if* they *would* be fully competent on reasonable accommodation. Those terms, too, have meaning. They must be seen as being included in the legislative intention that what is contained in s.16(1) can only be seen or understood in the context of what is provided for in s.16(3) of the Act. Section 16(3) is not peripheral – it is fundamental to understanding the section. This conclusion, based on the words of the section alone, as it happens, accords with any interpretation of the section by reference to the reasoning of the CJEU in *Ring*. But this does not mean that s.16(1) is irrelevant.

92. It follows, therefore, that I am constrained to express respectful disagreement with the judgments of the Court of Appeal. The judgment of Ryan P., which forms part of the ratio, laid much emphasis on the evidence in the case, and carried out a careful consideration of Ms. McGrath's report. That evidence in its entirety cannot be ignored.

Issues Addressed in the Court of Appeal

(a) Contact with the NCSE

93. But the judgment also referred to the telephone contacts made with the NCSE. He set out the school principal had followed up the floating SNA idea by contacting that body, but the proposal had not been approved. He observed that the official who had dealt with the request was named in the Labour Court, so that the school was specific as to the refusal of funding. Perhaps so, but this was unclear, and was not solely a matter for the school.

94. The duty laid down under s.16(3)(d) is mandatory. An employer is to explore "*the possibility of obtaining public funding or other*

assistance". To my mind, the making of a phone call, where there was a potential for there having been a misunderstanding, required more. I do not think it could be held to be satisfied simply by making a phone call, where arguably there was misunderstanding. (See Purdy, Equality Law in the Workplace, Bloomsbury, 2015, Ch. 17.105, which refers to the existence of the Government Employment Regrant Scheme for employers). This Court has not been given any reason why such issues could not have been clarified further in the Labour Court.

(b) Consultation with Co-Employees

95. The learned President also observed that the Principal should not be criticised for not approaching the other SNAs to take on physical aspects of the job. He held that the school had a decision to make about Ms. Daly's capacity to work as an SNA. In his view, the Principal was not required to canvass the other SNAs whether they would be willing to take on the work that the appellant could not do; even if they were willing, the Principal and the Board would still have had a decision to make. It would not have been sufficient to have a majority vote of the SNAs.

96. Again, I think this conclusion did not have sufficient regard to the fact that the terms of the section are mandatory. They place a duty on the employer to show that, if they have not carried out such a process, then it is only because the re-organisation necessary would be disproportionate or unduly burdensome. What is essential is that it be shown, objectively, that the employer has, in fact, given the question of redistribution full consideration.

97. The learned President went on to observe that, even if there could have been redistribution of some non-essential tasks, this was based on a mistaken premise, flowing from s.16(1), as to the need for full capability. It is clear the reasoning in the judgments proceeds upon the basis that consideration of redistribution should only be of non-essential tasks. For the reasons outlined earlier, that is to introduce a new test, and new words, into the Act.

(c) Evaluation

98. Addressing a "*duty to consult*", Ryan P. rejected, in very firm terms, the proposition that there was a "*freestanding obligation on an employer to carry out an evaluation, irrespective of the other circumstances of the case and without regard to the fundamental question as to whether the employee is actually capable of doing the job."* (para. 62). He concluded that as practical adjustments cannot be made as objectively evaluated, the fact that the process of decision is flawed does not avail the employee. (para. 63). He rejected the proposition that the section, in terms, made the process of inquiry a ground of default, or that a failure to consult constituted a breach of the duty imposed. (para. 56). He commented that this was "*starkly stated*" by the Labour Court, as a matter of law. This alleged failure was ultimately the basis for its conclusion that Ms. Daly was entitled to compensation, on the basis that the employer had failed in its duty under the Act to make reasonable accommodation. Ryan P. concluded there was nothing in s.16 to justify a rule that there should be adequate consideration, absent which, an employer could not form a *bona fide* belief that measures to be taken were impossible, unreasonable, or disproportionate. He considered the proposal to create a floating SNA position was to "*create an entirely new position".* (para. 58). The President went on to conclude that the central reality of the case was that the appellant was "*unable to perform the essential tasks of a Special Needs Assistant in this particular school."* (para. 64) In his view, no accommodations could change that, unfortunately. In his view, the Labour Court had wrongly concluded that the obligation of the employer was to strip away things the appellant could not do, and then to ask whether she was able to perform the essential tasks that remained. He concluded that this discounted the consideration which the school gave to the new position arising from Ms. McGrath's report, and was erroneous. (para. 64).

