THE HIGH COURT

[2024] IEHC 207
[Record No.] 2023 3330 P

ENOCH BURKE

Plaintiff

-v-

SEÁN Ó LONGÁIN, KIERAN CHRISTIE & JACK CLEARY

Defendant

Judgment of Mr. Justice Dignam delivered on the 15th day of February 2024.

Introduction

1. This is my judgment in respect of the plaintiff's application for an injunction restraining the defendants from holding a Disciplinary Appeal Panel hearing of his appeal against a decision of his employer to dismiss him.

2. The injunction is sought on the basis of alleged apparent, perceived or objective (these terms being used interchangeably in the authorities) bias of one of the members of the Disciplinary Appeal Panel ("the Appeal Panel"). The tone, tenor and some of the substance of the submissions made by Mr. Burke are more like allegations of actual bias against this member but the case that was stated as being made was that of objective bias and I have determined the application on that basis.

3. This is one of several written judgments arising from the same underlying dispute between the plaintiff and his employer, one of which I delivered on 17th January 2023. Very many of the background facts are set out in detail in those judgments and it is therefore not necessary for me to set out the background facts at any length. I will have to refer to some factual matters in detail during the course of this judgment.

4. I will refer to the plaintiff as Mr. Burke and the individual defendants by their respective surnames.

Background

5. Mr. Burke was dismissed from his employment at Wilsons Hospital School *("the school"),* by a decision of the school's board of management following a meeting on the 19th January 2023. He has appealed against that dismissal. In summary, the background to his dismissal is as follows.

6. On the 9th May 2022, staff at the school, including Mr. Burke, received an e-mail from the principal of the school, informing them that a third-year student would be making a social transition in their gender identity from the next day and stating that from then on the student would become known by a different name and that *"they"* should be used in place of the pronoun that had been used up to that point.

7. Mr. Burke immediately objected to the principal's instruction and there was an exchange of emails the following day in which Mr. Burke made his objection clear. These emails are quoted in my earlier judgment of the 17th January 2023 *(Board of Management of Wilson's Hospital School v Burke [2023] IEHC 22).*

8. Later that day, there was a scheduled staff meeting and Mr. Burke raised the matter at the meeting. The school is of the view that Mr. Burke acted wholly inappropriately in the timing and manner in which he raised the matter. Mr. Burke is of the view that he acted appropriately. This divergence of views was noted by Birmingham P in his judgment in the Court of Appeal in *Board of Management of Wilsons Hospital School v Burke [2023] IECA 52* at paragraph 7. These matters are a part of the underlying disciplinary process which includes the appeal the subject of these proceedings and are not matters to be resolved on this application.

9. There was a meeting on the 19th May between Mr. Burke, the principal and

the deputy principal to discuss the issue.

10. On the 27th May, the principal emailed Mr. Burke. The full text of the letter is set out in earlier judgments. It concluded by recognising that while it may be challenging for him in light of his religious beliefs, the principal expected that Mr. Burke would communicate with the student in accordance with the wishes of the student and the student's parents.

11. Mr. Burke replied on the 27th May stating, inter alia, that he had previously made his position clear at the meetings of the 10th and 19th May.

12. On the 21st June, a service was held in the school chapel followed by a dinner in the school dining hall. These are also the subject of the underlying disciplinary process and were a core part of the decision to dismiss Mr. Burke. Again, there is a dispute between the parties about what happened. I do not need to make any findings about precisely what happened at the service or immediately thereafter for the purpose of this application. It will be noted that Owens J in his judgment in *Board of Management of Wilsons Hospital School v Burke [2023] IEHC* 288 did make findings in respect of these events. What does not appear to be in dispute is that the service was attended by some past students, staff, board members, parents, clergy and some sixth-year students. Towards the end of the service Mr. Burke stood up and spoke, setting out that he would not accept what he called "*transgenderism*" and putting it to the principal to withdraw her instruction of the 9th May. The service was followed by a dinner in the dining hall and at a point during or immediately after the event Mr. Burke raised the issue again with the principal. A central part of the dispute between Mr. Burke and the school and a central part of the board of management's decision (as will be seen) is the appropriateness of Mr. Burke raising the matter on these public occasions and the manner in which he conducted himself in doing so. This dispute was described by Birmingham P at paragraph 11 of his judgment in the Court of Appeal.

13. On the 15th August 2022, the principal of the school instigated Stage 4 of the applicable disciplinary procedures. I set out these procedures below. Mr. Burke was suspended on full pay following a meeting of the board of management on the 22nd August 2022. He is heavily critical of this meeting.

14. Notwithstanding this suspension on full pay, Mr. Burke attended at the school and the school then issued High Court proceedings against him on the 30th August 2022 *(Board of Management of Wilsons Hospital School v Burke (Record*

No. 2022/4507 P). Ultimately the school obtained an injunction against Mr. Burke restraining him from attending at the school but he persisted in doing so and was found to be in contempt of court and was imprisoned for contempt. I return to these matters below in light of a preliminary objection raised by the defendants and, if necessary, when considering the balance of justice.

15. The next step in the disciplinary process was that the board of management proposed to hold the disciplinary meeting on the 14th September. Mr. Burke applied for an injunction to restrain the holding of the meeting. On the return date of the motion for that injunction (11th September) the board of management gave an undertaking not to hold the meeting on the 14th September and that no such meeting would take place without three clear days' notice to Mr. Burke.

16. The school then wrote to the defendant on the 22nd December 2022 giving him notice that a disciplinary meeting would be held on the 19th January 2023 and he then sought an injunction restraining the holding of that meeting.

17. That application was heard on the 11th and 12th January 2023 and judgment was delivered on the 17th January 2023 refusing the application on the basis that while the plaintiff had made out a strong case (the applicable threshold given the nature of the relief sought), he was not entitled to relief from the Court in circumstances where he had stated his intention to continue to breach earlier Court orders and where the Court gave him time to consider whether he would comply with those orders and he did not indicate that he would so comply. Mr. Burke did not appeal against this decision.

18. The disciplinary meeting of the board of management went ahead on the 19th January 2023 and Mr. Burke was informed by letter of the 20th January 2023 that he was dismissed. He is also very critical of this meeting and, indeed, claims that the entire disciplinary process is unconstitutional, unlawful, flawed and invalid.

19. He appealed the decision of the board to the Teacher's Disciplinary Appeal Panel on the 2nd February 2023. I will refer to the notice of appeal in greater detail below. A hearing was scheduled for the 7th July 2023. On the 20th June 2023, Mr. Burke became aware that the members of the Appeal Panel for this hearing were Mr. Sean Ó Longáin (Chair), Kieran Christie (Union Representative) and Jack Cleary (Management Body Representative). No issue is raised in relation to how these members came to be appointed and I therefore proceed on the basis that they were appointed in accordance with the disciplinary/appeal procedures.

20. By letter of the 30th June 2023 Mr. Burke requested that Mr. Christie and Mr. Cleary not be members of the Appeal Panel. He said:

> *"Mr. Christie is a promoter of transgenderism in the ASTI, has awarded those who advance transgenderism in schools, and has worked closely with TENI (Transgender Equality Network Ireland) over many years. It is not appropriate that Mr Christie be a panel member in this Appeal.*
>
> *I am also aware that Mr. Jack Cleary has been nominated to the Appeal Panel. Mr. Cleary is an Advisor with the JMB which advocates on behalf of TENI, works with TENI in promoting transgenderism in schools, and seeks to further the influence of TENI within the area of education. It is not appropriate that Mr. Cleary be a panel member in this Appeal.*
>
> *Please confirm as a matter of urgency that Mr. Christie and Mr. Cleary will not be members of the Appeal Panel and that those who are nominated to the Panel will not be activists for transgenderism."*

21. I will, of course, have to return to the basis for the objection to the composition of the Panel. For some unexplained reason (particularly given the language used in this letter in respect of Mr. Cleary) Mr. Burke has not proceeded with his objection to Mr. Cleary being on the committee.

