THE HIGH COURT

[2023] IEHC 302

Record No. 2021/5858 P

Between

QQ

Plaintiff

-V-

Board of Management of a School

Defendant

Judgment of Mr Justice Dignam delivered on the 21st day of March 2023.

INTRODUCTION

1. The plaintiff seeks various interlocutory reliefs directed at an ongoing disciplinary process. The background to this application is as follows.

2. The plaintiff is an Irish teacher and co-ordinator of the Irish Department in the defendant school ("the school"). Her son attends the school. He was due to the sit the Leaving Certificate in June 2020.

3. By email of the 27th May 2021 the Principal of the school initiated Stage 4 disciplinary proceedings against the plaintiff under Department of Education Circular 0049/2018 by sending to her and the school's Board of Management a copy of a "*comprehensive report on serious issues of alleged misconduct on* [her] *part (Stage 4 Disciplinary Proceedings)*" ("the Principal's Report" or "the Report") along with a booklet of relevant documentation referenced in the Report together with a copy of Circular

0049/2018. This circular sets out the disciplinary procedures agreed between the Department of Education, schools and teachers' unions.

4. The next day the Chair of the Board of Management wrote to the plaintiff notifying her of the initiation of the disciplinary proceedings by the Principal and requesting the plaintiff to provide her response in writing to the Report and to attend a meeting of the Board of Management.

5. The body of the letter, over the course of approximately a page and a half, set out "*a summary of the allegations made against* [the plaintiff] *in the report.*" This Court is not concerned with the merits or otherwise of these allegations. They are matters for the disciplinary process and I, therefore, do not propose to set them out in detail. In summary it is alleged that the plaintiff used her position in the school as teacher and as the department coordinator to gain an unfair advantage for her son in respect of the 2020 Leaving Certificate by, inter alia, taking various specified steps in respect of her son's subject level choice, contrary to the relevant Ministerial direction, the stated position of the State Examinations Commissions, and instruction by the Principal and Circular 0037/2020 (dealing with calculated grades).

6. The background to the initiation of these disciplinary proceedings rests in the Covid-19 pandemic and the alternative arrangements which were made in respect of the 2020 Leaving Certificate and various steps which the Plaintiff took in response to the announcements of these alternative arrangements.

7. On the 19th March 2020 the Minister for Education and Skills announced that all oral and practical exams for the Leaving Certificate were being cancelled. This obviously included the Irish oral exam. It was announced that students would receive 100% marks in lieu of the assessment. It was also announced at that time that students who were due to sit the oral exams in the affected subjects would take their written exams in those subjects at the level that they had indicated when confirming their subject choices to the State Examinations Commission in January 2020. It seems that normal practice in previous years was that students completed a State Examinations Commission form in the January of their Leaving Certificate indicating what level they intended taking but that this was not binding and that students were free, on the day of the relevant exam, to take the Higher level, Ordinary level, or Foundation level even if they had nominated a different level on the form. The Minister's announcement appeared to preclude this for the 2020 written exams. It will be remembered that when the orals were cancelled it was still anticipated that students would be sitting a written exam.

8. Immediately after the Minister's announcement had been communicated to staff in the school by the Principal, the class teacher raised the issue of two students (including the plaintiff's son) who had changed levels from Higher to Ordinary level and had indicated on the State Examinations Commission form that they wished to take the Ordinary level paper but had subsequently changed their mind after their mock exams and had resumed studying at the Higher level. She made the point that traditionally the State Examinations Commission forms were "*indicator forms*" only. They did so with a view to the school making representations to the State Examinations Commission that the students be allowed to sit the exam at Higher level. The plaintiff also contacted various school personnel. The Principal declined to make such representations, saying that the Minister's statement was clear and unequivocal. It is fair to say that the plaintiff was displeased with this response and continued to raise the issue with the school including through the Year Head, Deputy Principal, the Principal and the Chair of the Board of Management. She also contacted the State Examinations Commission directly.

9. On the 8th May 2020 the Minister announced the postponement of the Leaving Certificate exams and that students would be offered the option of receiving calculated grades or of sitting the 2020 Leaving Certificate exams at a later date. The announcement gave a summary of the process relating to the calculated grades option and provided a link to a guidance document in relation to the system of calculated grades. A core part of the system was to be that a school's principal, deputy principal(s), teachers or other members of the school staff must not under any circumstances discuss with any student or with the parents or guardians of any student the estimated marks that the school was submitting.

10. In the weeks that followed this second announcement (May and June 2020) the Plaintiff raised the issue of the level at which the two students should be graded under the calculated grades system with the school and with various school personnel. She also raised it directly with the Department of Education (which had taken over responsibility for the calculated grades process when the Leaving Certificate was postponed) The plaintiff forwarded her correspondence with the Department to the Senior Management team in the school because the Department required confirmation from the school that the student had completed the 2 year curriculum at Higher level. The Department subsequently emailed the Principal with reference to the plaintiff's emails, seeking confirmation that "*each candidate has completed the 2 year curriculum in respect of Irish, Higher Level*" and "*that the school will be able to provide predicted grades in the [sic] this subject and level in respect of each candidate referenced below.*" It will be

noted that at this stage the determinant of the level at which a student would be graded appears to have become whether they had completed the two-year curriculum at the relevant level, not what level they had marked on the State Examinations Commission form in January.

11. During this process, there were also interactions between the plaintiff and various school personnel about what was called the Subject Alignment Group in respect of Irish and the question of a conflict of interest given that the plaintiff's son was to be graded. An in-school alignment process appears to have been part of the calculated grades process for each subject and there appears to have been a Subject Alignment Group in each subject to oversee that process.

12. Much of these interactions were played out in emails. However, I have not set out the details of many of these matters or the parties' respective positions on them because there are deep conflicts between the parties about very many of them and, in particular, about their correct interpretation or characterisation and the appropriateness of many of the interactions. These are issues which will have to be considered in any disciplinary process and it is not strictly necessary for the purpose of the issues which the Court has to determine to set them out in detail. I will have to touch on some of them in the course of the judgment.

13. Ultimately, on the 9th June the Principal emailed the plaintiff stating that he was in receipt of a significant volume of correspondence which had been forwarded to him regarding levels of entry for the two students and referring to the Department of Education's Guidance, the principles of equity, fairness, objectivity, conflict of interest, the rules against any formal or informal contacts to attempt to influence the calculated grades process which stated that. It went on to say inter alia:

> "…*It is essential that the integrity of the school-based decision-making process is protected at every stage in order to fulfil the commitment to principles of objectivity, equality, and fairness to all students as repeatedly emphasised in the DES Guidelines. The Principal is required to ensure that these principles have been fully observed. Therefore, I should be grateful to receive an explanation for your decision to repeatedly correspondent and communicate with a wide range of individuals regarding levels of entry for* [the two students] *by 5.00pm on Thursday, 11 June prior to further consideration of any necessary action under the Revised Procedures for the Suspension and Dismissal of Teachers in accordance with Section 24 of the Education Act (1998)*".

14. The plaintiff sent two emails in reply pointing out that as the Principal's letter referred to the "*Revised Procedures for the Supervision and Dismissal of Teachers in accordance with section 24(3) of the Education Act 1998"* she was entitled to receive all documentation relied upon by the Principal. He replied to the first of these.

15. A letter was sent by the Principal on the 14th October 2020 apparently on foot of information that the Plaintiff had approached two class teachers in September to make inquiries about the estimated marking or ranking process that had been applied and the calculated grade outcomes. This had been preceded by an exchange of emails between the Principal and the plaintiff. The letter repeated what had been said in the letter of the 9th June about the Principal being in receipt of a significant volume of correspondence which was sent by the plaintiff to colleagues during the calculated grades process regarding levels of entry for the two students and then went on say that *"…it has come to my attention that you subsequently approached colleagues in the workplace to make detailed enquiries about the Leaving Certificate Calculated Grades process in what they regarded as being your capacity as a parent on the 15th and 18th September. Your decision to repeatedly communicate with colleagues regarding this matter disregarded lawful and reasonable directions from your employer issued on 2nd and 3rd September. The actions may also be regarded as breaching DES Guidance intended to protect the integrity of the Leaving Certificate Calculated Grades process…".* The letter concluded with the Principal stating that he was reserving the right to further consideration of any necessary action under Circular 0049/2018. There followed an exchange of correspondence resting, it seems, with an email from the plaintiff of the 20th October 2020.

16. Matters rested there until, it seems, the delivery of the Report by the Principal to the plaintiff and the Chair of the Board of Management. It was delivered to the plaintiff on the 27th May 2021. The evidence is that it was delivered to the Chair on the 27th May also though some doubt is cast on this by the plaintiff. There was a meeting of the Board of Management later that day. What happened at this meeting (and indeed shortly before it) is one of the issues at the core of the disputes between the parties and I will return to it at various points during the course of this judgment. One thing that is not in dispute is that the meeting agreed that the Chair of the Board should send a letter in agreed terms. This was sent on the 28th May and read, inter alia:

> *"I am writing to you formally in my capacity as Chairperson of the Board of Management at The High School. The Principal…has initiated the disciplinary*

procedures at Stage 4 of the disciplinary procedures contained in DES 0049/2018 in relation to work and conduct issues of a serious nature. I enclose a copy of the comprehensive report on the facts of the case which the Principal has referred to the Board of Management, together with a booklet of relevant documentation referred to in the report. I understand from the Principal that he also provided you with a copy of the report along with relevant documentation.

The Board of Management met on 27 May and considered the matter. I have been requested by the Board to seek your view in writing on the comprehensive report referred to the Board. A special meeting of the Board of Management has been arranged for Tuesday 22 June 2021 at 2.00pm You are requested to attend the meeting which will be held in line with public health guidelines.

The purpose of the meeting on 22 June is to give you the opportunity to make a formal presentation of your case to the Board of Management. The Board meeting will be a formal disciplinary hearing at Stage 4 of the procedures which could give rise to the imposition of disciplinary sanctions against you as provided for in the disciplinary procedures up to and including your dismissal. The specific nature of the allegations against you are set out in the report to the Board of Management…

…At the disciplinary meeting on 22 June you will be given the opportunity to respond in full to the allegations made against you, to state your case fully, and to challenge the evidence that is being relied upon for a decision. You are entitled to be accompanied at the meeting by your trade union representatives or by a colleague subject to a maximum of two persons. As the issues before the Board are very serious and if substantiated could amount to serious misconduct, I would strongly advise you to take appropriate independent advice. The Board as your employer has a duty to act reasonably and fairly in all interactions with staff and to deal with issues relating to conduct in a confidential manner which protects the dignity of the teacher. In addition, the Board recognizes that you have the right to a fair and impartial examination of the allegations themselves and your response to them in line with the principles of natural justice.

I would appreciate if you let us know in advance of the meeting as to whether you will be accompanied at the meeting and, if so, by whom. I would also appreciate it if you would let us know if you intend to call any witnesses on your own behalf. You will be advised in advance of the disciplinary meeting as to the *identity of any witnesses who will be attending. You will be entitled to question any witnesses on their evidence to the Board. The Principal as the complainant in this matter will not participate in the Board's decision making and will leave the disciplinary hearing when you do."*

17. There followed an exchange of correspondence between solicitors acting for the plaintiff and the school over the course of June to October 2021 in which many of the issues which were canvassed during the course of the hearing were first raised. Ultimately, the plaintiff issued proceedings by Plenary Summons on the 14th October 2021 seeking various declarations and injunctions directed at the disciplinary process and then applied on the 15th October 2021 for short service of a motion seeking interlocutory relief. This motion was grounded on the affidavit of the plaintiff of the 14th October 2021 and there followed an extensive exchange of affidavits (two further affidavits of the plaintiff and three affidavits of each of the Principal and the Chair of the Board).

18. Much of these affidavits are focused on the matters underlying the disciplinary proceedings. This Court can obviously not resolve those issues.

19. I set out the plaintiff's case in greater detail below but essentially it is her case on this motion (though this is not entirely reflected in the Plenary Summons) that the disciplinary process is irreparably flawed because the Principal's Report is flawed and unfair, the Principal is biased, the Board either wrongfully considered the Report at the meeting on the 27th May, i.e. before receiving the response of the plaintiff, or members of the Board considered it before the meeting, or the Board did not adequately consider it, the plaintiff has a reasonable apprehension that the Chair and members of the Board are biased, the Board has no jurisdiction because matters concerning the 2020 Leaving Certificate are matters between the plaintiff and the Department of Education, and there has been wrongful delay in commencing the disciplinary process. The plaintiff seeks the following reliefs:

"1. An Interlocutory Injunction restraining the Defendant, its servants or agents, from commencing and/or continuing with any Disciplinary process based on the Report attached to the Defendant's letter of 28 May 2021;

2. An Interlocutory Injunction restraining the Defendant from proceeding with the Disciplinary hearing for 3 and 4 November 2021;

3. An Interlocutory Injunction restraining the Defendant from dismissing the Plaintiff from her employment and/or imposing any disciplinary sanction upon her, in reliance upon any "findings", "conclusions" or "facts" contained in the Report attached to the Defendant's letter of 28 May 2021;

4. An Interlocutory Injunction restraining the Defendant from commencing and/or continuing with any disciplinary process involving any decisions made by or to be made with the participation of the current Chair of the Defendant and/or any members of the Defendant's Board of Management who participated in the decision of 27 May 2021 and/or based on any Report prepared by the Principal of The High School;

5. An Interlocutory Injunction restraining the Defendant from seeking to investigate and/or to discipline the Plaintiff in respect of matters where the Plaintiff has carried out duties for an on behalf of the Minister for Education and/or the Department of Education pursuant to Department Circular 37/2000 or otherwise;

6. An Interlocutory Injunction restraining the Defendant from dismissing the Plaintiff from her employment, or imposing any disciplinary sanction upon her save in accordance with the requirements specified by DES Circular 49/2018 and the requirements of fair procedures."