99. Finlay Geoghegan J. expressed similar views, in particular emphasising the distinction she perceived between the terms "*tasks*" and "*duties*". She considered that the duty of the employer was only to consider a distribution of certain *tasks*. That duty would depend on the facts, and, in particular, whether the tasks in question were, or were not, all the tasks demanded of a particular duty attached to the position in question.

100. Here I must respectfully differ. The duty to reasonably accommodate, or to take appropriate measures, where needed, is laid down in s.16(3), in order for a person with a disability to have "*access to employment*", unless the measure would impose a disproportionate burden on the employer. The matters to which a decider should have regard in this connection include those outlined in s.16(3)(c), including financial and other costs, etc. Finlay Geoghegan J. considered that the duty of an employer did not extend to considering the removal from a position or job of a duty, or duties, which might properly be considered a main duty, or an essential function of the position concerned, by the redistribution of *all tasks* demanded by that duty. But there is no such distinction in the section.

101. As explained earlier, the term "*distribution of tasks*" to be found in s.16(4)(b) is illustrative in nature. It must give way to the words in the main part of the section. The word "*duty*" or "*duties*" occurs five times in the section; "*tasks*" just once. An illustration cannot control the language of the section, although at times it may be a guide. It should not curtail or expand the meaning of the section. It does not derogate, or subtract, from the more general duty to be found in s.16(4)(a), to provide "effective and practical measures" where needed in a particular case, to adapt the place of business to the disability concerned. The sub-section is not to be interpreted as undermining or eroding the main purpose set out in s.16(3)(a) which is to hold that a person with a disability is fully competent to undertake any duties, if they would be so competent and capable on reasonable accommodation being provided by the employer, provided that it is not disproportionate. The term "*essential functions*" is not to be found in the Act. What is required by the section, read in its entirety, is that consideration be given to distribution of essential duties, as part of a reasonable accommodation.

102. Again, standing back from the facts of this case, a want of clarity, or vagueness, or imprecision, on this duty might permit employers to themselves categorise elements of a job as being "*duties*", rather than "*tasks*", thereby limiting the obligation to consider re-organisation of the way in which the work was done. I am unable, therefore, to agree with Finlay Geoghegan J.'s observations that s.16(1) contained a limitation, to the effect that nothing in the Act should be construed as requiring any person to retain an individual, if that individual is no longer competent or available to undertake the duties attached to the position. Section 16(1) is not freestanding, it is subject to s.16(3).

103. Finally, it should be noted that the Court of Appeal found that there was no justification for the rule outlined in the Circuit Court decision of *Humphries v. Westwood* [2004] 15 ELR 296. In *Humphries*, Dunne J., then a judge of the Circuit Court, held that, in order to form a *bona fide* belief that a claimant was not fully capable of performing the duties for which she was employed, a respondent employer would normally be required to make adequate enquiries to establish fully the factual position in relation to the claimant's capacity. The nature of the enquiries would depend on the circumstances, but would, at minimum, involve looking at medical evidence to determine the level of impairment arising from the disability, and its duration. If it was apparent that the employee was not fully capable, the respondent was required, under s.16(3), to consider what, if any, special treatment or facilities might be available, by which the employee could become fully capable, and account was to be taken of the cost of such facilities or treatment. But Dunne J. went on to hold that such an enquiry could only be regarded as adequate if the employee concerned was allowed a full opportunity

to participate at each level, and, on the facts of that case, to present relevant medical evidence, and submissions.