22. By letter of the 4th July 2023 the Department of Education informed Mr. Burke, inter alia:

> *"Having been appointed by the Board of Management of the school in accordance with the terms of Circular Letter 0049/2018, the panel is satisfied that the composition of the panel dealing with your appeal is correct and properly constituted.*
>
> *The panel, individually and collectively, are of the view that no conflicts of interest arise.*
>
> *The Disciplinary Appeal Panel will continue to undertake its work without fear or favour to any interest or party and within their remit under the terms set out in Circular Letter 0049/2018."*

Proceedings

23. In light of the refusal of the Appeal Panel to accede to Mr. Burke's request he commenced these proceedings by Plenary Summons on the 6th July 2023 and issued a Notice of Motion on the same date seeking *"An injunction restraining the Defendants, their servants or agents, from holding the Disciplinary Appeal Panel Hearing at Tullamore Court Hotel on Friday 7th July 2023 or on any other day".* As is apparent from the terms of the relief sought, it was not expressed as being interlocutory in nature or to be sought pending the determination of the proceedings but it must be understood as such. Indeed, that is the way both Mr. Burke and the defendants approached it. I have approached it accordingly. Furthermore, the relief (both in the Notice of Motion and the Plenary Summons) could also clearly be understood as seeking to restrain any hearing at all. This would, of course, be of significance to the plaintiff's entitlement to the relief. I therefore address it in the course of this judgment.

24. When the application was moved, in addition to the allegation of objective bias, the relief was sought on the basis that a particular recording had not been provided to Mr. Burke. This was not proceeded with by Mr. Burke and I therefore do not have to determine this point.

Preliminary Objection - Contempt

25. The defendants submitted that Mr. Burke was in ongoing contempt of Court and that in those circumstances the Court should not even consider granting relief or, in the alternative, that the balance of justice was against the granting of relief.

26. At the hearing, the contempt relied upon by the defendants was Mr. Burke's refusal to comply with Court Orders made by Stack and Barrett JJ in the proceedings issued by the school against the plaintiff *(Record no. 2022/4507P).* In those proceedings an interim order was granted by Stack J restraining Mr. Burke from attending at the school and from attempting to teach any classes. Notwithstanding this Order, Mr. Burke continued to attend the school and the school then made an application to attach and commit the plaintiff for breach of the Order. O'Regan J made an attachment Order on the 2nd September 2022 and, on the 5th September 2022, Quinn J committed Mr. Burke to prison for his breach of the Order of Stack J. Barrett J then made interlocutory orders on the 7th September. Mr. Burke refused to purge his contempt and refused to indicate that he would stay away from the school or comply with the Order of Barrett J. His

detention for contempt was reviewed on the 13th December 2022 and he refused to purge his contempt. The matter was relisted by this Court for mention on the 16th December for the purpose of asking the parties to address it on the question of Mr. Burke's continued detention in light of the fact that the school would be closing for the school holidays. It was then listed for the 21st December. This is dealt with in a ruling of O' Moore J of the 21st December 2022 *[2022] IEHC 719* in which O'Moore J released Mr. Burke from detention. On the 5th January 2023, when the school reopened after the school holidays, Mr. Burke once again attended at the school and did so again on the 6th, 9th and 10th January 2023. Following the hearing of Mr. Burke's motion for an interlocutory injunction to restrain the board of management from holding its disciplinary meeting (which is the subject of my earlier judgment *([2023] IEHC 22))*, Mr. Burke declined to take the opportunity given by the Court to indicate that he would comply with the Court Orders. On the 26th January 2023, O' Moore J gave a judgment *([2023] IEHC 36)* on a further motion for attachment and committal (or in the alternative sequestration of Mr. Burke's assets) issued by the school. He found that Mr. Burke had *"on the 5th, 6th and 9th January 2023 breached the Order of Barrett J, and did so consciously, deliberately and therefore wilfully."* He went on at paragraph 31 to say that *"It is clear that Mr. Burke does not recognise the validity of the Order of Barrett J, and that Mr. Burke intends to continue to go to school in defiance of what this Court has directed...At hearing of the motion on the 17th of January, Mr. Burke gave no reason to believe that he would comply with the Barrett Order. On the contrary, everything put before the Court by Mr. Burke himself in evidence and in submissions make it plain that he will continue to disobey the Order made by Barrett J on the 7th September 2022. The continuing contempt of court on the part of Mr. Burke therefore requires further measures to be taken."* O' Moore J imposed a daily fine, to apply until Mr. Burke purged his contempt, to take effect later in order to give Mr. Burke an opportunity to tell the Court that he would comply with the orders. The Court of Appeal heard Mr. Burke's appeal against a number of Orders of the High Court, including the Orders of Stack J and Barrett J in February 2022. At that time Mr. Burke had not purged his contempt as is clear from the judgment of the Court of Appeal.

27. At the hearing Mr. Burke submitted that there was no evidence that he was in ongoing contempt (it is important to note that he did not simply deny that he was in ongoing contempt).

28. Subsequent to the hearing of this application, the solicitors for the defendants sent to the Court a copy of a judgment of Heslin J which post-dates the hearing under cover of a letter stating, inter alia, *"we believe the enclosed judgment, which resulted*

in the committal of Mr. Burke for contempt of Court, is directly relevant to the issue of Mr. Burke's ongoing contempt of Court, an issue relied upon by our clients in defence of Mr. Burke's application for interlocutory relief against them".

29. Mr Burke objected to me having regard to this judgment. I will not have regard to it at this stage other than to note that it was also made in the school's proceedings against Mr. Burke *(Record no. 2022 4507P).*

30. In submitting that I should not even consider granting relief, the defendants rely on the approach taken by Birmingham P (with whom Edwards and Whelan JJ agreed) in *Board of Management of Wilson's Hospital School v Burke [2023] IECA 52* where he said:

> *"17. ... the matter was listed on Monday 13th February 2023 for mention. At that stage, the attention of the parties was drawn to the fact that the Court had concerns about whether it would be proper to embark on a hearing of the merits of the appeal, in circumstances where the appellant would be seeking to invoke the jurisdiction of the Court and to secure orders in his favour, while refusing to submit to the jurisdiction of the Court and insisting on an entitlement to disobey court orders. We pointed out that the issue of how a court should deal with somebody invoking its jurisdiction who is in contempt of court was a matter that had received consideration by Dignam J in the course of this controversy. As Clarke J, as he then was, commented in Moorview Developments v First Active [2008] IEHC 211, "[i]t is worth noting that the question of giving audience to persons in contempt involves the exercise by the court of a discretion in which ensuring obedience to court orders is afforded a very significant weight." It was indicated at that point that a response was not sought from the parties at that stage, rather that the Court was concerned lest anyone be taken by surprise by the fact of the issue being raised and that the parties were invited to reflect on the matter.*
>
> *18. When the Court sat for the scheduled hearing on Thursday 16th February 2023, we raised this issue as a preliminary matter. The appellant was trenchant in his opposition to the suggestion that his access to the court could be impeded or obstructed by reason of his conduct. Further, while voicing opposition in sometimes strident terms, the appellant made clear that his primary concern during the hearing of the appeal would be in relation to the orders made by Stack and Barrett JJ, which he saw as having the potential to undermine or set aside the conclusion that he had been in contempt of court. It is a noteworthy feature of this case that the actual*

decision to hold the appellant in contempt and to commit him to prison has not been the subject of an appeal. The appellant asserted that, in circumstances where his concern was with the decisions of Stack and Barrett JJ, the Court's concerns about an apparent imbalance in circumstances of the seeking of positive orders, which would be sought to be enforced, while declining to obey other orders, did not arise.

19. In urging the Court to embark upon the appeal, the appellant has made the point that the restrictions that have been applied in respect of those who are in contempt of court should not prevent access to the court for the purpose of appealing and seeking to set aside the order upon which the alleged contempt was founded. He referred in that regard to the case of Hadkinson v Hadkinson [1952] 2 All ER 567 and the more recent case of O'Shea v Governor of Mountjoy Prison [2015] IECA 101, a decision of this Court given by then then President, Ryan P.

20. For my part - and I have no doubt that, in this respect, I speak for all members of the Court - it has absolutely been beyond doubt that the appellant was entitled to appeal the finding that he was in contempt of court. However, it did not appear to me that this was what he was in fact engaged in. There had been no appeal of the decision of Quinn J. While there has been no direct or specific appeal of the finding of being in contempt of court, in exchanges with the appellant, I indicated that I recognised that there was an overlap between the issues that had led to the conclusion that he was in contempt of court and the issues he wished to canvass on the appeal. It was for this reason, I explained, that what had happened in the past, in terms of disobedience of orders up to that point, would not prevent the Court embarking on the appeal, but that the Court's concern was with what would happen in the future, while the matter was before this Court, including any period after judgment had been reserved and when the matter was being considered by the Court.