LEGAL FRAMEWORK

20. There is relatively little dispute between the parties as to the applicable legal principles in respect of the grant of interlocutory injunctions in the context of ongoing disciplinary processes.

21. The modern approach to interlocutory injunctions is set out in *Merck Sharp and Dohme v Clonmel Healthcare [2019] IESC 65*, in which O'Donnell J set out an eight-step approach:

"(1) First, the court should consider whether, if the plaintiff succeeded at the trial, a permanent injunction might be granted. If not, then it is extremely unlikely

that an interlocutory injunction seeking the same relief pending the trial could be granted;

(2) The court should then consider if it has been established that there is a fair question to be tried, which may also involve a consideration of whether the case will probably go to trial. In many cases, the straightforward application of the American Cyanamid and Campus Oil approach will yield the correct outcome. However, the qualification of that approach should be kept in mind. Even then, if the claim is of a nature that could be tried, the court, in considering the balance of convenience or balance of justice, should do so with an awareness that cases may not go to trial, and that the presence or absence of an injunction may be a significant tactical benefit;

(3) If there is a fair issue to be tried (and it probably will be tried), the court should consider how best the matter should be arranged pending the trial, which involves a consideration of the balance of convenience and the balance of justice;

(4) The most important element in that balance is, in most cases, the question of adequacy of damages;

(5) In commercial cases where breach of contract is claimed, courts should be robustly sceptical of a claim that damages are not an adequate remedy;

(6) Nevertheless, difficulty in assessing damages may be a factor which can be taken account of and lead to the grant of an interlocutory injunction, particularly where the difficulty in calculation and assessment makes it more likely that any damages awarded will not be a precise and perfect remedy. In such cases, it may be just and convenient to grant an interlocutory injunction, even though damages are an available remedy at trial.

(7) While the adequacy of damages is the most important component of any assessment of the balance of convenience or balance of justice, a number of other factors may come into play and may properly be considered and weighed in the balance in considering how matters are to be held most fairly pending a trial, and recognising the possibility that there may be no trial;

(8) While a structured approach facilitates analysis and, if necessary, review, any application should be approached with a recognition of the essential flexibility of

the remedy and the fundamental objective in seeking to minimise injustice, in circumstances where the legal rights of the parties have yet to be determined."

22. While this is set out as an eight-step process, it is clear that any application for an injunction must be approached "*with a recognition of the essential flexibility of the remedy and that fundamental objective in seeking to minimise injustice…*".

23. This was also touched on in *Betty Martin Financial Services Ltd v EBS DAC [2019] IECA* in which Collins J warned against a *"tick-the-box*" approach to the grant or refusal of an interlocutory injunction and said (at paragraph 34):

> *"[A]though establishing a serious issue to be tried is a necessary (but not sufficient) condition to the grant of an injunction (at least where that issue, if established at trial, would provide a basis for a permanent injunction), the decision to grant or refuse thereafter becomes a matter of overall assessment of where the balance of justice lies, though with particular (and, in many cases, decisive) weight being given to the adequacy of damages within that overall assessment…there are likely to be multiple considerations to be weighed in the balance, pointing in different directions, none of which are likely to be decisive in itself."*

24. The parties were largely agreed as to the appropriate threshold test (O'Donnell J's second step) in the circumstances of this case. The injunctions sought are prohibitory in nature and so the appropriate test is that of a "*fair question*" or "*serious issue to be tried*" rather than the test of a "*strong case which is likely to succeed*" (set down in *Maha Lingham [2006] 17 ELR 137*.) However, it is well-established that there is an additional element to the test in the context of an injunction to restrain an ongoing disciplinary process. Clarke J explained in *Carroll v. Bus Átha Cliath [2005] 4 IR 184*, that the courts should be reluctant to restrain an ongoing disciplinary process. He said:

> "*It seems to me that a court should be reluctant to intervene and in particular to intervene at an interlocutory stage, in an as yet incomplete disciplinary process. To do so would be to invite a situation where recourse might well be had to the courts at many stages in the course of what would otherwise be a relatively straightforward and expeditious set of disciplinary procedures."*

25. He then added to this in *Minnock v Irish Casing Company Ltd and Stewart [2007] 18 ELR 229* and outlined the circumstances in which the Court might intervene. He held:

> "*It seems to me, firstly, as a matter of law that the authorities are now beginning to settle upon a test as to the appropriate attitude to be taken or the test to be applied in cases such as this. It clearly is the case that in the ordinary way, the court will not intervene necessarily in the course of a disciplinary process unless a clear case has been made out that there is a serious risk that the process is sufficiently flawed and incapable of being cured, that it might cause irreparable harm to the plaintiff if the process is permitted to continue*."

26. In *Rowland v An Post [2017] 1 IR 355* Clarke J in the Supreme Court said:

> *"11… In many cases the proper approach of a court when called on to consider the validity of a disciplinary like process is to look at the entirety of the procedure and determine whether, taken as a whole, the ultimate conclusion can be sustained having regard to the principles of constitutional justice. Many errors of procedure can be corrected by appropriate measures being taken before the process comes to an end. Decision-makers in such a process have a significant margin of appreciation as to how the process is to be conducted (subject to any specific rules applying by reason of the contractual or legal terms governing the process concerned). Thus the exact point at which parties may become entitled to exercise rights such as the entitlement to know in sufficient detail the case against them, the entitlement in appropriate cases to challenge the credibility of evidence and the right to make submissions are, at least to a material extent, matters of detail to be decided by the decision maker in question provided that the procedures adopted do not, to an impermissible extent, impair the effectiveness of the exercise of the rights concerned.*
>
> *12. Precisely because procedural problems can be corrected and because there may well be a significant margin of appreciation as to the precise procedures to be followed it will, in a great many cases, be premature for a court to reach any conclusion on the process until it has concluded.*
>
> *13. However, the practical consideration which leans against a court interfering with an ongoing process may point in the opposite direction in a limited number of cases where the conduct of the process, up to the point when*

the court is asked to review it, is such that it is clear that the process has gone irremediably wrong. In such a case, rather than the practicalities pointing to letting the process come to its natural conclusion and, if necessary, being reviewed by a court thereafter, those same practicalities point to stopping the process and thus saving all concerned from engaging in what must necessarily turn out to be the fruitless exercise of continuing a process whose conclusions if adverse are almost certain to be quashed."

27. In *O'Neill v The Commissioner of An Garda Síochána [2020] IEHC 448* Allen J said:

> "*a court should be reluctant to intervene, particularly at an interlocutory stage, in an incomplete disciplinary process, and will do so only where a clear case has been made out that there is a serious risk that the process is seriously flawed and incapable of being cured, and that the continuation of the process might cause irreparable harm to the plaintiff.*"

28. These general principles are reflected in the judgments of Binchy J in *Joyce v Board of Management of Coláiste Iognáid [2015] IEHC 809* and *[2016] ELR 140* and Butler J in *Lally v Board of Management of Rosmini Community School [2021] IEHC 633*.

29. In Butler J's judgment in *Lally*, given in the context of the same disciplinary processes as are in question in this case, Butler J said.

> "*5. …The settled case law makes it clear that in normal course an ongoing disciplinary process should be allowed to proceed unless it is clear that the process has gone irremediably wrong such that any conclusion reached adverse to the employee would be bound to be legally unsustainable (per Clarke J., as he then was, in Rowland v. An Post [2017] IR 355). That said, there are also a number of cases in the education sector involving the application of these procedures (i.e. DES Circular 49/2018 or its predecessors) where the teacher concerned succeeded in establishing that the threshold had been reached. As each case depends on its individual facts, it will be necessary to look at the facts of this case in some detail.*"

30. Butler J went on to consider the interaction between the traditional threshold test and the requirement not to intervene unless it is clear that the process has gone irremediably wrong. Having identified the "*serious issue*" test as the appropriate threshold (there was no dispute between the parties) she said:

> *"61. This is not, however, the end of the matter because separate to the jurisprudence concerning the standard applicable to the grant of interlocutory injunctions, there is a line of case law relied on by the school to the effect that a court should not intervene in an ongoing disciplinary process unless it is clear that the process has gone irremediably wrong and it was more or less inevitable that any adverse conclusion reached against the plaintiff would be unsustainable in law. If the plaintiff cannot establish that the case reaches the standard, then the disciplinary process should be allowed to continue to its natural conclusion (see Rowland v. An Post [2017] 1 IR 355). This means that in establishing a "fair question to be tried", it is not sufficient for the plaintiff simply to show that she has a stateable case on fair procedures or a breach of Circular 49/2018 or objective bias on the part of the decision maker. She must show that she has raised issues which suggest that the process has gone irremediably wrong and that any conclusion ultimately reached against her will be legally unsustainable. Whilst the fair question threshold has often been described as a light one, it becomes a more exacting threshold in a case of this nature by virtue of the fact that it must be applied to legal proceedings which themselves attract a specific and higher standard for the grant of a permanent injunction.*
>
> *62. The judgment in Rowland v An Post was given in the substantive proceedings, interim and interlocutory injunctions having been granted at an earlier stage. Thus, the legal test under discussion by the Supreme Court was that to be applied to the question of whether the party in the position of the employer (strictly speaking it was not an employment case), should be permanently injuncted from continuing with a disciplinary process for the reasons advanced. However, in light of the fact that generally an interlocutory injunction should not be granted if a permanent injunction is unlikely to issue, for the reasons discussed in the preceding paragraph the legal test for the grant of a permanent injunction becomes relevant to the issue as to whether the plaintiff has established a fair question to be tried…".*

31. Butler J then quoted from paragraph 11 of Clarke J's judgment in *Rowland* (quoted above) and went on to say:

> "*63. Obviously, sight should not be lost of the fact that this remains an application for an interlocutory injunction; the plaintiff is not required to show that she must succeed in her case once the Rowland criteria are applied.* ***Rather she must show that she has raised a fair question to be tried, taking into account the high standard by reference to which that question will be judged at the substantive hearing.***" [Emphasis added]

32. Thus, following the formulation set down by Butler J, the plaintiff must show that there is a fair issue be tried, taking into account the requirement to prove at trial that the process has gone irremediably wrong, i.e. that there have been flaws in the process and that those flaws mean that there is a serious risk that the process has gone irremediably wrong.

DISCIPLINARY PROCESS

33. The applicable disciplinary process is contained in Circular 0049/2018 "*Revised Procedures for Suspension and Dismissal of Teachers and Principals".* The plaintiff is bound to apply those procedures. Of course, they must do so in a manner consistent with fair procedures.

34. The Circular provides, inter alia:

> *"Stage 4:*
>
> *If it is perceived that the poor work or conduct has continued after the final written warning has issued or the work or conduct issue is of a serious nature a comprehensive report on the facts of the case will be prepared by the Principal and forwarded to the board of management. A copy will be given to the teacher.*
>
> *The board of management will consider the matter and will seek the views of the teacher in writing the report prepared by the Principal. The board of management shall afford the teacher an opportunity to make a formal presentation of his/her case. The teacher should be given at least ten school*

days' written notice of the meeting. The notice should state the purpose of the meeting and the specific nature of the complaint and any supporting documentation will be furnished to the teacher. The teacher concerned may be accompanied at any such meeting by a representative, normally his/her trade union representative/s or a colleague/s subject to a maximum of two. The teacher will be given an opportunity to respond and state his/her case fully and to challenge any evidence that is being relied upon for a decision and be given an opportunity to respond. Having considered the response the board of management will decide on the appropriate action to be taken. Where it is decided that no action is warranted the teacher will be so informed in writing within five school days. Where following the hearing it is decided that further disciplinary action is warranted the board of management may avail of any of the following options;

deferral of increment
withdrawal of an increment or increments
demotion (loss of post of responsibility)
other disciplinary action short of suspension or dismissal
suspension (for a limited period and / or specific purpose) with pay ☐
suspension (for a limited period and / or specific purpose) without pay
dismissal

The board of management will act reasonably in all cases when deciding on appropriate disciplinary action. The nature of the disciplinary action should be proportionate to the nature of the issue of work or conduct issue that has resulted in the sanction being imposed.

Where the disciplinary action short of dismissal is proposed the case will be reviewed by the board of management within a specified time period to consider whether further disciplinary action, if any, is required."

35. This Circular and its operation was considered by Binchy J in *Joyce v Coláiste Iognáid [2015] IEHC 809* and by Butler J in the *Lally* case.

36. Two features of the procedures bear note in the current context: (i) the disciplinary process is initiated by the delivery by the Principal of a '*comprehensive report'*, i.e. it is not a two-stage process whereby the Principal delivers a comprehensive

report to the Board and then the Board decides whether or not to instigate the disciplinary process – it is instigated by the principal by the delivery of the report to the board (*Joyce*, para.78 and *Lally*, paras. 52-54); and (ii) there is no obligation to seek any response from the teacher before completing or delivering the report.