104. Ryan P. considered *Humphries* in the light of subsequent English case law. (See *Mid-Staffordshire General Hospital NHS Trust v. Cambridge* [2003] IRLR 566; *R (Davey) v. Oxfordshire County Council* [2017] EWCA Civ. 1308; *Muzi-Mabaso v. Commissioners for Her Majesty's Revenue & Customs* [2016] EWCA Civ. 1369; *Burnip v. Birmingham City Council* [2012] EWCA Civ. 269; *AH v. West London MHT* [2011] UKUT 74 (AAC); *Tarbuck v. Sainsbury's Supermarkets Ltd* [2006] IRLR 664, to which might be added *Chief Constable of South Yorkshire Police v. Jelic*, UKEAT/0491/09/CEA, and *Royal Bank of Scotland v. Ashton* [2010] UKEAT/0542/09 – 1612). In his view, a statutory duty was "*objectively*" concerned with whether the employer complied with an obligation to make reasonable accommodation. In this State, however, our courts have always attached importance to fair procedures where employment is at stake. (See *Bolger v. Showerings* [1990] ELR 184, Lardner J., and the recent judgment of Ní Raifeartaigh J. in *Dublin Bus v. McKevitt* [2018] IEHC 78).

105. I respectfully disagree with the Court of Appeal's conclusion on this issue, but I do not go so far as to say there is a mandatory duty of consultation with an employee in each and every case, the section does not provide for this, still less does it provide for compensation simply for the absence of consultation in an employment situation. But, even as a counsel of prudence, a wise employer will provide meaningful participation in vindication of his or her duty under the Act. But absence of consultation cannot, in itself, constitute discrimination under s.8 of the Act.

106. But I would again wish to emphasise these conclusions are not to be understood as requiring a situation where the duty of an employer is understood as having to provide an entirely different job. The duty of accommodation is not an open-ended one. There is no obligation to redefine the employment of an airline pilot as an airline steward, or vice versa. The question is, rather, to consider whether the degree of redistribution, or "*accommodation*", is such as to effectively create a different job entirely, which would almost inevitably impose a disproportionate burden on an employer. Even within the scope of compliance, a situation may be reached where the degree of re-arrangements necessary, whether by allocation of tasks, or otherwise, might be such as to be disproportionate. It is a matter of degree, capable of being determined objectively.

A Final Issue: Section 16(1)
107. Once consultation, or other necessary steps for compliance, have been taken, an employing entity may have to ask itself the ultimate question whether, having explored the modes of accommodation, and if, prudently having consulted with an employee, the position, as defined in s.16(1), is, *in fact*, capable of adaptation so as to accommodate that claimant, and whether the claimant would be capable of performing that function thus adapted. But it is that "*position*" or *job*, not another one. If there is a challenge to this decision, this must be assessed objectively by the tribunal vested with the statutory duty of carrying out such an enquiry, and also vested with the expertise to carry out such assessment. If, on reasonable accommodation, a claimant is unable to fully undertake the duties attached to the position, then the Act provides there can be no finding of discrimination.

The High Court Judgment
108. In other circumstances, it might be that the decision of the High Court could then stand in place of that of the Court of Appeal. Regrettably, I cannot reach such a desirable conclusion, which would at least bring an end to this litigation. While there are significant areas of the legal reasoning where I find myself in respectful agreement with Noonan J., one cannot ignore the factual lacuna which arose in this case. In the High Court, Noonan J. referred to the decision of this Court in *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 I.R. 34, where Hamilton C.J. observed that courts should be slow to interfere with decisions of expert administrative tribunals, save where the conclusions were based on an identifiable error of law, or unsustainable finding of fact. Noonan J. concluded he should be slow to interfere with the determination on that reasoning. I do not think *Henry Denny* is the last word on this issue.