21. On the basis that the appellant was indicating that he was not seeking positive orders in respect of what had occurred before Stack and Barrett JJ, but was seeking to set aside orders that had been made, this Court, having taken a short time to consider the matter, indicated that we would proceed with the hearing, but dealing only with the issues as they relate to Stack and Barrett JJ. We would not consider any request for positive orders which would be sought to be enforced while the appellant continued to breach court orders on an ongoing daily basis. Having earlier indicated that his primary concern

was with the orders made in the context of an application for an interim injunction and in the context of an application for interlocutory relief, he indicated he was seeking that the Court would review the decisions of Dignam and Roberts JJ, while repeating that he was not, at this stage, seeking positive orders in relation to what occurred in their courts."

31. It is long-established that a court may decline to even entertain an application for relief by a person who continues to be in contempt of Court, particularly where the relief that is sought are positive orders. This is partly due to the fundamental requirement in a democratic system based on the rule of law that Court Orders would be complied with. As I put it in my earlier judgment in *Board of Management of Wilsons Hospital School v Burke [2023] IEHC* 22:

> "99. *The enforceability of Court Orders is a central plank of any system based on the rule of law. It is part of the constitutional framework which governs us all. A citizen and society is entitled to expect that a person against whom an Order is made will comply with that Order, and will be compelled by the Court to comply with it, while it is valid and subsisting.*
>
> *100. ...Individuals do not get to pick and choose when they will comply with Court Orders on the basis of their own assessment of the Order's correctness. Their remedy, if aggrieved with the Order is to appeal; their obligation in the meantime is to obey the Order.* "

32. However, whether or not to entertain an application is a matter for the Court's discretion having regard to all of the circumstances. This is clear from the Court of Appeal's careful consideration of the different aspects of Mr. Burke's appeal. It is also expressly stated by Clarke J in *Moorview Development* (quoted by Birmingham J*).* This arises from the need for the Court to strike a balance between the fundamental requirement that a system based on the rule of law (which, after all, is in the interests of all citizens) must be based on the enforceability of Court Orders, the rights of the persons affected by the Order that is not being complied with, and the contemnor's rights.

33. In deciding how to deal with this matter I must attach significant weight to ensuring the Court Orders are enforced.

34. It also seems to me that a very significant factor in the circumstances of

this application and, therefore, in the exercise of my discretion is that the Orders of which Mr. Burke is alleged to be in contempt were obtained by a different party in separate proceedings. This is an important point of distinction between this application and the position before the Court of Appeal. Of course, an ongoing contempt of Court, which, after all, is a contempt of the system of justice which is enshrined in the Constitution, is a very grave and weighty matter. However, in the exercise of my discretion I think it is more appropriate to consider the question of Mr. Burke's alleged ongoing contempt as part of the consideration of whether the balance of justice favours the grant of relief rather than as precluding any consideration of Mr. Burke's application.

35. All issues relating to the alleged contempt, including whether it is a matter for the defendants to prove an ongoing contempt of court or whether it is a matter for Mr. Burke to prove that he has purged that contempt, and whether the Court should consider Heslin J's judgment can be dealt with if the Court has to consider the balance of justice.

Disciplinary Process

36. The disciplinary process under which Mr. Burke was dismissed by the school and pursuant to which his appeal is brought is contained in *"Revised Procedures for the Suspension and Dismissal of Teachers pursuant to section 24(3) of the Education Act 1998 as provided for in DES Circular 49/2018.* Section 24(3) provides, inter alia, that a board of management may *"suspend or discuss such teachers and staff, in accordance with procedures agreed from time to time between the Minister, the patron, recognised school management organisations and any recognised trade union and staff association representing teachers or other staff as appropriate".*

37. As envisaged by s.24(3), it appears that these procedures were the product of discussion or consultation between the Minister, bodies representative of school patrons, recognised school management organisations and recognised trade unions and staff associations (paragraph 48 of *Lally v Board of Management of Rosmini Community [2021] IEHC 633,* section 1 of the Revised Procedures and the Preamble section of the disciplinary procedures themselves).

38. This is reflected in paragraph 6 of the defendants' replying affidavit which was sworn by Mr Christie, He said:

> *"The ASTI participated actively in the negotiations which led to the creation of the Circular, and during those negotiations it sought and secured robust*

protections for members and all teachers, including an independent appeal process, the integrity of which it is committed to upholding. The inclusion of such a process in the Circular was an important objective for the ASTI in participating in the negotiations."

39. Section 2 of the Revised Procedures sets out the general principles underpinning the procedures. It notes that, inter alia, considerations of equity and justice require that acceptable procedures be in place and be observed, and expressly states that the procedures are intended to comply with the general principles of natural justice. They specify certain matters which are provided for by the procedures including that there will be a presumption of innocence, that the teacher has the right to a fair and impartial examination of the issues being investigated, taking into account the allegations or complaints, the response of the teacher concerned to them, any representations made by or on behalf of the teacher concerned and any other relevant or appropriate evidence, factors or circumstances, and that the board of management, as employer, has a duty to act reasonably and fairly in all interactions with staff.

40. The general scheme of the procedures was considered by Butler J in *Lally v Board of Management of Rosmini Community School [2021] IEHC 633.* There are four stages moving from informal stages to formal stages which may lead to disciplinary action up to and including dismissal. The procedures state *"[A]lthough disciplinary action will normally follow the progressive stages the procedures may be commenced by the school at any stage of the process if the alleged misconduct warrants such an approach."* Thus, the disciplinary action may be commenced at stage 4 if the alleged misconduct is considered to be serious enough though, even then, it does not have to be started at stage 4. As Butler J put it at paragraph 50 of *Lally:*

Presumably, there must be some consideration given not only to the conduct involved but also to the circumstances in which it arose and the teacher's history including any past disciplinary action, before a decision is made to start the process at the final stage".

41. The disciplinary action in this case was commenced at stage 4.

42. Stage 4 provides, inter alia, *"If it is perceived that the poor work or conduct has continued after the final 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." It sets out the procedural steps which must be taken and provides that if the board of management is satisfied that disciplinary action is warranted it can impose deferral of an 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 or without pay, and dismissal. It goes on to provide that:

> *"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."*

43. A right of appeal is expressly provided for in the following terms:

> *"It will be open to the teacher to appeal against the proposed disciplinary action.... In the case of a sanction being imposed under stage 4 of the procedure an appeal will be to a disciplinary appeal panel appointed by the board of management.*
>
> *The procedures for appealing are as set out in Appendix 1A"*

44. Appendix 1A provides, inter alia:

> ***"Teachers Disciplinary Appeal Panel***
>
> *1. The board of management shall appoint a Teachers Disciplinary Appeal Panel which shall comprise;*
>
> - *An independent Chairperson from a panel nominated by the Minister for Education and Skills*
> - *A representative of the recognised management body*
> - *A nominee of the relevant teachers union*
>
> *2. No member shall be appointed to the Panel to consider a case referred to the Panel who has had any prior interest in or dealings with that particular case.*

Appeal Process

3. *A teacher may seek a review of disciplinary proceedings by the Panel on one or more of the following grounds:*

    i. *the provisions of the agreed procedures were not adhered to*

    ii. *all the relevant facts were not ascertained*

    iii. *all the relevant facts were not considered or not considered in a reasonable manner*

    iv. *the teacher concerned was not afforded a reasonable opportunity to answer the allegation*

    v. *the teacher concerned couldn't reasonably be expected to have understood that the behaviour alleged would attract disciplinary action*

    vi. *the sanction recommended is disproportionate to the underperformance or misconduct alleged.*

4. *A teacher who has been notified that it has decided to take disciplinary action against him or her may, within 10 school days of receiving the notification of the decision, request in writing that the disciplinary proceedings be reviewed by the Panel.*

…

6. *Where a teacher requests that disciplinary proceedings be reviewed by the Panel the following submissions shall be made;*

    i. *a written statement by the teacher concerned of the grounds on which the review is being sought, to be furnished to the Panel and the employer within 10 school days of the submission of the request for an appeal referred to above.*