37. The combination of these features imposes a requirement on the Principal to ensure that the report is fair and balanced and does not contain any findings. It is long established that where a report is to be prepared without input from the subject of the report no findings of any sort may be made against the party. It suffices to refer to *Joyce* and *Lally* (see also *O'Sullivan v Mercy Hospital Cork Limited [2005] IEHC 170* page 9-10). Binchy J in *Joyce* (which was concerned with the same procedures but as the school principal was the subject of the report the chair of the board of management was the author) referred to *Minnock* and held:

> "*75. Moreover, this is consistent with the jurisprudence in the area, to which the Court has been referred. It is quite clear that the principles of fair procedures and natural justice do not apply to the investigatory stage provided that, in the wods of Clarke J in Minnock 'no findings of any sort are made on behalf of the inquirer other than to determine whether there is sufficient evidence or materials to warrant a formal disciplinary process."*

38. He went on to say at paragraph 80:

> "80. *The July report itself contains a number of remarks or comments (set out in paragraphs 25-28) which by any standards could only be regarded as highly prejudicial to the plaintiff. A number of them are most definitely in the nature of conclusions and some are in the nature of rhetorical questions, begging only of an answer adverse to the plaintiff. A considerable amount of time at the hearing was taken up in discussing whether or not those parts of the July report that referred to 'the views of the board' in fact represented the views of the board. However, I am not altogether sure that this really matters; it is clear from the authorities that where the investigator goes beyond the mere gathering of facts in order to determine whether or not there is a case to answer to warrant a formal disciplinary proceedings and makes findings or draws conclusions, the enquiry can not any longer be characterised as one which Clarke J described in Minnock of a 'pure evidence-gathering type' to which the rules of natural justice do not apply. In that case, Clarke J held that the second defendant, who was*

conducting an investigation on behalf of the first defendant employer had purported to make what he described as findings and for that reason he granted an order restraining the continuation of the investigation pending the full trial of the action."

39. Binchy J concluded at paragraph 83 that the plaintiff had established that the relevant report *"contains not just a statement of the facts, but also findings and conclusions which have been made without affording the plaintiff any opportunity to respond, thereby depriving the plaintiff of fair procedures and natural justice…"*

40. Butler J in paragraphs 74 and 75 of the *Lally* judgment said:

"74.…The report is a mandatory step in the process. In my view there is an obligation on the principal to act fairly in the preparation of a report, particularly one which is intended to start a disciplinary process at stage 4. This means that the facts set out in the report must be both ascertained and presented fairly. If there are facts or circumstances known to the principal which tend to disprove the allegations or to minimise the seriousness of what is alleged, these should be brought to the attention of the Board of Management in the report.

75…. The manner in which the allegations are put before the Board of Management by the principal can be significant and can serve to set the bar which the teacher must meet in order to exonerate herself. As the sending of the report is the step which both commences and frames the subsequent disciplinary process, on balance I would be inclined to the view that it is a step which cannot be rectified – certainly not easily rectified – as the process progresses."

41. The normal burden which arises from the Report being prepared without the involvement of the teacher, i.e., being an exercise of a "*pure evidence-gathering type*", is reinforced because of the role the Principal plays in a school. The principal of a school is often a member of the Board of Management and, I would expect, a member whose views are valued and bear a certain amount of weight. This will, of course, vary from school to school but, after all, even if not a member of the Board, the Board entrusts the principal with the day-to-day running of the school. Thus, a report from the principal can be expected to carry a certain amount of weight and it is therefore essential that the

report be fair and proper. The burden is further reinforced where the principal is also the complainant or a person who has been involved in the matters giving rise to the Report.

42. Senior Counsel for the defendant emphasised the particular facts of *Lally* and I accept any guidance which it might offer in this case must be approached with a degree of caution. For example, in *Lally* there was in fact two reports from the principal: the second was an edited version of the first in which "*all categoric statements in the first report have been changed using various formulae. The word "facts" has been replaced with "materials", and the phrase "there is evidence that" or "evidence appears to indicate" has been inserted before what were, in the first comprehensive report, statements that the plaintiff had done or failed to do something".* Butler J describes the difference between the two reports as "*minimal*". The Board had considered the first Report extensively and therefore had also in substance considered the revised Report extensively. Secondly, the revised Report was issued following the institution of proceedings by the plaintiff and she had made specific averments in two affidavits in those proceedings but no change or addition was made to the Report in response to those matters. Thirdly, the plaintiff had specific technical problems in accessing potentially favourable information from relevant devices and there were technical issues relating to the underlying allegations against her. All of these are perhaps captured in paragraphs 69-70 of Butler J's judgment:

> *"69. That said, however, there is an obligation on a principal in preparing such a report to act fairly. In this case, I have serious concerns as to whether the principal has acted fairly in the preparation of the second comprehensive report. A number of serious issues were raised by the plaintiff on affidavit in relation to the first comprehensive report. These included whether the audit on which the report is based fairly reflects her level of engagement with her students other than through the Google Meet platform and the VSWare roll system. The principal prepared his second report after the plaintiff's first two affidavits had been delivered and with the knowledge of these concerns but does not address them in any way. Given that the plaintiff is being accused of having "cancelled" classes, it is I think relevant for the Board of Management to know whether she engaged with her students through other elements of the Google Suite platform provided by the school during those periods she is alleged to have cancelled classes. There is a significant difference in terms of the seriousness of what is alleged between a teacher who simply cancelled classes and made no provision at all for her students during those periods and a teacher who did not conduct all classes remotely by maintaining a live presence throughout the class period but who distributed and assigned work in a structured way for students to do*

independently, who made herself available to assist and answer questions from students and who corrected and returned work done by students during these periods. Similarly, the plaintiff had identified difficulties with the VSWare roll system and, particularly, as regards taking the roll for double classes. Given the allegation is that the plaintiff took the rolls inaccurately, it would be important for the Board of Management to know whether any inaccurate rolls were caused by the system the school provided to the plaintiff rather than by the plaintiff's deliberate actions. One might have expected the second comprehensive report to at least identify that the plaintiff was asserting technical difficulties and perhaps to identify how many of the 41 rolls allegedly inaccurately taken by her related to this type of double classes.

70. In light of the knowledge the principal must have had of these issues through his engagement in these proceedings, a serious issue arises as to whether he acted fairly in simply re-presenting the first comprehensive report subject to the editorial changes identified above."

43. Butler J's judgment must, of course, be seen in the context of those particular facts. Nevertheless, it seems to me that the principles contained in paragraphs 74-75 of the judgment are of general application and arise from the fact that the comprehensive report may be prepared without input from the teacher and from the particular features of the process established under the Circular and the role and importance of the school principal.

APPLICATION OF THE PRINCIPLES

Permanent injunction would not be granted

44. As noted in step one of O'Donnell J's approach, the Court must consider whether, if the plaintiff succeeded at the trial, a permanent injunction might be granted and, if not, then an interlocutory injunction is unlikely to be granted. I am satisfied that if the plaintiff succeeds at trial a permanent injunction might be granted.

45. It was submitted on behalf of the defendant that a relevant consideration at this stage is the breadth of the reliefs sought by the plaintiff. It was submitted that the effect of the reliefs being sought by the plaintiff would be to permanently enjoin the Board from conducting any disciplinary process against the plaintiff or from dismissing or

imposing any sanction on her "*in reliance upon any findings, conclusions or facts contained in the Principals Report*" and from "*commencing or continuing with any disciplinary process involving any decisions made by or to be made with the participation of the current Chair of the Defendant or any members of the Defendant's Board of Management…*" The defendant described the plaintiff as seeking "*to immunise the plaintiff from any disciplinary process arising from the matters in suit*" and that if the entire Board is enjoined from participating in the disciplinary process, the entire process would be stymied. It seems to me that the defendant is correct in its description of what is being sought and of the effect of all of the reliefs being granted. However, that would not preclude a permanent injunction being granted. Firstly, if the Court is satisfied that the plaintiff has made out her case that the process has gone irremediably wrong then it would be open to the Court to grant permanent relief even if the effect of same would be to "*stymie the process*" or to "*immunise the plaintiff from any disciplinary process arising from the matters in suit.*" Indeed, it would likely and logically follow that the process should not proceed if it has gone irremediably wrong. The precise terms or scope of the relief would depend on the grounds upon which the plaintiff succeeded. Secondly, I do, of course accept that the Court must have regard to the breadth of the injunctions sought and it may be that even if the plaintiff is successful at trial that the Court would not grant such broad relief but O'Donnell J's judgment does not require the Court to be satisfied that all of the relief sought in the Notice of Motion would be granted on a permanent basis or that the relief would be in the precise terms sought. What is required is that the Court be satisfied that a permanent injunction directed at the issues in the case is a possibility. In my view, permanent injunctive relief is a possibility if the plaintiff succeeds at trial.

46. The defendant also submits that relief should be refused on the basis of step 1 of the *Merck Sharp & Dohme* approach because an injunction would not be granted because it is difficult to understand how the plaintiff can reasonably say that it would be impossible for her to ever obtain a fair hearing and "*as this is manifestly not a disciplinary process that has gone irremediably wrong*". This is to approach the questions in the wrong order. What step 1 in *Merck Sharp & Dohme* requires is for the Court to consider whether a permanent injunction might be granted ***if the plaintiff succeeds***. What this submission asks is that the Court should conclude that a permanent injunction will not be granted because the plaintiff will not succeed. The question of whether the plaintiff might succeed is to be considered on the basis of whether the plaintiff has established a fair issue to be tried (or in some cases whether they have established a strong case), i.e. at step 2.

Serious issue to be tried

47. The plaintiff sets out the core of her case in paragraph 37 of her grounding affidavit (which is directly referred to in paragraph 10 of her written submissions). The grounds of complaint are reflected in the Statement of Claim which was subsequently delivered on the 15th March 2022 and in paragraph 24 of her written submissions. She claims that the current disciplinary process is irredeemably flawed for the following reasons:

(i) The Principal's Report is self-evidently prejudicial to her and was not prepared fairly in that, inter alia, it entirely predetermines the main issues alleged against her and makes concluded findings of fact to the extent that it will not be possible for her to obtain a fair hearing in relation to the matters alleged;

(ii) She has a real and justified apprehension that the Principal is biased against her arising from the recent interactions between the Principal and the plaintiff and the manner in which the Principal's Report was prepared;

(iii) The Board of Management committed a serious error in the process by already considering the Principal's Report in advance of hearing from the plaintiff;

(iv) She has a reasonable apprehension of bias in relation to the Chair of the Board of Management because he was actively involved in the underlying events the subject of the Principal's Report and the complaints against her and almost certainly discussed the matters alleged in the Report with the Principal well in advance of the preparation of the Principal's Report. She also alleges bias on the grounds that the Chair is friends with the Principal's brother;

(v) She has a reasonable apprehension of bias in respect of the members of the Board of Management because they were willing to consider the Principal's Report at the meeting of the 27th May in circumstances where they could not have given the matter any or any due consideration where they appear to have been simply railroaded by the chairman at the said meeting;

(vi) The Board of Management has failed to respond properly to reasonable queries raised on her behalf or to provide her with the necessary information and documentation to ensure a fair hearing at the threatened disciplinary hearing;

(vii) The defendant is seeking to discipline her for issues that are matters between the Department of Education and the plaintiff and which the Department has not raised or sought to raise;

(viii) The matters alleged do not warrant convening Stage 4 disciplinary proceedings which could lead to her dismissal;

(ix) The Principal has been guilty of such delay in relation to the preparation of the Principal's Report in relation to the underlying events complained of that it is wholly prejudicial and disproportionate to subject her to the risk of dismissal at this juncture.

48. At the hearing, the plaintiff's focus was on points (i) – (v) of these and I therefore propose to deal with these first. It seems to me that while they are each separate grounds of complaint, they also to a large extent feed into each other (for example, part of the complaint of bias against the Principal is the manner in which the Report was prepared (points (i) and (ii)) and part of the case that the process had gone irremediably wrong is that the Board or members of it considered the Report (points (i) and (iii)). I therefore propose to deal with them together.

49. The plaintiff's first complaint is that the Principal's Report was prepared unfairly, pre-determines the main issues, makes concluded findings of fact and is prejudicial to the plaintiff and it is therefore impossible for her to obtain a fair hearing. It seems to me that there are in fact two limbs to this: whether the Report suffers from those alleged defects and whether those defects mean that the plaintiff can not obtain a fair hearing. One does not necessarily follow the other. This second limb is in fact an iteration of the test which must be satisfied before the courts will interfere with an ongoing disciplinary process.

50. I am satisfied that the plaintiff has established a fair issue that the Principal's Report is defective on the basis that it makes concluded findings against the plaintiff and is unfairly prejudicial to the plaintiff. When assessing a report such as this, it must be borne in mind that a school principal is not a lawyer, and should not be held to the standard that might be expected of a person with legal qualifications. It would also be inappropriate to parse the Report and to condemn it on the basis of isolated statements or passages. The Report's contents, tone and effect must be taken as a whole.