109. But in the *Attorney General v. Davis*, The Supreme Court, 27th June, 2018 [2018] IESC 27, (O'Donnell J., McKechnie J., MacMenamin J., Dunne J., O'Malley J.), there is to be found a convenient summary of the present law, which is somewhat more nuanced than the judgment in *Henry Denny*. In a detailed judgment, McKechnie J., speaking for the Court, identified what may be regarded as issues of law which may be considered on a case stated. These included (i) findings of primary fact where there is no evidence to support them; (ii) findings of primary fact which no reasonable decision-making body could make; (iii) inferences or conclusions which are unsustainable by reason of any one or more of the matters listed above; or which could not follow or be deducible from the primary findings as made; or which were based on an incorrect interpretation of documents. (See para. 54). If not included in that category, I would add a determination which is *ultra vires*, where there is a failure of statutory duty. Undoubtedly, deference is due to an administrative tribunal acting within the scope of its duty. But, when there is a substantial failure of compliance with that statutory duty, a court must intervene. The determination did not comply with the statutory duty laid down in the Act.

110. It is a most unfortunate fact that this case has now been considered and analysed in some detail by five different tribunals, but there is now only one course available in my view.

Remedy
111. The question of remedy is constrained by the fact that the approach adopted in each earlier legal forum was erroneous. The Court is faced with a series of invidious choices. But this does not mean that the situation is entirely beyond remedy. While the Labour Court determination did not comply with the statute, what occurred can, in fact, and in law, be addressed. But, to my mind, it can *only* be remedied by remitting the appeal to the legal forum charged under the statute with evaluating the evidence in accordance with law – and applying the law to the facts. There are some issues yet be determined; which, in my opinion, can only be determined by the Labour Court itself. In this way, statutory compliance can be achieved. This Court should not act as a surrogate Labour Court, which is charged with carrying out a statutory function. Regrettably, therefore, it seems that the only appropriate order is to remit the matter for the Labour Court for further consideration in accordance with the totality of the evidence adduced, together with such further limited evidence as may be necessary, and the law, as explained in this judgment. This Court should not, in my view, seek to pre-empt, or short-circuit, that process. But the decision of the Labour Court must address the legal principles applicable in light of the full evidence. The Labour Court is under a statutory duty to carry out its function in accordance with the law enacted by the Oireachtas. This duty can result in having to make difficult decisions, as well as easy ones. It is to be hoped, however, that whatever ultimate conclusion is arrived at, based an appreciation of the full factual background, and on a correct interpretation of the law, will bring an end to this overlong litigation.

What the Labour Court must address
112. The issues which the Labour Court must address are:

(a) The process of consultation with the NCSE;

(b) The entirety of Ms. McGrath's evidence, and its legal consequences.

An ultimate legal question, however, is the extent to which it can be said that, even with reasonable accommodation, the appellant can return to the position of an SNA. That is what s.16(1) provides for in this type of case. If it arises, the Court will have to provide a reasoned basis for any award of compensation, having regard to the principles of rationality and proportionality, and the appellant's employment status. The scope of the inquiry is limited to whether the appellant was, in fact, the subject of unlawful discrimination, and, if so, what was the precise nature of that discrimination?

113. The appellant obviously carried out her work to everyone's satisfaction prior to her accident. Her situation will inevitably attract much sympathy. The issues are important for employees who are disabled, but also for employers, who must know their duties. The fact that this case has not been otherwise resolved to date reflects the fact that the legal issues are not easy ones. The order proposed does not imply that there must be any predetermined outcome in the Labour Court's reconsideration. Ultimately, the duty of the Labour Court is to make a determination on the entire facts, by applying the law as enacted. The scope of the renewed hearing will inevitably be narrow. Other than these limited areas identified, no new issues can be introduced by either side. That would be to create an injustice. I would, therefore, propose that the appeal against the Court of Appeal order be allowed, and that the specific matters arising be remitted to the Labour Court for further consideration.