    …

7. *Where the Panel has decided to review the disciplinary procedures having considered the submissions it shall set a date for a hearing within 20 school days of receipt by the Panel of completed submissions from the teacher and employer.*

8. *The Panel may, at its sole discretion, invite any person to give evidence orally and or in writing. The Panel shall consider and decide on any request from a party to the procedure to give evidence orally and or in writing.*

…

11. *Having made such enquiries as it considers necessary and having considered any submissions made or evidence given the Panel shall form an opinion as to whether or not grounds for a review of the case have been established and shall issue its opinion within ten school days of the hearing to the Chair of the board of management, the teacher concerned and their representative.*

12. *Where that opinion is to the effect that such a case has been established by the teacher concerned, the Panel may, at its sole discretion, recommend to the board of management that;*

    i. *no further action should be taken in the matter, or*

    ii. *the disciplinary action decided by the board of management should be amended in a specific manner, or*

    iii. *the case should be re-considered by the board of management to remedy a specified deficiency in the disciplinary procedures (in which event the provisions of this code shall continue to apply)*

13. *Where that opinion is to the effect that such a case has not been established the board of management will proceed with the disciplinary action.*

…

14. *The final decision in respect of the appeal panel recommendation rests with the board of management which shall set out in writing the basis for its decision."*

Legal Framework

Bias

45. The principles governing claims of objective bias are well-established. I was referred to a number of English authorities and, while these are helpful in relation to specific points in these proceedings and I return to them, as Denham J said in *Bula v Tara (No.6) [2000] 4 IR 412,* we need look no further than the authorities in this jurisdiction for the general principles.

46. Of course, the rationale for objective bias (rather than actual bias) is the important principle that justice not only be done but be seen to be done. The fundamental importance that justice be seen to be done has been emphasized repeatedly by the Courts including, for example, by Denham CJ in *Goode Concrete v CRH Plc [2015] 3 IR 493.*

Nature of objective bias

47. The nature of objective bias was described by Keane CJ in *Orange Ltd v Director of Telecoms (No. 2) [2000] IESC 22* where he said:

> *"In such cases, the courts proceed on the assumption that, where there is a reasonable apprehension of bias, the decision must be set aside, although there is not the slightest indication that the decision maker was in fact actuated by any bias... "*

48. He went on to say that a decision will be set aside on the ground of objective bias:

> *"Where there is a reasonable apprehension or suspicion that the decision maker might have been biased, i.e. where it is found that, although there was no actual bias, there is an appearance of bias."*

Test for obiective bias

49. The measure by which the existence of a reasonable apprehension of bias is to be judged is that of the reasonable person armed with all the facts and not of any of the parties.

50. In *Bula Ltd v Tara Mines (No.6)* (quoted in numerous cases) Denham J said:

> "... *it is well established that the test to be applied is objective, it is whether a reasonable person in the circumstances would have a reasonable apprehension that the Applicants would not have a fair hearing from an impartial judge on the issue. The test does not invoke the apprehension of the Judge or Judges. Nor does it invoke the apprehension of any party. It is an objective test - it invokes the apprehension of the reasonable person".*

51. In *O'Callaghan v Mahon [2008] 2 IR 514* Denham J (with whom the majority of the Court agreed) said at paragraph 77:

> *"The appearance of what is being done is critical. It is essential that justice be seen to be done. Therefore, the test refers to a reasonable apprehension by a reasonable person, who has knowledge of all the facts, who sees what is being done. It is this reasonable person's objective view which is the test. This is the criterion which is required to be applied. It is not the apprehension of a party."*

52. At paragraph 234 she said that the *"test to be applied is whether a reasonable person, who had knowledge of all the relevant circumstances, would have a reasonable apprehension of bias. It is an objective test".*

53. At paragraph 551 of the same judgment, Fennelly J 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 which show prejudice, hostility or dislike towards one party or his witnesses."

54. The reasonable apprehension test was approved by McKechnie J in *Nurendale Ltd t/a Panda Waste Services v Dublin City Council [2013] 3 IR 417* where he said that, as observed by Fennelly J in *O'Callaghan v Mahon,* it is strictly objective; it is whether the reasonable person, knowing all relevant facts, would have a reasonable apprehension of pre-judgment.

55. In *Goode Concrete v CRH [2015] 3 IR 493* Hardiman J described paragraph 80 (a) of the quote from Fennelly J in O' *Callaghan v Mahon* as *"an apt epitome of the modern Irish law on objective bias."* Hardiman J gave a dissenting judgment but there was no disagreement on this aspect.

56. In *Goode Concrete v CRH* Denham J said at paragraph 493:

"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.'

57. This was referred to by Irvine J on behalf of the Court of Appeal in *Nasheuer v National University of Ireland Galway [2018] IECA* 79 who went on to say:

"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.

Attributes of the Reasonable Person

58. The attributes of this reasonable person have been considered in a number

of cases.

59. As will be apparent from some of the passages already set out above, the reasonable person is a person who must be taken to be in possession of or armed with all of the relevant facts and circumstances. They are a person who is well-informed of the essential background and particular circumstances of the individual case (McKechnie J in *Reid v Industrial Development Agency [2015] IESC 82* - referred to by Dunne and Charleton JJ in *Kelly v Minister for Agriculture [2021] 2 IR 624).* It follows that the facts which the reasonable person must be taken to have knowledge of are the correct facts - see *President of the Republic South Africa v South African Rugby Football Union [1999] 2 ZACC 11, [1999] SA 147* (quoted in Hardiman J's judgment in *Goode Concrete v CRH).*

60. They will also be right-minded (Murphy J in *O'Neill v Irish Hereford Beef Society Ltd [1991] ILRM 612,* fair-minded and a person who is not *"unduly sensitive"* (Fennelly J in *O'Callaghan v Mahon).*

61. Recently, the Supreme Court considered objective bias in *Kelly v Minister for Agriculture [2021] 2 IR 624 [2021] IEHC 23.* O'Donnell CJ indorsed the test as being that of *"the objective bystander apprised of all relevant facts"* (paragraph 6) and went on to say:

> *"[10] In my view, a reasonable bystander who was neither unduly cynical nor prone to conspiracy theories would certainly note, and be troubled by, these events. In other circumstances, these factors in themselves might be decisive. However, the reasonable bystander must be expected to be not just fair, but robust and aware that a standard for objective bias that is met if even a suspicion can be voiced could result in a near-impossible test which could be too easily invoked by disappointed parties who cannot point to any weakness in the individual decision. It is easy to say that the system benefits if the most demanding standards are required, since this will exclude even unrealistic suspicions about the process, but such a test assumes that the benefit of avoiding any hint of suspicion in the mind of even the most committed cynic is costless, when in fact such a test exacts a very heavy price in decisions set aside and outcomes delayed. Indeed, if a reasonable bystander had an interest in the classics, he or she might be aware that the test that Caesar's wife must be above suspicion, often used to justify demanding of officials, adjudicators and judges that they not only perform their functions correctly, but do so in a way which cannot be criticised by even the most suspicious person (see, in this regard, the famous comment of Bowen L.J. in Leeson v.*

The General Medical Council (1889) L.R. 43 Ch. D 385), was first announced to allow Caesar to justify divorcing his wife, Pompeia, an event that did not seem to trouble him, since it left him free in due course to marry a third wife. Pompeia's views are not known. It would be more impressive if the standard of behaviour was one demanded of oneself rather than used as a vehicle to criticise and undermine the decisions of others. This, or any other case, should not be approached on the basis that if a suspicion can be stated, particularly in a world of fevered social media commentary, a decision must inevitably be set aside."