51. Nonetheless, I am satisfied that that there is a fair issue that this Report is fundamentally flawed in a number of respects. As discussed above, a report of this nature should not contain any findings. This Report contains a number of very prejudicial findings against the plaintiff and they are expressed in very prejudicial terms. For example, on page 10 of the Report, the Principal refers to a claim by the plaintiff that the two students had studied Higher Irish all through 5th and 6th years and describes it as "*false*". The Principal may be right or wrong. He is entitled to lay out the evidence which shows that the claim is not correct. But the statement that the claim is "*false*" is a concluded finding against the plaintiff and, perhaps even more importantly, is expressed in prejudicial terms connoting dishonesty on the part of the plaintiff. It is a matter for the Board to decide on the basis of the evidence whether the claim made by the plaintiff in relation to the level at which the students studied is right or wrong and whether, in making her claim, the plaintiff was making a false claim, as opposed simply to a claim that was incorrect. This does not seem to be purely academic. If I understand the Report and its appendices the plaintiff seems to be claiming that the students were in a Higher level class throughout (though they opted to do Ordinary level in the mocks and for the Leaving Certificate) and it seems likely that she will be relying on their place in the Higher level class as the basis of her claim that they studied High Irish throughout. As stated it will be a matter for the Board to weigh up those competing claims. Similarly, the Principal states at pages 13-14 that the claim by the plaintiff that the students had "*not studied the Ordinary level course ever*" is "*false and misleading*". On page 23-24 (and page 26 and elsewhere) the Principal states that the plaintiff "***wilfully misled** the relevant SEC and DES officials regarding the level at which* [the two students] *had studied Irish at Leaving Certificate…*" [emphasis added]. On page 36 the Principal states that "*It should be noted that* [the plaintiff] *attempted to contact* [the class teacher]*…contrary to the standards required of registered teachers in respect of professional integrity, relating to conflict of interest and professional conduct vis a vis compliance with agreed DES and SEC directions…*" and "*It is clear that these communications were in contravention of the principle of integrity underpinning DES Circular 0037/2020 as she was making representations to* [the class teacher]*, as the mother of* [the student] *using her position as teacher and subject coordinator to do so. In addition,* [the plaintiff] *was sending numerous correspondence to* [the class teacher]*, a junior member of the Irish Department of which she was the Subject Co-ordinator, requesting that* [the class teacher] *ask the Chairperson of the Board of Management in support of a false claim made by* [the plaintiff] *regarding her son…"*. Statements that the plaintiff had put forward a "*false claim*" or "*wilfully misled*" certain individuals are repeated on page 37 and page 48. On page 48 the Principal refers to "*a series of false claims*" by the plaintiff in respect of her son.

52. On page 24 the Principal states that the plaintiff "*did not declare an actual or perceived conflict of interest regarding the fact that she was the mother of* [her son] *as well as being a teacher and Subject Co-ordinator of Irish at HSD in her emails and other correspondence to/with the SEC and DES*." The plaintiff claims that the State Examinations Commission and the Department of Education were both aware that she was his parent because she had previously been in touch with them. It is not the Court's role to resolve this issue but, for the purpose of this application, there is a fair issue that this is a finding against the plaintiff on a matter which is disputed by her.

53. These all constitute and are expressed as findings against the plaintiff of very serious wrongdoing.

54. However, as noted above, the Report must be read in its entirety and it is important to note that towards the latter part of the Report the Principal uses the phrases that something "*is submitted*" or "*alleged*". For example, on page 48, he says that "*It is submitted that* [the plaintiff] *was making representations to the Chairperson of the Board of Management, members of the Senior Management Team, Year Head and Form Teacher in support of a series of false claims concerning her son…",* thus not stating the particular matter as a finding. There are several examples of the use of this language. Furthermore, elsewhere he also acknowledged that facts which were set out in the Report remained to be substantiated. For example, he says at page 51 that "*It is further submitted that if these communications by* [the plaintiff] *are substantiated, there exists serious concerns of the standards of conduct required of teachers as set out in the Code of Professional Conduct for Teachers not being met by* [the plaintiff]." On page 53 he says "*It is submitted that this communication from* [the plaintiff]*, if substantiated, represents canvassing on behalf of her son, using her position as school teacher and subject coordinator to make representations to* [the Deputy Principal] *(and by extension all staff at HSD) in support of a false claim, in respect of her son… If substantiated, such communication constitutes refusal to adhere to the direction of her Principal on this issue*…" In the "*Introduction*" section at the beginning of the Report and the "*Summary*" section at the end the Principal states that "*it is alleged that* [the plaintiff] *subsequently used her position as Subject Coordinator of the Irish department at HSD to secure an unfair advantage for her son…by the following alleged actions*…" and refers to the "*alleged conduct*" and "*alleged actions*" and that these matters "*possibly represent*" a fundamental breach of trust.

55. I am not convinced that the use of phrases such as "*It is alleged*" or "*It is submitted*" necessarily means that what follows should not be read as a finding or, indeed, that their absence means that a finding is being made (it will depend on the particular circumstances and the overall contents and tone of the document) but it is undoubtedly arguable that in this case this language goes some way to mitigating the language used elsewhere in the Report (some of which is set out above) and goes some way to clarifying that the Principal was not making findings in those earlier sections. However, this will be a matter to be determined a trial and it seems to me that there is nonetheless clearly, notwithstanding this language, a fair issue that the earlier sections contain findings against the plaintiff stated in prejudicial terms and that the language in the later sections does not undo the damage caused by the language used in those earlier sections. For those reasons, I do not accept, as is contended on behalf of the defendant (and in paragraph 8 of the Principal's first replying affidavit) that the Report makes clear that the matters in the Report are "*currently no more than allegations*" against the plaintiff.

56. I am also satisfied that when one considers the overall tone and approach of the Report there is a fair issue that it is not properly balanced and is unfairly prejudicial to the plaintiff. This is evidenced in a number of different instances but overall it is captured by the absence in the Report of matters which might stand to the plaintiff's credit or even of any indication that a particular matter which is referred to could be interpreted in different ways. For example, it is common case that the plaintiff has an unblemished disciplinary record for twenty-five years but there is no reference to this in the Report. Nor is there any acknowledgement of the air of uncertainty that pervaded society in the weeks and months of March/April 2020 as the country entered and came to grips with the public health measures directed at containing the spread of Covid, or of the challenges for all sectors in society in coming to grips with, and having to adjust to, alternative arrangements and new ways of doing things. Neither of these things could render the Report unfair, not least because the plaintiff could bring them to the Board of Management's attention, but the absence of any acknowledgement of them is arguably indicative of an overall approach which omits matters which might be relevant and favourable to the plaintiff.

57. This overall approach is also evident from pages 39-40 of the Report where the Principal deals with a letter which the relevant year head sent to the Chair of the Board of Management about the two students. This was broadly consistent with the approach of the plaintiff. In her letter, the year head made clear that she was "*unaware of all of the circumstances of the matter*" and that she had a "*limited understanding*". The

Principal then states in bold type (which is also a notable feature of the Report) that *"one of the reasons that* [the year head] *conceded that her understanding of the situation was by her own admission limited is due to the fact that she was not present in school throughout this period due to being required to self-isolate at home in response to an underlying health condition."* The plaintiff points out in her affidavits that most of the school staff were not present in school due to the Covid restrictions in place at the time. This was not controverted in any of the replying affidavits. By omitting to acknowledge that most staff were not present in the school when highlighting this fact in relation to the year head, the Report fails to place any context on the reference to the year head not being present. It conveys the impression that the year head's letter can somehow be dismissed by the fact that she alone was not present in the school when, in fact, that was not unusual at the time. The Board of Management will, of course, know that and the fact that the Board will know it may go to the question of whether the flaws in the Report have irremediably damaged the process but the knowledge of the Board can not determine whether the Report is fair and balanced in the first place. More fundamentally, the only treatment of this letter in the Report is to note that the reason why the year head's understanding was limited was because she was not present in school and to note that "*this communication was contrary to the type of conduct prohibited under DES Circular 0077/2020 as* [the year head] *was making representations to the Chairperson of the Board of Management in support of a false claim made by her colleague* [the plaintiff] *in respect of her son…".* There is no reference whatsoever to the possibility that the fact that the year head wrote this letter might be relevant to an assessment of the plaintiff's position or conduct. The fact that the year head was not present in the school does not explain or justify the Principal not acknowledging that the fact that the year head had written the letter might be relevant to a consideration of the appropriateness or otherwise of the plaintiff's conduct. It is also significant that as far as I can make out there is nothing which is indisputably factually incorrect in the year head's letter. She said *"[the plaintiff's son] remained in a higher level Irish class throughout both 5th and 6th year, and opted to sit an ordinary level mock exam, but then after the mock clearly expressed a wish to his Irish teacher to sit the actual Leaving at Higher level, which is documented in his report. His Irish teacher also commented in the report that he is well capable of higher level but will have to work hard".* There is clearly a dispute about which level the student was studying at but I thought he remained in the same class. However, the contact from the year head was largely dismissed notwithstanding that there are no inaccuracies in it.

58. There is also a separate issue in relation to the treatment of the letter from the year head. The Principal does not say whether he is surmising that one of the reasons

why the year head's understanding was limited was her non-presence at school or whether he spoke to the year head for the purpose of preparing the Report and that she told him this. Fairness requires that the Report be clear in this respect and that if he spoke to her the Report should set out what was said, particularly if what she said was favourable to the plaintiff. Similarly, on page 35 the Principal refers to a contact from the relevant ASTI School Steward to the Chair about the matter and the Principal states that "*It is submitted that this contact by* [the ASTI School Steward] *arose from a request by* [the plaintiff] *that he canvas on behalf of her son regarding the grade level issue, using her position as teacher and subject coordinator to do so."* The Report is unclear whether the Principal spoke to the ASTI Steward or whether the Principal's position is based on his inference drawn from the terms of the contacts from the steward. I do not need to resolve the question of whether "*witness statements*" must be included with the Report but it seems to me that it must be clear from the Report what the Principal's source or means of knowledge are, i.e. is a particular statement surmise or inference on his part or is it based on what he was told by an individual? I do not accept, as may be suggested in paragraph 57 of the Principal's affidavit, that the Principal's means of knowledge does not need to be disclosed until it becomes clear from the plaintiff's response which claims are contested and which are not.

59. On page 32 of his Report the Principal states that an email of the 2nd June 2020 from the plaintiff to the Principal about a Subject Alignment Group contained "*the first direct acknowledgement by* [the plaintiff] *that* [the student] *is her son and that he was being taught Leaving Certificate Irish at* [the school] *by* [another teacher]*".* This may be entirely correct but it seems to me that the way it is stated is arguably unfair and does not contain proper balance. One would expect it to be also stated that while this was the first direct acknowledgement by the plaintiff, the school and the Principal were fully aware of the relationship between the plaintiff and one of the two students. Indeed, the interactions about this Subject Alignment Group were based on the fact that the student is the plaintiff's son. That being the case it is unclear what the purpose of making this statement at that point was: it could be seen as simply a statement of fact, but if that is the case, there is no appreciation of the prejudicial effect of including it without any context.

60. A further example of the possible omission from the Report of facts or context which might be helpful or favourable to the plaintiff relates to the treatment of the interactions about the Student Alignment Group. This is a significant issue in the Principal's Report and, indeed, one of the allegations contained in the Summary is that the plaintiff sought to become involved in the Subject Alignment Group stage of the

Calculated Grades process despite a conflict of interest regarding her son and contrary to Department of Education Guidelines and Circular 0037/2020. As noted previously, this allegation may transpire to be correct – that is a matter for any disciplinary process. However, the plaintiff says in paragraph 47 of her affidavit that "*The principal fails to disclose in his report relevant facts, of which he is aware, related to how other Subject Alignment Groups were conducted in the Respondent school in May and June 2020. In particular, the principal fails to disclose that the email I sent to the principal at 16.04 on 29 May 2020 outlines a proposal in respect of the Subject Alignment Group for Irish that aligns with the manner in which Subject Alignment Groups were being conducted for other subjects, including where the Group was required to consider calculated grades for a student who was a child of a teacher…"*. The Principal does not engage with this in his affidavit and does not say that what was suggested by the plaintiff did not align with the manner in which Subject Alignment Groups were being conducted for other subjects. That being the case, while ultimately it might be decided that this does not impact on the appropriateness or otherwise of the plaintiff's conduct, it was unfair not to balance the allegation of inappropriate conduct with an acknowledgement that what was being suggested was the same as for other Subject Alignment Groups.

61. Finally, I am satisfied that there is an argument that there is an inadequate consideration in the Report of a number of things which occurred following the postponement of the Leaving Certificate and how they might impact on a view of the plaintiff's conduct. As noted above, and as discussed in detail in the Principal's Report, when the oral exam was cancelled the Minister announced that all students would take their written exam at the level which they had stated on the State Examinations Commission form in January 2020. However, obviously, when the written exams were postponed and the option of calculated grades was introduced there was the possibility of not sitting any exams at any level. That seemed to give rise to a degree of uncertainty as to the level at which calculated grades should be calculated. The Department of Education also took over responsibility for the system from the State Examinations Commission. There is reference in the affidavits and exhibits to the establishment by the Department of an online portal where students could confirm their subject level choice (there does not appear to have been certainty that they could only confirm what they previously selected on the State Examinations Commission form). Furthermore, the emphasis seems to have changed from the selection on the State Examinations Commission form to whether students had completed the two year curriculum at a particular level. There was discussion at the hearing about how a student could have completed the two year curriculum when the schools were closed early but that is not an issue for this application. Furthermore, the ASTI issued guidance which seemed to

suggest that the level at which a student should be graded was then a matter of student choice. It is not a matter for this Court to consider any of these issues in detail or how they will impact on any assessment of the appropriateness of the plaintiff's conduct but the point at this stage is that there is no real reference to the relevance or possible significance of these matters in the Principal's Report. The ASTI guidance and the online portal are referred to in paragraphs 14, 15 and 17 of the plaintiff's first replying affidavit and the Chair's reply was to say in paragraph 18 of his affidavit that the ASTI guidance issued after the events of March 2020 and does not accord with the Minister's announcement on the 19th March or the '*guidance, announcements or circulars issued by the Department of Education or the Minister'.* It is, of course, correct to say that the ASTI guidance, the opening of the online portal and the move in emphasis from the State Examinations Commission form to whether a student had completed the two year curriculum happened long after the events of March 2020 and therefore their relevance to any assessment of the plaintiff's behaviour in that period must be extremely limited. However, that is to miss the point. These matters are potentially helpful to the plaintiff in any consideration of the propriety of the plaintiff's conduct, at least after the Leaving Certificate had been cancelled, and were known by the Principal and not properly referred to or considered in the Report.

62. I am conscious that in giving these instances there is a risk that I have unduly parsed the Report – an exercise which I cautioned against. However, it seems to me that it was necessary to give examples which taken together illustrate how the overall approach and tone of the Report was not properly balanced and was unfairly prejudicial to the plaintiff. It would not be sufficient to simply refer to overall tone and approach without reference to some of the ingredients which make up that tone and approach. These individual examples are not given as instances any of which in their own right would lead to a conclusion that there is a fair issue that the Report is fundamentally flawed but, taken cumulatively, they do lead to that conclusion.

63. However, it is not sufficient for the plaintiff to simply establish a fair issue that there are flaws, or even serious flaws, in the Report but must establish that these flaws mean that the process has gone irremediably wrong. The plaintiff claims that the process is irremediably damaged by the flaws in the Report alone (and I return to this) but also by the Board of Management (or members of it) having considered the Report either at the meeting of the 27th May or before the meeting (both being before the plaintiff could respond to it).

64. A striking feature of the plaintiff's case in this regard is that she raises two mutually exclusive complaints. On the one hand she contends that the process has gone irremediably wrong because the Board considered the flawed Report; on the other hand she claims that the process has gone wrong because the Board did not give sufficient consideration to the Report and simply signed off on the letter presented by the Chair. I consider these in turn.

65. Before doing so, I should say that I am not at all convinced that the Circular or these passages preclude a Board from discussing a report at all in advance of hearing from the teacher. What is clear is that there must not be any active discussion of the substance or merits of the allegations. That is a basic principle of fairness because the teacher has not been heard at that stage. But that does not preclude all discussion of the report. The Circular itself expressly provides that *"[T]he board of management <u>will consider the matter</u> and will seek the views of the teacher in writing of the report prepared by the Principal."* [emphasis added]. In order for a board, which is a collective body, to *"consider the matter"* it must be entitled to discuss it. The precise meaning of this provision will have to be determined at trial. For example, an argument could possibly be made that this sentence must be understood as limiting the obligation to "*consider the matter*" to a point in time after "*the views of the teacher*" have been received. This interpretation was advanced by the school who submitted at paragraph 21 of their written submissions that to "*consider the matter*" involved considering the written and oral submissions made by the teacher, but it seems to me at this stage that this is an unlikely interpretation, particularly when the sentence is read in the context of the previous paragraph and the subsequent sentences. It seems clear that the obligation to "*consider the matter"* in the first sentence comes before receipt of the written or oral submissions made by the teacher. It is also important to note the requirement in the Circular that the notice of the disciplinary meeting must state "*the specific nature of the complaint".* That begs the question of how the Board could state the precise nature of the complaint without some consideration of the Report. It is also difficult to imagine how a board could function without some consideration being given to the Report. On a very basic, practical level, how could a board arrange a disciplinary meeting without some consideration of the report at least by some member(s) of the board. Would the meeting take 1, 2, 3 or 4 hours for example? If they have to book a meeting room, how long should it be booked for? Much more importantly, the allegations in a particular case may give rise to the need to consider placing a teacher on administrative leave. If the report may not be considered or discussed at all, how is the board to know that this need may arise. What of an extreme case where the alleged behaviour of a teacher is, if true, a danger to children? How can the board fulfil its functions of protecting the

children in its charge without considering the report? In a case where it is necessary to consider placing a teacher on administrative leave, how can the board make its decision without discussing the report? Of course, it will have the views of the teacher at that stage but they will be the teacher's views in relation to suspension rather than on the allegations themselves. Indeed, at an earlier stage, in a case where there may be two (or more) legitimate views as to whether it is necessary to decide whether to place the teacher on administrative leave how can the board reach a view as to whether it should even hold a hearing on the question of possible suspension without discussing the report?

66. The question of whether the Board of Management may consider the Report in advance of hearing from the teacher was discussed by Binchy J in *Joyce v Coláiste Iognáid* and by Butler J in *Lally*.

67. In *Joyce* the school Principal was the subject of the disciplinary process and therefore the Chair was the author of the Comprehensive Report. In paragraph 78 Binchy J held:

> "*There is no doubt that strict compliance with the procedures set out in Circular 60/2009 requires the chairperson to send his report to the principal at the same time that he sends it to the board. However, counsel for the defendant has submitted that it is necessary for the board to consider the report in the first instance in order to decide whether or not there is a prima facie case that merits proceeding any further with the matter. I do not think however that this is correct. There is no ambiguity about the procedure in this respect – it clearly envisages the chairperson delivering, simultaneously, his report to each of the board and the principal. As counsel for the defendant submitted in another context, these procedures were the subject of exhaustive negotiations and if it was intended that the board should be given the report in advance of the principal, then the procedures would have been worded accordingly. Even if a board determines that it does not wish to advance an investigation any further, after receiving a report from the principal, it seems to me that a principal would in any event be entitled to receive a copy and would most likely want to receive a copy of the chairperson's report in case there are any adverse inaccuracies that a principal would not wish to see left uncorrected or in any way on the principals' record.*"

68. In paragraphs 53 and 54 of *Lally* Butler J said:

> *"53. The disciplinary process at stage 4 is commenced by the preparation of a comprehensive report by the principal and the forwarding of that report to the Board of Management and the teacher concerned. Once the report is received by the Board of Management, its function is to seek the views of the teacher both in writing and by affording him or her an oral hearing at which he or she can present their case. There is no intermediate stage where the Board of Management considers whether the comprehensive report raises sufficient concerns to warrant the initiation of a disciplinary process. The process has already been initiated. There is no further requirement for the Board of Management to forward another copy of the report to the teacher. The report has already been provided to the teacher by the principal. Instead, the function of the Board of Management at this stage is to conduct the disciplinary process which has been initiated by the principal and, ultimately, to make its decision based on all of the evidence contained in both the report and in the teacher's submissions. Therefore, I think the school is operating under a fundamental misapprehension in assuming…. that there is no disciplinary process in being. This in turn leads to a significant misapprehension as to the significance of the step already taken by the principal and as to the consequences of that step, in terms of the plaintiff's entitlement to be advised of the precise nature of the matters alleged against her and to have access to all relevant material concerning those matters as set out in Circular 49/2018. As previously indicated, I do not propose to make any findings on the plaintiff's complaint that the school has acted in breach of the High Court order but I do note the school's misunderstanding as to when the process commences.*
>
> *54. Leaving aside for the moment the suggestion of prejudgment, in my view, the procedure adopted by the school in relation to the first comprehensive report was more reflective of Circular 49/2018 than that which is now proposed and, indeed, what is suggested in the more recent correspondence from the school's solicitor. The principal sent the plaintiff the first comprehensive report on 13th April, 2021. The Board met on 15th April and set a date for an oral hearing on 10th May. The chairperson then wrote to the plaintiff on 16th April advising that the principal had initiated a disciplinary process. She sought the plaintiff's views in writing on the comprehensive report and advised the plaintiff of the meeting scheduled for 10th May at which she was to be given an opportunity to make a formal presentation. This is what the procedure requires. Whilst it must always be open to a board of management to reject the*

allegations made in a comprehensive report either because they are not substantiated by the report itself or they are not sufficiently serious to warrant pursuing the process at stage 4, the teacher must still be allowed the opportunity to address the board of management in writing and orally before any decision is made. If it had been intended that the procedure before the Board of Management would comprise two stages, then no doubt those two stages would have been clearly set out in Circular 49/2018. Any such two-stage procedure immediately gives rise to issues such as those which have been addressed in more formal statutory contexts by the distribution of functions between preliminary investigation committees, fitness to practice committees and the boards or bodies with ultimate responsibility for the imposition of any sanction. This does not arise here because the procedure set out in Circular 49/2018 does not envisage that the Board of Management will actively consider the substance or merits of the allegations against a teacher, even on a threshold basis, before the teacher is afforded a right to be heard."

69. I do not believe that these judgments determined that there could be no consideration of the Report. What was being discussed in these passages is whether the Board has any role in the institution of the disciplinary process or in determining whether the report raises sufficient concerns to warrant the initiation or continuation of such a process, not whether a board may or may not have any discussion of the Report.

70. It seems to me, subject to full argument at trial, that what is precluded is a discussion or consideration of the substance or merits of the allegations, and not any discussion at all of the report.

71. One direct consequence of a board being entitled to consider a report in the limited terms set out above is that if the report is not fair and proper then it risks tainting the members of the board and any subsequent decision. Paragraph 75 from *Lally* (quoted above) is instructive in this regard. A consequence of the board being entitled to discuss the report even for the limited purposes set out above is to reinforce the obligation to ensure that the report is fair and balanced and does not, for example, contain findings or conclusions. If it is not fair and balanced, then the fact of it being discussed by the board will be directly relevant to the question of whether the process has gone irremediably wrong.

72. There is a clear conflict between the parties as to whether the Report was considered at the Board meeting of the 27th May 2021. I can obviously not resolve any such conflict at this stage. However, I am not satisfied that the plaintiff has established a fair issue that it was considered by the Board or members of the Board either at or before the meeting on the 27th May. Indeed, it was unclear whether the plaintiff was seriously pushing the point that the Report was considered at the meeting in circumstances where she says at paragraph 67 of her grounding affidavit that she has real concerns that not all members were even provided with the Report and where she also suggests that the Report could not have been considered at the meeting.

73. A central basis for the plaintiff's case that the Board considered the Report is that the letters of the 28th May 2021 (from the Chair) and of the 30th July 2021 (from the defendant's solicitors) make clear that the Report was considered. The point is also made that the letter of the 28th May 2021 is in very similar terms to the letter in the *Lally* case, that the Report in the *Lally* case was considered by the Board in that case, that the school in the *Lally* case was represented by the same solicitor's firm and therefore it is clear that the Board believed it could or must consider the Report and that it was only immediately after the delivery of the judgment in *Lally* that the Board in this case changed position and claimed that it had not considered the Report. She also claims that the letters of the 28th May and 30th July make it clear that the Report was considered. The letter of the 28th May states that the Board "*considered the matter*" and in the letter of the 30th July the defendant's solicitors said that the Principal's Report, and supporting documentation *"was deemed to be a comprehensive report on the facts of the case against [the plaintiff] as required by stage 4 of the Disciplinary Procedures…".*

74. In his replying affidavit (paragraphs 7-10) the Chair of the Board states that the Board agreed at the meeting of the 27th May 2021 that it should provide a copy of the Report to the plaintiff and invite her to make submissions on the Report and agreed the contents of the letter to be furnished to the plaintiff (the letter of the 28th May 2021). He goes on in paragraph 8 to say that "*Insofar as that letter* [the letter of the 28th May] *states that, at its meeting of 27 May, the Board "considered the matter", I confirm that all that actually occurred at the meeting was that the members of the Board were informed that the Comprehensive Report had been prepared and that the Board was now required to furnish a copy of same to* [the plaintiff] *and to invite her to make submissions on the report and to attend a meeting of the Board to make her presentation of the case. The members of the Board were not furnished with copies of the Comprehensive Report; the report was not opened at this meeting; its contents were not considered. It was made very clear to all present that the next step in the process*

was to invite the views of [the plaintiff] *in relation to the report. The contents of the letter to be furnished to* [the plaintiff] *dated 28 May 2021 were agreed by the Board. For the avoidance of doubt, I was the only member of the Board of Management (other than the principal) who received a copy of the Comprehensive Report. I have not provided any other member with a copy of the Comprehensive Report.*" He says at paragraph 10 of his affidavit that "*…at the meeting of the 27 May 2021, the Board of Management was simply informed of the fact that the Comprehensive Report had been prepared. The contents of the report and/or the allegations contained therein were not considered and the Board of Management certainly did not make any findings adverse to* [the plaintiff] *at that meeting.*"

75. The plaintiff joined issue with these averments and alleges at paragraphs 28-37 of her first replying affidavit that the meeting did not take place as described by the Chair. She also added that some discussion took place in advance of the meeting with some members of the Board. I return to this specific point below. In relation to the question of what occurred at the meeting the plaintiff says at paragraph 26 that "*I say and believe that* [the Chair's] *averments in relation to what occurred at the Board of Management meeting which took place on the 27th May 2021 are inaccurate. My means of knowledge in this regard is from information received from an attendee at the meeting and will, I say and believe, be demonstrated at trial.*"

76. In a further replying affidavit, the Chair explained at paragraph 7 how the matter was dealt with at the meeting and repeated his claim that the Report itself was not considered. He says that copies of his draft letter (which became the letter of the 28th May) were given to people who were physically in attendance and, because some members were attending remotely, the draft was read out. He confirms that the Report was not made available to the members and was not considered by them and no discussion took place in relation to the substance of the Report or the allegations contained in it.