62. Charleton J in the same case also set out what attributes the reasonable person must be taken to have. Charleton J's judgment was a dissenting judgment but it does not seem to me that there was any disagreement in respect of the attributes of the reasonable person. He said at paragraph 185:

185. *Similarly, in England, it is not necessary to prove bias was present or to show the probability of bias, but rather a real danger of bias. Thus the test in Porter v. Magill[2001] UKHL* 67, *[2002] 2 A.C. 357 is whether a "fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased"; per Lord Hope at para. 103, p. 494. This observer is not a litigant and is not paranoid or subject to conspiracy fantasies but rather has objectivity and has diligently self-educated as to the facts of the case and background; see de Smith's Judicial Review (8th ed., Sweet and Maxwell, 2018), para. 10-018, pp. 543-546. As has been observed, this paragon is an ideal being, and capable, of fine judgment; in a context where such diverse decisions as between a daughter appearing to plead a case in front of her father who is the judge or the judge who subscribes to a magazine of questionable views will always form a right judgment. Clearly, the gravamen of objective bias is not that the decision-maker or investigator formed a pre-judgment, and then tendentiously acted upon it by twisting facts to suit what was already decided, but rather that a person of common sense and reason and in full possession of the relevant background and the facts of the case would reasonably suspect bias may have influenced the process..."*

63. He went on to refer to a passage in Lord Hope's judgment in *Helow v Home Secretary [2008] UKHL 62, [2008] 1 WLR 2416* (to which I return) where Lord Hope said:

"1 ... the fair-minded and informed observer is a relative newcomer among the select group of personalities who inhabit our legal village and are available to be called upon when a problem arises that needs to be solved objectively. Like the reasonable man whose attributes have been explored so often in the context of the law of negligence, the fair-minded observer is a creature of fiction. Gender- neutral (as this is a case where the complainer and the person complained about are both women, I shall avoid using the word 'he'), she has attributes which many of us might struggle to attain to.

2 The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in Johnson v. Johnson (2000) 201 CLR 488, 509, para 53. Her approach must not be confused with that of the person who has brought the complaint. The 'real possibility' test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.

3 Then there is the attribute that the observer is 'informed'. It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment."

64. Charleton J continued at paragraph 186:

"186. This reasonable person would be neither complacent nor unduly sensitive or suspicious and is required by the case law to be particularly well-informed and in possession of quite extensive knowledge. Thus, reasonable suspicion requires actual circumstances whereupon a reasonable individual would find

grounds for suspecting that bias had entered the equation. But, that conclusion would not be leapt at; the reasonable individual would take no superficial view but sift through what could be known and then apply the test."

Cogent and rational link

65. In *Ó Ceallaigh v An Bord Altranais [2011] IESC 50* Fennelly J said:

"35. I believe that the law is comprehensively and authoritatively stated in the judgment of Denham J, delivered in July 2000, in Bula v Tara (No.6). Having reviewed the law, and having considered, in particular, the decision of the House of Lords in Reg. v Gough [1993] AC 646, she rejected the suggestion that our courts should adopt a test based on "a real danger of bias." She cited the decision of the High Court of Australia in Webb v The Queen (1993-1994) 181 C. *L.R. 41 to similar effect. She held, at page 441 in favour of a test based on reasonable apprehension of bias:*

…

39. She made, at page 445, in particular, the important point, emphasised by the trial judge in this case, that, in assessing objective bias, the "links must be cogent and rational," i.e., there must be a real and not a mere hypothetical or a speculative link between the association under consideration and the apprehension of lack of impartiality being alleged.

40. On this point, she cited, with approval, at page 445, the following analysis of Merkel J. in Aussie Airlines Pty. Ltd. v. Australian Airlines Pty. Ltd. (1996) 135 A.L.R. 753:-

> *"55. In my view, as with the cases considering personal, family and financial interests, the decision in the cases dealing with professional association between adjudicator and litigant demonstrate that the courts do not take a hypothetical or unrealistic view of an association relied upon in a disqualification application. In particular they appear to accept that the reasonable bystander would expect that members of the judiciary will have had extensive professional associations with clients but that something more than the mere fact of association is required before concluding that the adjudicator might be influenced in his or her resolution of the particular case by reason of the*

association. Although the test is one of appearance it is an appearance that requires a cogent and rational link between the association and its capacity to influence the decision to be made in the particular case. In the absence of such a link it is difficult to see how the test for disqualification as stated in Livesey can be satisfied." (emphasis added)

41. This need for a cogent and rational link between the claimed bias and the feared departure of the adjudicator from the standard of impartiality, has been emphasised in two subsequent cases in the High Court of Australia. In particular, in the majority judgment delivered by that Court in Smits v Roach, cited above, the case where Kirby J delivered a wide ranging concurring judgment cited by Dr Forde. At paragraph 53, three judges from the majority (Gleeson C.J., Heydon and Crennan JJ), with whom two other members (Gummow and Hayne JJ) agreed in a separate judgment, cited the earlier judgment of the court in Ebner v Official Trustee in Bankruptcy (2000) 75 ALJR 277, paragraph 8:

"The apprehension of bias principle admits of the possibility of human frailty. Its application is as diverse as human frailty. Its application requires two steps. First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an 'interest' in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed. "

42. In Smits v Roach, the objective bias alleged was that the brother of the judge trying a case between a firm of solicitors and a former client was a member of the firm of solicitors which formerly acted for the same former client. It was alleged that the judge's brother's firm might be indirectly affected by the outcome of the case. On that point, Kirby J differed from his colleagues. Five of the judges thought that the required cogent link had not been shown between the judge's brother and any risk of partiality suspected or apprehended. Kirby J thought otherwise".

66. These cases were concerned with an association between persons or bodies, i.e. the basis for the alleged bias was an association between the decision-maker and a relevant party or witness. It seems to me that the same logic must apply where the basis for the alleged bias is, as in this case, an association between a position or view held by or allegedly held by the decision-maker and a position or view which it is claimed arises for decision in the case. There must be a cogent and rational link between the position taken or claimed to have been taken by the decision-maker and the issue that has to be decided. This is reflected in Fennelly J's judgment in *O'Callaghan v Mahon* that "... *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..."* and in *Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451* where the Court said "... *if on any question at issue in the proceedings before him the Judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind*". This point would apply, not just where the judge had made statements or expressed such views, but also where he was sufficiently associated with such statements made or views held by a third party such as an organisation with which he is connected.

Burden of Proof

67. Denham CJ held in O' *Callaghan v Mahon Ltd* that *"there is no doubt that the burden rests upon the applicants to prove their case on the balance of probabilities. They carry the onus of proof."*

Summary

68. Thus, the general principles, insofar as they are relevant to this case can be summarised as follows:

- objective bias is where there is a reasonable apprehension or suspicion that the decision-maker was or is biased;

- the test is objective; the apprehension is to be measured by the standard of the reasonable person and not according to the views of the parties or the court;

- the reasonable person must be taken to be armed with all of the correct relevant facts and circumstances;

- the reasonable person has various characteristics, including (but not limited to) being are fair-minded, not unduly sensitive or cynical, robust, aware that a standard for objective bias that is met if even a suspicion can be voiced could result in a near-impossible test which could be too easily invoked; they are not paranoid or prone to conspiracy theories but rather are capable of fine judgment; must not be complacent and must appreciate the imperative that justice must be seen to be done but would not leap to the conclusion that there may be bias. In fact, what these attributes add up to is a fair, balanced and objective person;

- there must be a cogent and rational link between the grounds of alleged bias and the issue to be decided;

- the burden of proof is on the plaintiff.

Interlocutory Injunctions

69. The test for an interlocutory injunction application is contained in *Campus Oil v Minister for Industry (no.2) [1983] 1 IR 88.* The modern approach to the consideration of such applications is set out by O'Donnell J in *Merck Sharpe and Dohme v Clonmel Healthcare Ltd [2019] IESC 65* including setting out an eight-step approach. This was not meant as a prescriptive set of principles but rather as a useful analytical framework or approach. O'Donnell J emphasised the overarching or inherent flexibility of the remedy, whose purpose is to serve the interests of justice.

70. The focus of the arguments between the parties was whether the plaintiff could secure a permanent injunction in the terms sought (step 1 of *Merck Sharpe and Dohme),* the appropriate standard of proof or threshold test, whether that standard was met, and whether the balance of convenience or justice favours the grant or refusal of the injunction sought. Thus, it is not necessary for me to consider all of the steps identified by O'Donnell J.