77. In her third affidavit the plaintiff once again joined issued with the account of the meeting given by the Chair. She specifically emphasised that the minutes of the meeting had not yet been agreed and claimed that this shows that the meeting did not take place in the manner claimed by the Chair and that there are members of the Board who have a dispute in relation to what is alleged to have occurred at the meeting. The Chair replied to this in a further affidavit and explained that the issue that was holding up the approval of the minutes related to a separate complaint made by another member of

staff against the plaintiff. I return to this second complaint below because it is directly relevant to the allegations of bias.

78. I obviously can not resolve these acute conflicts of fact on an interlocutory application heard on affidavit. Nor am I required to. I must determine whether the plaintiff has established that there is a fair issue to be tried that the Report was considered at the meeting. I am not satisfied that she has discharged the burden of doing so. Firstly, I do not believe that the terms of the letter of the 28th May could establish a fair issue that the Report was considered by the meeting. It simply states that the Board "*considered the matter*." It does not say that they considered the Report and it must be read in the context of the Circular itself. The Board was required by the Circular to "*consider the matter*". In relation to the case that I should conclude that the Board did consider the Report from the close similarities between this letter and the letter in the *Lally* case, where the report in that case had been considered, I do not believe that I can safely draw the conclusion at this stage that it means that this Board also considered the Report. While the same solicitors firm was acting for the school as had acted for the school in the *Lally* case, the parties were different. In this case there is sworn evidence (which I return to below) that the Board did not consider the Report. The plaintiff herself strongly suggests (and indeed makes it part of her case) that the Report was not provided to some members. Nor do I believe that the reference to the Board "*deeming*" the Report to be a report under the Circular is sufficient evidence to conclude that the Board considered the Report at the meeting. Firstly, this argument is based on the plaintiff's belief that this statement means that the Board deemed it to be a comprehensive report at the meeting of the 27th May but this is not what the letter says. In fact, the context in which that reference is made is in response to the plaintiff's requests for clarification which, of course, came after the meeting. It is therefore unclear what the paragraph actually means and to conclude from this statement that there was a consideration of the Report at the meeting would be contrary to the sworn evidence. A different complexion may be put on this following examination and cross-examination but I must determine the matter on the basis of the evidence as it currently stands. Even if those letters are suggestive of the Board having considered the Report I must weigh in the mix the clear and unambiguous sworn evidence of the Chair that the Report was not provided to members and was not considered at the meeting. The plaintiff addresses the sworn evidence by deposing that an attendee at the meeting has told her that the Chair's account is not correct. The plaintiff has not identified who the attendee is and there is no evidence from that person. In those circumstances there is no proper evidence contradicting what the Chair has sworn to as to what occurred at the meeting

and, in those circumstances, I could not properly conclude that there is a fair issue that the Report was considered at the meeting.

79. As noted above it is also claimed that there were prior discussions in advance of the meeting, either of the Report itself or of the substance of the allegations. Obviously, if the matter, and in particular if the Report and its contents, were discussed by members of the Board in advance of the meeting that would be as damaging, if not more so, than the Report being considered at the meeting itself. This too is the subject of a stark conflict between the parties. At paragraph 7 of her second affidavit the plaintiff says that she believes that there were other discussions between the Principal and some members of the Board which have influenced the process to date to the point where it is not possible for her to receive a fair hearing. The plaintiff's allegation that there were prior discussions appears to also be based on what she was told by the attendee at the meeting who has not been identified. The allegation also goes further than simply that there was a prior discussion and the plaintiff also asserts a belief (partly on the basis of a planned earlier meeting on the 20th May to discuss "*a staff HR issue")* that the matters had been discussed and that there was a *"clear plan of action discussed and/or agreed for the Board of Management meeting on the 27th May 2021."* The plaintiff points to the fact that the Chair's evidence is that he received the Report at 2.30pm and drafted a letter, with assistance from solicitors, by the time of the Board meeting at 5.30pm and expresses the view that this is unbelievable. She suggests that it means that the Chair received the legal advice prior to the 27th May. The relevance of this, of course, is that if he obtained legal advice prior to that then the contents of the Report must have been discussed with him.

80. The Principal says in his second affidavit that he furnished his Report to the Chair at 14.30 on the 27th May and that, when providing it to him, he simply told him it was his Report, and that he did not discuss the Report with any other member of the Board of Management. The Chair says in paragraph 5 of his second affidavit that he was provided with a soft and hard copy of the Report on the 27th May, that he had not seen the Report or its contents in draft or final form until then, and that he did not discuss it with the Principal or any members of the Board. The Principal and the Chair both denied any discussion of the contents of the Report between themselves or with any member of the Board.

81. The plaintiff has not adduced any evidence of such prior discussions or that certain members of the Board came with a "*plan of action*" already made. It appears that the plaintiff has a source and evidence may be adduced at the trial but at this stage

there is no direct evidence before the Court. In those circumstances, the height of the plaintiff's case that the Report or its substance were discussed prior to the meeting is the speed with which the Chair claims to have considered the Report (which he must have done in order to prepare the letter), including consulting with the school's solicitor, and drafted the letter. She says that this lacks all credibility and that I must infer that he had received the Report, or at least had been informed of its contents, at an earlier time or date and that I should also therefore infer that he had discussed it with the Principal and other members of the Board. I have to say that a period of three hours is a very short one to have taken these steps but I do not believe that it so short as to lack credibility or even to be sufficiently lacking in credibility that I could conclude that a serious question has been established that he could not have done so or did not do so. Such a conclusion would be in the teeth of the only direct evidence that is yet available to the Court - the affidavits of the Principal and, more particularly, the Chair. However, even if I were to infer that the Chair had considered the contents of the Report prior to the afternoon of the 27th May, unless I can also conclude that he had discussed its contents with other members of the Board, then I could not conclude that the process is irremediably flawed because the Chair has already agreed not to participate in the process.

82. I am not satisfied that I could conclude, on the basis of the evidence to date, that the plaintiff has established a fair issue that members of the Board discussed the contents of the Report prior to the meeting. Thus, the plaintiff has not established a fair issue that the Board or members of it considered the Report at or before the meeting. Nor can I conclude on the state of the evidence that there is a fair issue that the members of the Board considered the contents at the meeting of the 27th May.

83. However, this is not sufficient to deal with the matter. Two other elements have to be considered. The first is the ongoing role of the Chair in the disciplinary process having regard to the fact that he considered the Report. In circumstances where I have concluded that there is a fair issue to be tried that the Report suffers from serious flaws it seems to me that there would be a fair issue that the consideration by him of the Report is an irremediable flaw if he was going to be involved in the process. However, the Chair has already indicated that he will not be involved and in my view that resolves that particular difficulty.

84. The second element is in fact the plaintiff's first point, i.e. that the flaws in the Report are such that she could not obtain a fair hearing and the process has already gone irremediably wrong (irrespective of whether it has been considered by the Board or some members of the Board). The question is whether, in the absence of consideration

of the Report by the members of the Board it can it be said that the process has gone irremediably wrong. If the members of the Board did not consider the Report then they will only be seeing its contents at the same time as seeing the teacher's response and the plaintiff will therefore be able to address any of the difficulties in the Report. This is a thread running throughout the defendant's position and at the level of principle there is considerable merit to it. There is no doubt that the fact that the Board would not be seeing the Principal's Report in isolation, without also seeing the Plaintiff's response, would mitigate to some extent the potential damage caused by the Report. That must be considered together with the mitigation effected by the use of different language in the latter parts of the Report, i.e. matters being framed as "allegations" and *"submissions"* and by referring to the need for facts to be "*substantiated*". However, in my view, to conclude for the purpose of determining an interlocutory application that this sufficiently reduces the risk of a fundamental unfairness brought about by the Report would be to entirely underestimate the effect of the flaws in the Report, and of importance of the Report and of the Principal in the work of the school and the Board. As discussed above a Principal is entrusted with the running of the school and one would expect a report by him or her to carry particular weight with the members of a board. I also agree with the views of Butler J in *Lally* that the manner in which allegations are put before the Board can be significant, can serve to set the bar which the teacher must meet in order to exonerate herself, and frames the disciplinary process. It seems to me that this applies even if the Report is not considered by the Board in advance of receipt of the teacher's response, although the flaws would have to be more significant in such instances.

85. The effect of much of the language in the Report would be to convey to the members of the Board that the Principal, who they entrust with running the school, has already found wrongdoing and, through the use of phrases such as "*false*" and "*wilfully misleading*", possibly serious wrongdoing on the part of the plaintiff. It is difficult to see how it could be said that they would be able to entirely set that aside. In those circumstances, I am satisfied that the plaintiff has established a fair issue to be tried taking into account the need to establish at trial that the process has gone irremediably wrong on the basis of the Principal's Report even though the Board has not considered the contents of the Report. It may be the case that the process would be repaired by the withdrawal of the Report in light of my conclusion that a fair issue has not been established that the Report was considered by the Board or members of it but that possibility was not canvassed other than by way of a passing comment and I must determine the application on the basis of the current process.

86. The plaintiff also claims that the Principal, Chair and the Board are biased. As noted above, to a certain extent this claim is intertwined with the complaints about the Report and its alleged consideration by the members of the Board. The claim against the Principal is one of actual bias; the claims against the Chair and the Board are a mixture of actual and objective bias. I deal with these in turn.

87. In relation to the Principal, the plaintiff pleads at paragraph 37 of the Statement of Claim that "*Fundamentally, it is the position of the Plaintiff that the allegations against her have been levelled in bad faith by the Principal of the Defendant in circumstances where he is biased against the Plaintiff and where he is seeking to pursue a campaign to secure the removal of the Plaintiff from employment with the Defendant school.*" The essence of the claim of bad faith and bias is pleaded at paragraphs 46 and 47 of the Statement of Claim and boils down to a claim that the Principal is determined to get rid of the plaintiff from the school, that he had hoped that a previous complaint against the plaintiff from another member of staff would lead to the plaintiff's removal and that it was only when it was clear that this previous complaint was going nowhere that the Principal moved to try to have her removed on the basis of the matters contained in the Report relating to the Leaving Certificate. She points to the fact that the Principal's Report came "*out of the blue"* and came on the same day as a letter from the School's solicitor in relation to that other complaint. The plaintiff also relies on "*the manner in which the Principal's Report has been prepared"* as evidence of his bias.

88. It is necessary to refer briefly to the other complaint which is relied on by the plaintiff in connection with the claim of bias on the part of the Principal. The plaintiff made a complaint against another member of staff in the school in her capacity as a parent and she believes that it was not investigated appropriately. She was informed by the Principal on the 29th January 2020 that an allegation of bullying had been made by that other member of staff against the plaintiff. On the 4th July 2020 the Principal wrote to inform her that he had decided to commence a formal investigation into this allegation of bullying. The plaintiff claims that nothing further occurred until the Principal told her on the 23rd October 2020 that the investigation was proceeding and a barrister had been appointed to carry it out. Around the same time there was correspondence from the Principal about the Leaving Certificate issues also and in an email of the 14th October he stated that the plaintiff's communications about the examination level of the two students "*disregarded lawful and reasonable directions from your employer"* and that he was reserving any rights under the Circular. In January 2021, the barrister who had been appointed to investigate the bullying complaint had to step down and the plaintiff was informed by another barrister that they were taking over the investigation. Solicitors

on behalf of the plaintiff raised a number of issues in relation to the matter by letters of the 28th January and, 9th February 2021. By letter of the 15th April 2021 the school's then solicitors replied and in the course of doing so, stated "*In relation to the issue regarding the Leaving Certificate 2020 Calculated Grades Process, the School will be commencing a separate independent investigation."* There was a further exchange of correspondence about the bullying complaint and the new solicitors on behalf of the school wrote on the 27th May 2021 saying that they had "*taken over acting on behalf of the Board of Management of the High School in this matter. We're taking our client's instructions in relation to your letter of 14 May and will revert*." It will, of course, be noted that this letter was sent on the same day as the delivery by the Principal of his Report, the subject of these proceedings. The same solicitors have acted for the school in relation to the disciplinary process instigated by the Principal's Report and in these proceedings. It seems that nothing further has occurred in relation to the bullying complaint.

89. In essence, the plaintiff claims that the Principal decided to allow the bullying complaint to peter out when he realised it was going nowhere and to switch his focus against her towards preparing the Report and that she is concerned that he is motivated by "*some type of animus towards her*".

90. I do not believe that I can conclude purely on the basis that the Principal was investigating the other complaint and that it has not gone anywhere that the Principal is biased, motivated by animus or bad faith, or is intent on securing the removal of the plaintiff. If a complaint is made the Principal is obliged to deal with it and, even if it does not progress and another potential disciplinary matter arises, it can not be said that the need to deal with the other disciplinary matter is somehow wrongful.