71. In relation to the first of these, as noted above, the express terms of the reliefs could be understood as seeking to preclude any hearing of Mr. Burke's appeal. The defendants submitted that a permanent injunction in those terms could not be obtained and therefore Mr. Burke could not obtain an interlocutory injunction. However, Mr. Burke clarified at the hearing that he was only seeking to restrain a

hearing by an Appeal Panel which has Mr. Christie as a member. I have to say that there are some grounds for scepticism that this is all that Mr. Burke hopes to achieve in circumstances where Mr. Burke declined to answer questions from the Court when trying to explore the logic of his position. As will be discussed below, one of Mr. Burke's core points is that because, as he puts it, the ASTI supports or promotes what he refers to as *"transgenderism"* and because Mr. Christie is the General Secretary of the ASTI there would be an apprehension that he would be biased against Mr. Burke by association with the position of the ASTI. The Court asked Mr. Burke whether the logic of this point meant that no officer of the ASTI could sit on a panel to hear his appeal and whether it also meant that no member of the ASTI could do so in circumstances where it could be argued that they subscribe to the union's position (if it has a position). Mr. Burke declined to engage and insisted that the Court must only decide the case before it. It is, of course, obvious that the Court can only determine the case before it but the Court is entitled to ask such questions because of the basis of Mr. Burke's claim of objective bias and in order to explore the logic of that claim. Mr. Burke's response is either based on a fundamental misunderstanding of the purpose of asking these questions (which was explained by the Court during the hearing) or gives rise to a degree of scepticism that ultimately Mr. Burke will object to any member of the ASTI hearing his appeal and thereby seek to prevent any hearing or determination taking place. However, that is an issue which may or may not require to be determined at a future date. In circumstances where the relief sought is also readily capable of being understood as only seeking to restrain a hearing by this Disciplinary Appeal Panel, and must be read in the context of the grounding affidavit, I will take the plaintiff's clarification at face value and will determine the sole issue of whether Mr. Burke is entitled to an interlocutory injunction restraining a hearing by an Appeal Panel of which Mr. Christie is a member. A permanent injunction in those terms could be secured and therefore step 1 of the approach in *Merck Sharpe and Dohme* is met.

72. The injunction sought is a prohibitory injunction and as such the normal test is whether the plaintiff has established a fair, bona fide or serious question (these terms being used interchangeably). This has been described as a low bar in *O' Gara v Ulster Bank Ireland DAC [2019] IEHC 213* and *Betty Martin Financial Services Ltd v EBS DAC [2019] IECA 327.*

73. As discussed in my judgment in *Board of Management of Wilsons School v Burke [2023] IEHC 22,* it is, however, well-established that there is an additional element to the test in the context of an injunction to restrain an ongoing disciplinary process arising from the courts' reluctance to intervene in an incomplete disciplinary process (see Clarke J in *Carroll v Bus Átha Cliath [2015] 4 IR 184).* In *Minnock v*

Irish Casing Company Ltd and Stewart [2007] 18 ELR 229 Clarke J said:

> *"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."*

74. 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."*

75. Clarke J also dealt with the appropriate approach in *Rowland v An Post [2017] IR 355.*

76. These general principles are reflected at paragraph 5 of the judgment of Butler J in *Lally v Board of Management of Rosmini Community School [2021] IEHC 633* which was given in the context of the same disciplinary procedures (albeit that the case concerned an earlier stage of the process).

77. In that case, Butler J noted that the decision in *Rowland* was given in substantive proceedings and not in respect of an interlocutory application and she had to consider what the appropriate test is in respect of an interlocutory injunction application to stop an ongoing disciplinary process. In paragraph 61 Butler J said *"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." In paragraph 62 she said that "... *in light of the fact that generally an interlocutory 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",* and went on to say in paragraph 63 that *"[O]bviously, 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".*

78. The plaintiff submitted that this additional *"Rowland"* element does not apply because he is not attempting to stop the appeal hearing but simply attempting to stop it progressing with Mr. Christie as a member of the Panel (paragraph 9 of the plaintiff's written submissions). I do not accept that this is sound as a matter of principle. The Appeal Panel which has been appointed in accordance with the agreed procedures comprises Mr. Christie and Mr. Burke seeks to stop that appeal hearing the progress of the matter in those circumstances. I see no reason of principle why Mr. Burke should not have to satisfy the burden of establishing a serious question to be tried having regard to the specific burden that will be on him to prove at trial that an appeal with Mr. Christie involved has gone irremediably wrong.

79. However, I am not certain that in a case of alleged objective bias the additional element of the test adds very much to the applicant's burden. It seems to me that if an applicant establishes that there is a fair question to be tried that a member of the body which will be determining the case (in this instance the Appeals Panel) is objectively biased then it must follow that they have made out a fair question taking into account the requirement to prove that the process has gone irremediably wrong. This is because a decision-making process which is tainted by objective bias and which nonetheless proceeds must be said to have gone irremediably wrong. In the specific context of an allegation of bias which is made in advance of the relevant hearing it seems to me to follow that if the applicant establishes a fair question that there is bias then he must be taken to have satisfied the additional burden of establishing that they have 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."* This is also why the Court must assess a claim of objective bias very carefully and by reference to the reasonable person with

the attributes discussed above because otherwise it would be too easy for the person who is the subject of the decision-making process to delay or derail the process. As O'Donnell J put it in *Kelly v The Minister for Agriculture* (in the passage quoted above), too high a test exacts a very high price in decisions set aside and outcomes delayed. This was also touched upon by O'Neill J in *Joyce v Minister for Health [2004] IEHC 290* where he said at paragraph 27 that *"...there is also in issue the principle that not only must justice be done but it must be seen to be done. I would accept as has been urged upon me by counsel for the defendants that for that principle to be invoked requires a very high threshold of proof in order to protect the proceedings of the many and varied tribunals that sit on a daily basis in this jurisdiction from unmeritorious allegations designed to frustrate their proceedings."*

80. The defendants raised a different point in relation to the standard to be applied. In their written submissions, in response to Mr. Burke's written submissions, they described Mr. Burke's characterisation of the fair issue or serious question standard as a *"low threshold"* as *"simplistic and inapt in the present case"* and went on to submit that *"[B]y its nature a claim of objective bias is concerned with the appearance of bias, rather than the probability of establishing it. Based upon the objective facts which are identified. Mr. Burke must show that there is a cogent and rational cause for a reasonable observer to think that he will not receive a fair hearing. While the overall test to be met at interlocutory stage is somewhat lesser than that which may be required at a full trial, the legal exercise in assessing cogency and rationality remains a logically rigorous one at interlocutory stage."*

81. At the hearing, Senior Counsel for the defendants expanded on this and, while not submitting that the Court should formally adopt a lower test than the traditional fair or serious question test, essentially argued that in a case of alleged objective bias, in reality the applicant at the interlocutory stage had to establish a reasonable apprehension of bias. He submitted that at trial what has to be established was that there is a reasonable apprehension and not that on the balance of probabilities there is such an apprehension. He said this was the case because the question was binary, the reasonable apprehension either exists or it doesn't. This led him to argue that there is not much difference between demonstrating that there is a reasonable apprehension and demonstrating a fair question to be tried as to the existence of a reasonable apprehension of bias. He also explained that the two standards do not operate to create a lower bar- because it is a serious question in relation to a reasonable apprehension, the Court does not take a low bar and adds another low bar below it. He said the two bars are very similar to

each other.

82. There is considerable force to the argument. One of the reasons why there is generally a lower threshold at the interlocutory stage (whether it is a prohibitory or mandatory injunction) is because in many cases all of the facts will not yet be known and the plaintiff will not have had the opportunity to seek discovery or avail of other pre- trial mechanisms or to otherwise marshal the evidence and would therefore not be able to prove the case on the balance of probabilities. However, at the time when a claim of an apprehension of bias is advanced it must be based on facts which are already known. The known facts either give rise to or do not give rise to a reasonable apprehension of bias on the part of the reasonable person and therefore the question of a preliminary or interlocutory threshold does not arise.

83. As I say, there is a considerable force to this argument. However, the approach which has been taken by the Courts in objective bias cases to date has traditionally been to apply the traditional interlocutory injunction test (albeit in some cases with the additional *Rowland* element). For example, Irvine J on behalf of the Court of Appeal in *Nasheuer* applied the traditional test. She said *"I am, of course, mindful of the fact that on the present appeal what the court must address is whether Professor Nasheuer had established a serious issue to be tried concerning objective bias, a somewhat lesser threshold than that which would apply on a substantive hearing of the same issue".* Butler J in *Lally* stated *"...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."* Of course, the courts in those cases do not appear to have been urged to adopt a different approach such as was argued for in this case and so they can not be taken to have conclusively determined the point.

84. However, in circumstances where the courts have previously proceeded on the basis that what had to be established was whether there was a serious question to be tried concerning objective bias, I propose to adopt that traditional approach first and only if necessary, i.e. if satisfied that Mr. Burke has met that test, will I determine whether I should approach it in the manner contended for by the defendants and, so whether Mr. Burke has satisfied the burden on him using that approach.

85. Therefore, the standard that I am applying throughout this judgment unless I expressly say otherwise is whether Mr. Burke has established a serious

question that a reasonable person would have a reasonable apprehension of bias and any conclusions should be understood as being arrived at using that standard.

The Claim of Bias

86. As claims of bias are, by their nature, fact specific, it is necessary to consider the factual bases for Mr. Burke's claim. They are contained in two affidavits. They were initially set out in paragraphs 17 to 21 of the grounding affidavit and were expanded on in Mr. Burke's replying affidavit where he referred to additional matters. Mr. Christie filed a replying affidavit which contains relevant facts. The approach that has been adopted in some cases *(Kelly v Minister for Agriculture* and *Burke v Adjudication Officer [2003] IEHC 225,* for example) is to enumerate the facts in a separate list. I think the appropriate approach in this case is to identify all of the relevant facts when discussing the factual bases advanced by Mr. Burke for his claim and then to deal with any additional relevant facts.

87. There are a number of aspects to Mr. Burke's claim but the fundamental basis of his claim is that his appeal concerns *"transgenderism"* and the profession and practice of religious beliefs and Mr. Christie and/or the ASTI have publicly taken a position on *"transgenderism"* which is so contrary to his that Mr. Christie would be perceived as being biased either personally or by association with the position of the ASTI. In other words, there is objective bias in respect of the issues which have to be decided in his appeal. This is expressed by Mr. Burke in various ways including, for example, at paragraph 8 of his replying affidavit where he says "...*This appeal concerns transgenderism and the profession and practice of religious belief. The DAP has a statutory obligation in the circumstances of this case to review whether holding and expressing the Christian belief on male and female amounts to gross misconduct"* and in paragraph 25 of his written submissions where he says *"[T]he Plaintiff submits that Mr. Christie is inevitably associated with the views and positions of the ASTI, which are very clearly on the opposite side to the Plaintiff's position on the issue that is at the heart of the Plaintiff's appeal to the DAP. The impartial observer knowing all of the relevant facts, would be bound to conclude that there is a real possibility that Mr. Christie will not approach the Plaintiff's case with an open mind and that his decision on the Plaintiff's appeal would be vitiated by prejudgment."* Indeed, Mr. Burke's position has been that everything, including the litigation since August 2022 is about transgenderism, his religious beliefs and his constitutional rights in relation to them. This has been rejected by both the High Court and the Court of Appeal.

88. Of course, it is necessary for Mr. Burke to establish a cogent and rational link between the ASTI/Mr. Christie's alleged position and the issues to be decided to the required standard (i.e. that there is a serious question). He sets out the factual basis for his claim that the ASTI/Mr. Christie has taken a position on the issues in his case and what he says that position is. He expresses Mr. Christie's and the ASTI's position in various terms and I return to them below.

89. The first issue which must be considered is the fundamental issue of precisely what the Appeals Panel are being called on to decide. There are two matters which are of relevance to this: the nature and scope of an appeal under the Circular and precisely what issues have to be decided.

Nature and scope of the appeal

90. One issue which arose between the parties in respect of the disciplinary procedures is the nature of the appeal provided for under those procedures.

91. Mr. Burke submitted that the appeal is *"not simply a procedural review".* He submitted that the Appeal Panel must consider whether it was appropriate to institute disciplinary action and whether it was appropriate to institute it at stage 4, and the Appeal Panel must engage in a proportionality exercise under ground (vi) *("the sanction recommended is disproportionate to the underperformance or misconduct alleged").* He submitted on those bases that the Appeal Panel is required to review the merits of the disciplinary decision and relied on a number of paragraphs from *Kelly v Board of Management of St. Joseph's National School [2019] IEHC 392* (including paragraphs 76, 78(iv), (v), 165, 166, 167, 168 and 170). O'Malley J held that the Disciplinary Appeal Panel was a type of body to which the Court would generally give deference and that the relevant board of management should therefore only depart from the recommendation of the Disciplinary Appeal Panel for very good reason. He also relied on an assertion (which was not disputed) that it is commonplace for an Appeals Panel to overturn or to substitute an alternative sanction for the sanction of the school board and *"hence a DAP hearing would therefore typically involve detailed consideration of the substantive issues that were before the school board".*

92. The defendants submitted at paragraph 48 of their written submissions that the *"appeal to the DAP is, in the main, a review in relation to process. It is not a de novo appeal and is not concerned with the merits of the finding of serious misconduct against Mr. Burke. Any reasonable observer would appreciate that Mr.*

Christie's political, social or other views are largely irrelevant to the grounds of review before the DAP, which relate to the observance of fair procedures and adherence to the Circular."

93. It is not in fact necessary for me to determine the precise parameters of the appeal provided for. It is, necessary for me to determine whether there is a fair question as to the broad type of appeal that is provided for because of Mr. Burke's submission that the Appeals Panel is required to review the merits of the disciplinary decision.

94. It is clear that the type of appeal is more in the nature of a review (similar to a judicial review) rather than a de novo or full appeal on the merits.

95. The language of the Circular is somewhat confusing. It is described as an *"appeal"* in the body of the disciplinary procedure, the process is described in the Appendix as an *"Appeal Process",* and the body is described as *"Teachers Disciplinary Appeal Panel".* However, the detailed provisions for the *"Appeal Process"* use the language of review. They commence by permitting a teacher to *"seek a review of disciplinary proceedings by the Panel"* and there are repeated references throughout Appendix 1A to a *'review'* or a *'review of the disciplinary proceedings'.* One or other of these (or a similar formula) appears in clause 3, 4, and 6. Clause 4, for example, provides that the teacher may, following notification of a decision by a board of management to take disciplinary action, *"request in writing that the disciplinary proceedings be reviewed by the Panel".* Clause 6 uses the similar formula of *"where a teacher requests that disciplinary proceedings be reviewed by the panel".*

96. More importantly, while there is some ambiguity in the language, it is clear from the substance of the process that what is provided for is in the nature of a review.

97. Clause 3 sets out specified grounds upon which a teacher may seek a review of disciplinary proceedings. The prescription of specified grounds of review is itself a very strong indicator that the type of appeal provided for is more in the nature of a review and this is reinforced by the substance and nature of the permitted grounds of review. These grounds are all much more focused on the disciplinary and decision-making process rather than on the merits of the decision in a similar way that a court conducting a judicial review will be concerned with the process rather than the merits of the decision (though the analogy is not perfect). Of course, there are areas, even in the context of judicial review, where the separation between a strict review and a full appeal on the merits is not clear-cut.

Proportionality can be one of those, for example. Nonetheless the question of whether a decision-maker has acted proportionately is a matter which is typically encompassed within a review-type exercise and is certainly not inconsistent with such an exercise. Similarly, an assessment of the reasonableness of a teacher's understanding as to whether the alleged behaviour would attract disciplinary action is encompassed within a review type appeal.

98. I am further reinforced in my conclusion by the provisions of clause 14 and 15. Clause 14 provides, inter alia, that *"...the Panel shall form an opinion as to whether or not grounds for a review of the case have been established..."* and clause 15 provides:

> *"Where that opinion is to the effect that such a case has been established by the teacher concerned, the Panel may, at its sole discretion, recommend to the board of management that;*
>
> *i. no further action should be taken in the matter;*
>
> *ii. the disciplinary action decided by the board of management should be amended in a specified manner, or*
>
> *iii. the case should be re-considered by the board of management to remedy a specified deficiency in the disciplinary procedures (in which event the provisions of this Code shall continue to apply)."*

99. Clause 15 makes clear that the decision of the Appeal Panel is no more than a recommendation. Clause 15(iii) essentially provides for a remittal which is much more typical of a review type process rather than an appeal on the merits. The decision to remit is also grounded on a finding of procedural infirmity rather than on the merits of the decision. Even clause 15(ii) leaves the decision-making power of the board of management intact and provides for amendment of that decision in a *"specified manner''.* Furthermore, clause 18 firmly leaves the decision-making power with the board of management in that the board of management is left free to decide whether or not to accept the recommendation of the Appeal Panel. One would expect if this was an appeal on the merits that the Appeal Panel would simply be permitted to issue its own decision as to the disciplinary action or that the bord of management would be obliged to accept and implement the Panel's decision/recommendation.