91. Nor can it actually be said that the Principal's Report came entirely *"out of the blue*". On the plaintiff's evidence (paragraph 15 of her grounding affidavit and the correspondence referred to earlier), the Principal told her in June 2020 and October 2020 that he reserved his right to bring disciplinary proceedings against her. It is correct to say that a relatively long period passed from October 2020 to May 2021 (I consider this further under the complaint of delay) but the possibility that disciplinary proceedings would be instituted had been raised with the plaintiff. It would be much better practice to be clearer with a teacher and perhaps to inform them that a Report is being prepared but I do not believe that the omission to do so is, in itself, a breach of fair procedures or of the Circular or is evidence of bias.

92. However, as against that, there is a feature which must be considered. The furthest the Principal went in June and October 2020 was to say that he reserved the rights under the Circular. He did not tell the plaintiff that he was preparing a Report or even that he was investigating the matters. Indeed, there is no evidence that he was preparing his Report at that stage or at any stage prior to April 2021. This is noteworthy in the context of the plaintiff's criticism of the delay and the allegation of bias. The Principal's response to this criticism is to say that that he does not accept that he has been guilty of delay and that the Report addresses matters that occurred as late as October 2020 (and not just March to June 2020); and that he wanted to ensure that the Report was as comprehensive as possible. What he does not say is when he prepared or started preparing the Report. By letter dated the 14th June 2021 the solicitors for the plaintiff asked when the Principal completed his report and why he did not progress his alleged concerns as disciplinary issues in 2020 but no reply has yet been given to these queries. The solicitors for the school stated in their letter of the 15th April 2021 that "*In relation to the issue regarding the Leaving Certificate 2020 Calculated Grades Process, the School will be commencing a separate independent investigation."* This very clearly suggests that the investigation and preparation of the Report had not commenced before the 15th April 2021. If that is correct then it does add weight to the contention that the current issue only really became live at a time when nothing was happening in relation to the bullying complaint and could therefore add weight to the claim that the Principal only moved on the Leaving Certificate 2020 issues when the other complaint appeared to be going nowhere.

93. There is no doubt that the contents of a Report or '*the manner in which it was prepared*' could in certain circumstances amount to evidence of bias, particularly, though not exclusively, in the sense of prejudgment. But it cannot be said that the mere fact that a Report is flawed or even unfair in its terms or its preparation means that its author is biased. I think there would have to be something more – either an exceptional unfairness in the Report or some other circumstances to conclude that the Report itself is evidence of bias. While I have concluded that there is a fair issue that this report is flawed, I do not believe that those flaws are sufficient to conclude actual bias on the part of the Principal. The coincidence of dates in respect of the commencement of the preparation of the Comprehensive Report and the "*petering out*" of the bullying complaint investigation could be a basis for a conclusion that the Principal was biased. However, it seems to me that in circumstances where the claim is one of animus, bad faith and actual bias particular acre must be taken in assessing whether a fair issue has been established and, where there is some basis for a concern of bias on the basis of the

evidence to date, I do not believe it is sufficient to justify a conclusion the burden of proof has been discharged.

94. In any event, crucially, any decision as to whether the plaintiff is guilty of misconduct and as to the appropriate sanction is a matter for the Board and not the Principal. Of course, if the Principal was to take any further part in the process his bias would taint the process. However, the Principal has already indicated that he will not take part in the process. Thus, it seems to me that even if I were to conclude that the plaintiff had established a fair issue to be tried that the Principal is biased same does not, in itself, mean that the process has gone irremediably wrong (save to the extent that it may have fed into the Report but I have dealt with the Report earlier in this judgment).

95. There are two broad limbs to the claim of bias against the Chair. The first is that he was actively involved in the underlying events the subject of the Principal's Report and the complaints against the plaintiff and has almost certainly discussed the matters alleged therein with, inter alia, the principal, well in advance of the preparation of the Principal's Report and as a result the plaintiff has a reasonable apprehension of bias in relation to the Chair. The second is that he has a close friendly relationship with the Principal's brother. These claims are a mixture of actual bias and objective bias though they are expressed as objective bias. The plaintiff alleges that there is a reasonable apprehension of bias in respect of the Chair's prior involvement and his friendship with the Principal's brother and that the Chair is guilty of actual bias (in the sense of prejudgment) because he has discussed the matter with the Principal. At first glance, this also appears to be a complaint of objective bias but, as discussed below, the plaintiff goes much further in her affidavit.

96. Irvine J in *Nasheuer v National University of Ireland Galway [2018] IECA* 79 considered the test for objective bias and said:

> *"46. The test for objective bias has been discussed at some length in a significant number of cases over the last decade. These include Bula Limited v Tara Mines Limited (No. 6) [2000] 4 IR 412, O'Callaghan and Ors v McMahon and Ors (No. 2) [2007] IESC 17 and [2008] 2 IR 514, Goode Concrete v CRH plc & Ors [2015] IESC 70 and The Commissioner of An Garda Síochána and Ors v Penfield Enterprises and Ors [2016] IECA 141.*
>
> *47. While the parties to this appeal are not in dispute as to the test to be applied by a court when considering a claim of objective bias it is not harm to*

reflect upon that test which was summarised in the following fashion by Denham CJ in Goode Concrete v CRH plc & Ors at p.54 of her judgment. This is what she said:-

> *"The test to be applied when considering the issue of perceived bias is objective. It is whether a reasonable person, in all the circumstances of the case, would have a reasonable apprehension that there would not be a fair trial from an impartial judge. It is an objective test, it does not invoke the apprehension of a judge, or any party; it invokes the reasonable apprehension of a reasonable person, who is possessed of all of the relevant facts."*

48. What is clear from the test thus formulated is that each case will necessarily turn on its own particular facts and in respect of each case, the reasonable person, by whose standard the apprehension of bias is to be tested, is to be taken to be in possession of all of the relevant facts.

49. In O'Callaghan & Ors v McMahon & Ors (No. 2) at para.80 of his judgment Fennelly J helpfully identified the principles which he considered relevant to the court's consideration of a claim of objective bias. This is what he said:-

> *"80. The principles to be applied to the determination of this appeal are thus, well established:*
>
> *(a) objective bias is established, if a reasonable and fair-minded objective observer, who is not unduly sensitive but who is in possession of all the relevant facts, reasonably apprehends that there is a risk that the decision-maker will not be fair and impartial;*
> *(b) the apprehensions of the actual affected party are not relevant;*
> *(c) objective bias may not be inferred from legal or other errors made within the decision-making process; it is necessary to show the existence of something external to that process;*
> *(d) objective bias may be established by showing that the decision-maker has made statements which, if applied to the case at issue, would effectively decide it or show prejudice, hostility or dislike towards one party or his witnesses."*

97. For the purpose of the analysis of the first ground of complaint of bias, the Chair's involvement in events must be divided between the events prior to the delivery of the Principal's Report and those after that.

98. At paragraph 61 or her grounding affidavit the plaintiff states *"…it is difficult to see how the Chairman could even purport to involve himself as an independent decision maker in relation to these matters given his substantial prior involvement which it seems extremely likely to have led to him already forming a view in relation to how these matters should be judged.*" It will be noted that this appears to be a claim of objective bias (possibly concluding with a claim of actual bias in the form of prejudgment). However, elsewhere the plaintiff's claim in respect of the Chair's prior involvement was stated very clearly in terms of actual bias. The plaintiff claims that emails by which the Chair forwarded correspondence which he received from parents and staff to the Principal indicated that "*throughout this process the chairman and the principal were working hand and glove in relation to the matter*" (paragraph 59 of her grounding affidavit). In paragraph 57 she says "*It seems reasonable to suspect…that* [the Chair] *and* [the Principal] *had discussions about all of these underlying matters as they were occurring. In those circumstances I believe it is extremely unlikely that the Principal would have devoted so much time belatedly to the preparation of the Principal's Report which was delivered to the Board of Management on the 27th May had he not discussed same with the chairman and had a real understanding as to how the matter would be received by the Chairman.*" She amplifies this allegation in paragraph 28 of her grounding affidavit where she says that "… *Given that the report appeared to have only been finalised on 27 May and yet the Chairman of the Board of Management was in the position to issue such a comprehensive letter the very next day it appeared to me likely that there was significant behind-the-scenes collusion between the two. My reasonable concerns in that regard have only been amplified by what has subsequently emerged based on a detailed analysis of the Principal's Report and the nature of the correspondence since written on behalf of the Defendant by their solicitors."*

99. I have therefore considered the claim as both actual and objective bias.

100. In the preceding paragraphs of her affidavit the plaintiff gave examples of the Chair's prior involvement. These include email exchanges between the Chair and the plaintiff. These were instigated by the plaintiff seeking to raise the issue of the appropriate examination levels with the Chair and in which the Chair said "*thank you* [the Plaintiff] *I don't believe this is a matter for Board attention."* The plaintiff also refers to other emails from other parents and teachers to the Chair and responses from the

Chair. The Chair had forwarded the emails which he had received to the Principal. In relation to one email from the plaintiff (27th March) he had forwarded it under a covering email saying "*Hi* [Principal] *below fyi. Let's discuss.* [Chair]*".* The plaintiff says that it is likely that the Chair and the Principal had discussions about the underlying matters as they were occurring.

101. However, the Chair says in his first replying affidavit in response to the allegation that he was "*involved in the underlying events*" that *"This not the case. It is the role of the school principal and his senior management team to manage the day to day operation of the School. Where an issue or complaint is made directly to me, I will always refer the matter back to the principal in the first instance. If the matter is considered to be a matter for the Board of Management, the matter will be tabled accordingly, discussed and decided upon by the Board of Management…In my capacity as Chairperson of the Board of Management, I generally meet the Principal every second Friday at 10am for thirty to sixty minutes. The purpose of these meetings is to discuss staffing, student issues and any other issues which may be relevant to the Board of Management…While I was aware from discussions with the Principal that* [the plaintiff] *was unhappy with the manner in which the School had dealt with her request to change her son from ordinary level Irish to higher level Irish, I was unaware of the nature of the allegations now made in the Comprehensive Report. While I did express a desire to speak to the teacher of* [the two students] *…I confirm that I never spoke to* [her] *in relation to these matters."*

102. I think on the basis of the Chair's own mail forwarding the plaintiff's email of the 27th March to the Principal, in which he said *"Let's discuss"* and his own evidence that he was aware *"from discussions with the Principal that* [the plaintiff] *was unhappy with the manner in which the school had dealt with her request to change her son from ordinary level Irish to higher level Irish*", I must conclude that there is a fair issue to be tried that the Chair discussed the underlying issues with the Principal. I would, in fact, be surprised if he had not had some discussions where he was being contacted by the plaintiff, and staff members.

103. However, in my view there is no basis upon which I could conclude from such contemporaneous discussions that the Chair had prejudged matters against the plaintiff or was guilty of actual bias.

104. The position is different in relation to the complaint of objective bias. I do not believe that it could be said that a reasonable person would apprehend that there is a risk that the Chair would not be fair and impartial purely on the basis of the Chair had

contemporaneous discussions about the underlying matters in the manner described. The logic of that position is that if the Chair of the body which is statutorily responsible for governing the school receives communications about an issue concerning the school and passes them on to the Principal who is responsible for the day-to day running of the school then they could never subsequently participate in any disciplinary process arising from that issue. In my view, as a general principle, that is untenable. However, when assessing whether there is a reasonable apprehension of a lack of impartiality the Court must have regard to all of the circumstances.

105. The plaintiff also alleges bias on the basis that the Principal's brother is a friend of the Chair and is godfather to one of the Chair's children. The Chair states in paragraph 16 of his replying affidavit that he and the Principal's brother attended the school together in the 1980s and saw each other sporadically after they finished school. The Principal's brother is godfather to one of the Chair's daughters but he and the Principal's brother lost touch after a period after they left school and that he believes that the Principal's brother has not seen his goddaughter since she was four years of age. He also says that he met the Principal's brother in October 2017, in December 2019 and in January 2020 at various events. In paragraph 41 of her replying affidavit the plaintiff, even in the face of the explanation, says "*from my perspective he and* [the Principal] *have a family connection that is significant. Furthermore,* [the Chair] *and* [the Principal] *meet on a fortnightly basis to discuss matters concerning the school and are very clearly in regular communications about matters which I will never be aware of but from my perspective this illustrates a close work and family bond which causes me real concern about my ability to obtain a fair hearing in this matter*".

106. If there was a close relationship between the Chair and the Principal's brother this, taken together with the prior discussion (even of the limited nature described) could possibly give rise to a reasonable apprehension that the Chair would not be fair and impartial.

107. However, the Chair has given clear evidence as to the nature and extent of the relationship between him and the Principal's brother and it is clear from that evidence that the relationship is not particularly close.

108. The plaintiff also alleges bias on the basis of the Chair having had discussions with one of the relevant class teachers who is likely to be a relevant witness in the disciplinary process. However, the Chair says at paragraph 133 of his first replying

affidavit that "*While I did express a desire to speak to the teacher of* [the two students]*, I confirm that I never spoke to* [the teacher] *in relation to these matters".*

109. In those circumstances, I am not satisfied that there is a fair issue in respective of objective bias.

110. I should also say that even if the plaintiff and the Principal's brother had remained on closer terms and in more regular contact than appears to be the case, a complaint of bias on that basis alone would have to be approached with caution. What is suggested is that a reasonable person would be concerned that the Chair would not be able to exercise independent decision-making about a matter raised by the Principal purely because of a friendship with the Principal's brother. In a small country like Ireland there will often be family or friendly links between parties and in most cases, including this one, something more will be required than the mere existence of that link. It must also be borne in mind that because service on a board of management is voluntary very many members of boards will have attended the relevant school and are very likely to have familial links and social links with members of the school community including pupils, past-pupils and staff. In my view, something more than such a link would be required to properly ground a claim of bias.

111. Crucially, even if I had been satisfied that there was a basis for the complaint of bias against the Chair, central to the question of whether this irremediably damaged the process is that the Chair has already agreed not to participate in the process. That would not be sufficient if, for example, I had concluded that there was a fair issue that he had discussed matters with members of the Board but in circumstances where I have not so concluded, it seems to me that the Chair's non-participation would cure any issue arising in the process if I had held against him on the question of bias.

112. The plaintiff also alleges objective bias on the part of the Board itself. She does so on the basis that they were willing to sign off on the draft letter (which became the letter of the 28th May 2020) without considering the Report at the meeting of the 27th May 2020. This, of course, is at odds with the complaint that the Board (or members of it) did in fact consider the Report. I do not accept that signing-off on the letter could be a basis of a finding of objective bias, particularly where one of the plaintiff's main points (in reliance on *Lally*) is that a Board is not entitled to consider a Report in any detail. The Board's function is to notify the teacher of the meeting and of the specific details of the allegations and it does not seem to me that authorising a letter which does that and is drafted by a member who has considered the Report can amount to bias.

Requests for Information, Jurisdiction, Stage 4 excessive, Delay.

113. The plaintiff also raised four other points which are stand alone points and do not feed into the other points or each other in the same way. In light of the fact that I have already decided that the plaintiff has established a fair issue to be tried – and particular emphasis was not placed on these remaining points – it is not necessary for me to decide these issues other than to for the purpose of considering the precise terms of the relief. I therefore consider them briefly.

114. The first of these is that the plaintiff's solicitors raised a number of queries and requests for information and clarifications and the defendant has not responded adequately. These matters were raised in a letter from the plaintiff's solicitor of the 14th June on foot of the contents of the Board's letter of the 28th May and the Principal's Report. The letter of the 14th June contained approximately twenty-four requests and appended a further approximately eighty-five (depending on how they are read). Given that it is not necessary to fully determine this point that the requests were not considered individually at the hearing, I do not propose to go through these requests individually. It does seem to me that some of these constitute reasonable and appropriate requests which would have to be attended to prior to any hearing but there are others which strike me as somewhat artificial. For example, the letter states "*The Principal's report makes numerous and varied allegations against our client. Your letter dated 28 May provides "a summary of the allegations" at page 1 to 3. Our client does not require a "summary" of the allegations. Our client requires a comprehensive list of the allegations"* and goes on to say *"Please confirm that the list that you refer to as a "summary" is actually a comprehensive list of the allegations against our client.*" The allegations are to be found in the Principal's Report. Thus, it seems to me at this stage (without hearing substantive argument on the point) to be somewhat artificial to ask for confirmation as to what the full extent of the allegations are.

115. More importantly, even if there are matters which should be provided, I am not satisfied that the failure to provide them up to now means that the process is irremediably flawed. To the extent that they are necessary in advance of the hearing the school still has an opportunity to provide answers. Indeed, even if material or information is not provided in advance of the hearing and it transpires to be necessary the Board can adjourn any hearing in order to ensure that the plaintiff has the relevant material information.

116. The second point is essentially that the Board of Management has no 'jurisdiction' to discipline the plaintiff in respect of the matters in the Principal's Report because they are actually matters between the plaintiff and the Department of Education.

117. It is pleaded in paragraph 7 of the Statement of Claim that "*Circular 0037/2020 specifically provided that work done by teachers and schools in relation to the calculated grades process is work undertaken on behalf of the Minister for Education and Skills and for the DES."* This is a reference to paragraph 2.4 of the Circular which provides that "*teachers, schools and centres for education will carry out the duties described in Calculated Grades for Leaving Cert; Guide for Schools on Providing Estimated Percentage Marks and Class Ranking Order (May 2020) on behalf of the Minister. This means that all of the tasks being undertaken by teachers, principals and schools are being done on behalf of the Minister and further to the exercise by him of his executive powers in establishing and operating the calculated grades model.*"

118. The plaintiff submits that as the work that she was doing in respect of the Leaving Certificate was being done on behalf of the Minister she can not be disciplined by the school. I am not convinced that there is a fair issue in respect of this in circumstances where at least some of the allegations made against the plaintiff amount to allegations that she did not comply with instructions issued to her by her employer, the school, and that she, in her capacity as a teacher of the school, misled certain individuals and State bodies. Furthermore, it is alleged that the plaintiff used her position in the school to gain an unfair advantage for her son. I am not satisfied that they are not matters for the school. Of course, I am not expressing any views as to whether or not there is any merit to these allegations but it seems to me that even if the work in respect of the predicted grades and the Leaving Certificate was being done on behalf of the Minister the plaintiff can still be guilty of misconduct as a teacher in the school. Perhaps more importantly in the context of the particular test to be applied is that the plaintiff can make the point to the Board that it is not open to that body to discipline her even if they are satisfied that the facts are made out and give rise to a finding that the plaintiff's conduct was inappropriate.

119. The third point is that the matters alleged against her do not warrant convening a Stage 4 disciplinary process against her. Essentially the plaintiff's case is that even if she is guilty of misconduct it could not be sufficiently serious to warrant instigating the process at the most serious level which could lead directly to the plaintiff's dismissal.

120. I accept as a matter of general principle that a decision in a given case to initiate the process at Stage 4 could be so disproportionate that the Court could intervene to stop it. However, in the first instance, it is a matter for the Principal to decide whether or not to instigate disciplinary proceedings at Stage 4 and the Court could only intervene if such decision were so disproportionate as to render the process irreparably damaged by the process even being commenced at that stage. I have to consider whether there is a fair issue that the decision is so disproportionate. I am not satisfied that there is.

121. The allegations include, for example, that the plaintiff made false claims or gave false information and wilfully misled members of the school community and the State Examinations Commission and the Department of Education. It could not be said that commencement at Stage 4 in respect of such allegations is so disproportionate that the Board could not even be permitted to enter into a consideration of them. Of course, the Board could decide that the alleged misconduct did not warrant Stage 4 or that misconduct is not established or that any misconduct which may be found is minor in nature. They are all matters for the Board but it could not be said that the commencement of the process at Stage 4 is entirely disproportionate.

122. The final point is that the Principal has been guilty of such delay in relation to the preparation of the Principal's Report that it is wholly prejudicial and disproportionate to subject her to the risk of dismissal at this juncture. Of course, it must be noted that dismissal is not the only possible sanction under Stage 4 but it is one of the available sanctions.

123. The Court has to have regard to the fact that the main events giving rise to the instigation of the process occurred in the March-June 2020 period. However, there were also some events in September and October 2020. Thus the delay was a period of between 14 and 7 months. I am completely satisfied that this period is too long, particularly where the plaintiff was not told that such a Report was being prepared. I do not accept that the claim that the Report is "*comprehensive*" is sufficient to explain or justify the delay. While there is a lot in the Report, fundamentally it consists of school records and emails (though there remains the query discussed above as to whether the Principal interviewed members of staff for the purpose of preparing the Report). However, this delay does not automatically mean that the process has been irremediably damaged. The plaintiff has not claimed or given evidence of any particular prejudice caused by the delay and it seems to me that some prejudice would be required before it could be said that delay had irremediably damages the process. The Circular does not prescribe any particular period. Of course, the Circular must be applied in a manner

which is consistent with fair procedures even where there is not an explicit provision. Finally, as noted, a significant portion of the evidence contained in the Principal's Report appears to be the contents of various emails, letters and texts. It may well be that some witnesses may have to give evidence but in circumstances where much of the evidence is likely to be documentary in nature and where no particular prejudice is claimed it seems to me that the passage of time has not given rise to an irremediable risk of harm.

BALANCE OF CONVENIENCE

124. In circumstances where I have decided that the plaintiff has established that the there is a fair to be tried, I must consider where the balance of convenience or balance of justice lies. This was not the focus of the dispute between the parties. In any event I am satisfied that the balance of convenience/justice favours the grant of interlocutory relief provided appropriate directions are made to ensure that the matter will be ready for trial as soon as practicable.

125. As noted above, since *Merck Sharp & Dohme*, the adequacy of damages is now to be considered as part of the overall assessment of where the balance of justice lies or as part of the assessment of how matters should best be arranged pending trial. While the plaintiff could, if refused an interlocutory injunction but is successful at trial, be compensated for her direct loss by way of an award of damages, regard must be had to the very serious reputational damage that she would suffer if she were dismissed (see *Joyce v Coláiste Iognáid*). As regards the other aspects of the balance of convenience, regard must be had to the understandable desirability from the school's point of view of proceeding with the disciplinary process and bringing it to a conclusion as soon as possible. However, weighed against that must be the fact that the plaintiff continued to work in the school throughout the period from the events the subject of the Principal's Report to delivery of the Report, and perhaps, more importantly, after the delivery of the Report. The school obviously saw no need for the plaintiff to be suspended while the disciplinary process was going on and it must be presumed that the school is of the view that there is no risk to the students in the school or their education or any immediate risk to the smooth running of the school. Indeed, that would seem to follow from the nature of the alleged misconduct. It is also noteworthy that the issues are historic and do not appear to be of an ongoing nature. Thus, balancing the understandable desire on the part of the school to progress the disciplinary proceedings and the fact that direct financial loss arising from a dismissal could be compensated by an award of damages with the very significant reputational damage that would be suffered by the plaintiff, the

fact that the alleged conduct is not ongoing, and that there is no risk to students or their education or to the smooth running of the school, the balance of justice clearly favours the grant of interlocutory relief.

RELIEF

126. In light of my findings, it seems to me that the appropriate relief is an amended version of relief number 2 in the Notice of Motion. That seeks '*an interlocutory injunction restraining the defendant, its servants of agents from commencing and/or continuing with any Disciplinary process based on the Report attached to the Defendant's letter of 28 May 2021*'. In circumstances, where the disciplinary process under Stage 4 of the Circular is commenced by the delivery of the Principal's Report the process has already been commenced. In those circumstances I will grant an interlocutory injunction restraining the Defendant, its servants or agents, from continuing with any disciplinary process based on the Report attached to the Defendant's letter of 28 May 2021 pending determination of the proceedings.

127. Relief 3 is redundant given that it refers to a disciplinary hearing for the 3rd and 4th November 2021.

128. It seems to me that relief 4 is not necessary at this stage as the imposition of a disciplinary sanction could only occur on foot of the conclusion of a disciplinary process and that process has been restrained pending determination of the proceedings. Furthermore, there is no indication that the defendant is planning to impose any disciplinary sanction on foot of the Principal's Report outside of that process. There is therefore no current need for an Order in these terms. I will give liberty to apply.

129. There are a number of limbs to relief 5. Firstly, it seeks an injunction restraining the commencement of a disciplinary process. That process has already commenced and there is no evidence of an intention to commence any other process and my comments in respect of relief 1 apply. Secondly, it seeks an injunction on any disciplinary process involving any decisions made by or to be made with the participation of the current Chair of the Defendant. This is also caught by relief 2 but is also caught by the Chair's indication that he will not participate in the process. The third limb of this relief is an order restraining any disciplinary process involving any decisions made, or to be made, by any members of the Defendant's Board who participated in the decision of 27th May 2021 or based on "*any Report prepared by the Principal*". Insofar as this relates to the Principal's Report the subject of this judgment there is no need for this Order because it

is caught by relief 2. However, the relief seems be broader and seems to seek to restrain any process involving members of the Board who were at the meeting of the 27th May based on any Report based by the Principal. In my view, this is far too open-ended. There is no evidence of any other Report and if such a Report were to emerge it would have to be considered before an Order could be made. The basis for this limb of the relief seems to be the allegation of bias on the part of the Board arising from their alleged consideration of the Principal's Report or their alleged inadequate consideration. I have found that there a serious question has not been established in respect of these matters and therefore I can not make an Order in these terms.

130. In relation to relief 6, in circumstances where I have held that a fair issue was not established in respect of the defendant's entitlement to discipline the plaintiff in respect of the matters contained in the Principal's Report there is no basis for an Order in terms of this relief.

131. For the reasons set out in respect of relief 4, I do not believe that an Order in terms of paragraph 7 is necessary but I will give the plaintiff liberty to apply.

132. There is currently an Order in place under section 27 of the Civil Law (Miscellaneous Provisions) Act 2008 restraining publication of any matter which would or would be likely to identify the plaintiff's son as suffering from a medical condition. I propose to continue that Order. In light of this and in light of the fact that judgment must be administered in public (part of which must include the publication of judgments) I have endeavoured to prepare this judgment in a way which will not identify the parties or the plaintiff's son as suffering from a medical condition. I will hear the parties as to these matters before the judgment is published to anyone other than the parties.

133. It is now necessary to ensure that these proceedings are prepared for trial and determined as expeditiously as possible. I therefore propose to make directions to set a timeline for the taking of next steps in the proceedings with a view to achieving this. In the first instance I would suggest that the parties discuss such a timeline and I will hear them as to any appropriate directions.