100. I do not accept that O'Malley J's decision in *Kelly* that the Disciplinary Appeals Panel is an expert body of the type to which the courts would generally give deference means that the appeal is full or an appeal on the merits. It does not follow from the fact that it is an expert body to which deference should be given that an appeal is a full appeal on the merits. Mr. Burke also submitted that the Appeal Panel must consider whether it was appropriate for the board to institute disciplinary action and to do so at a particular level. These are not expressly provided for in the permitted grounds of review but even assuming that they are encompassed in the grounds they do not mean that the appeal is an appeal on the merits.

101. While it is much more in the nature of a review, it is not limited strictly to a review because of some of the particular features of the scheme. For example, it provides for the taking of oral evidence by the Appeals Panel (clause 10) and clause 3(ii) provides that one of the grounds of review is that *"all the relevant facts were not ascertained."* This allows of the possibility (or perhaps necessity in some cases) for the appellant teacher to establish the facts at the appeal which it is claimed were not ascertained by the relevant board of management. Therefore, to a limited extent this brings it beyond a strict procedural review but this is limited in that the ground of appeal is still focused on the alleged procedural infirmity of a failure by the board of management to ascertain relevant facts.

Issues to be decided

102. Mr. Burke was dismissed by a decision of the Board of Management following a meeting on the 19th January 2023. He maintains that he was dismissed because of his objection to the principal's instruction to all staff to address the student by a new name and the 'they' pronoun and for holding and expressing his religious beliefs. It is not the apprehension of the applicant that is relevant in a claim of objective bias. Mr. Burke's opinion or apprehension as to what the disciplinary proceedings, including his appeal, are about is not determinative and the test is objective. What the appeal is about must be assessed objectively. The letter by which the board communicated its decision to Mr. Burke was exhibited by Mr. Christie in his replying affidavit. This letter stated, inter alia:

> *"I refer to the letter dated 22nd December 2022 in relation to a Disciplinary meeting at Stage 4 of the Disciplinary Procedures to be held on 19th January 2023. In the letter you were informed that the purpose of the meeting was to discuss concerns in relation to your conduct.*

You were informed that at the meeting you would be given an opportunity to respond to the conduct issues outlined in Ms. McShane's report and that the meeting was at Stage 4 of the Disciplinary procedures and could give rise to your dismissal. Your entitlement to be accompanied by a representative, up to a maximum of two, was confirmed. You were informed that having considered your response, the Board would decide on the appropriate action to be taken.

You were put on notice that you are participating in a disciplinary process which could give rise to the imposition of a disciplinary sanction against you as provided for in the disciplinary procedures and that if a case of serious misconduct is upheld the normal consequence will be dismissal.

You attended the Stage 4 hearing on 19th January 2023 with 3 family members. At the hearing Mr. McShane outlined the Stage 4 report, which has been circulated to the Board members and to you. You were given the opportunity to respond to the allegations contained in Ms. McShane's report however you refused.

You were also given the opportunity to call any witnesses. As you refused to respond and did not call any witnesses, Ms. McShane then made her closing statement. You were also invited to make a closing statement however you chose not to. As you would not participate in the Stage 4 hearing in accordance with the Circular and you engaged in intimidating behaviour towards the Board, the meeting closed and you were informed that the Board would proceed to make a final decision in relation to the allegations contained in the Stage 4 report.

The Board has noted that according to the agreed disciplinary procedures: "If the investigation upholds a case of serious misconduct, the normal consequence will be dismissal". The Board finds that the conduct issues outlined in the Principal's report amount to serious misconduct on your part. Accordingly, and with great regret, the Board of Management wishes to inform you that you are hereby dismissed with effect from the expiry of three calendar months' notice. The notice period begins with immediate effect and will expire on Thursday, 20th April 2023. Your dismissal will therefore take effect on 21st April 2023...".

103. Thus, the reason given for the dismissal was that the *"conduct issues outlined in the Principal's report amount to serious misconduct''* on Mr. Burke's part.

This is reflected in the earlier sections of the letter where it is stated that Mr. Burke was informed at the meeting that he would *"be given an opportunity to respond to the conduct issues outlined in Ms. McShane's report"* and that at the meeting he was *"given the opportunity to respond to the allegations contained in Ms. McShane's report..."* It is necessary therefore to refer to the principal's report.

104. In an introduction section, that report states *"The report outlines the behaviour of Mr. Burke during the period from 9th May up to 21st June 2022, which appears to have arisen in response to the school's decision to accommodate the social transition of a student following a request from the student and the student's parents."* The principal's report is then broken into a number of sections headed *"Chronology of events", "Mr. Burke's behaviour",* and *"Conclusion".* The section headed *"Chronology of events"* contains two sub-headings, *"1. 9th May to 20th June 2022"* and "2. 21st *June 2022",* in which matters that were alleged to have happened between or on those dates are set out.

105. The second section headed *"Mr. Burke's behaviour"* contains the following subheadings: *"(i) Mr. Burke's objection to the direction to staff regarding the social transitioning of a student''* and *"(ii) Concerns around Mr. Burke's public statement of his refusal to accept transgenderism".* It is necessary to set out the contents of this section and the following section, *"Conclusion",* in full. Of course, this Court is not dealing with the merits or correctness of the allegations but with the nature of them. They state as follows:

> *"**II Mr Burke's behaviour***
>
> *There are two aspects to Mr. Burke's behaviour: first, the manner in which he has expressed his objection to the direction to staff regarding the social transitioning of a student and second, concerns around the public statement of his refusal to accept transgenderism and the potential impact this may have for this particular student and the student body.*
>
> *(i) Mr Burke's objection to the direction to staff regarding the social transition of a student*
>
> *Mr Burke has treated the decision to accommodate the social transition of a student as a personal decision of mine rather than a decision of the school. In view of this, his objections have been very personally directed at me rather than the school. In addition, Mr Burke has chosen quite deliberately to*

articulate his objections in public rather than in private, while ignoring all established norms and procedures for addressing concerns for teachers in voluntary secondary schools. Mr Burke interrupted a staff meeting at the beginning of the meeting and persisted in questioning me and the Chaplain, even when he was advised that it was not the place to do so and where I had offered to meet with him to discuss the matter. Staff meetings may on occasion become heated when issues are discussed on which staff have opposing views. In my years as Principal and a teacher, however, I have never experienced a staff meeting where a teacher has sought to hijack a meeting to pursue an issue in such a disrespectful manner. Regardless of the personal view held by any teacher, it is inappropriate to interrupt a staff meeting in the manner in which Mr Burke did. At the very least, however, that interruption and challenge took place in the confines of the staffroom and was limited to the teaching staff present. The interruptions at the Chapel and the dinner were made very much in public and were highly personal to and disrespectful of me.

Mr Burke interrupted Bishop Glenfield during a public Church service, which was attended by stakeholders of the school. His outburst was directed at me personally in front of current students and staff and other members of the school community. It was upsetting and embarrassing for everyone present. The students who were present in the Chapel were visibly upset by his remarks and left the service, refusing to come back into the Chapel. The students present were in the middle of sitting their Leaving Certificate exams and did not need such a distraction at a critical time in their education. Although Bishop Glenfield was able to bring the service to a close, Mr Burke's interruption tarnished what was supposed to be a celebration to mark the end of the 260th school year.

Once again, after the dinner, Mr Burke challenged me about the issue in front of members of the wider school community. He was agitated and followed me around the room as I tried to move away from him. It was completely inappropriate for Mr Burke to address me in such a manner, once again in a public place.

It is unacceptable for any member of the teaching staff to challenge management in a public setting as Mr Burke did. His outburst in the Chapel resulted in what should have been a private in-school matter entering the public sphere. The very public manner of his outburst meant that it has spread invariably beyond those present into the wider school community and may even have found its way back to the student concerned. That is most

concerning.

(ii) Concerns around Mr Burke's public statement of his refusal to accept transgenderism

The second aspect of Mr Burke's behaviour relates directly to child welfare. Mr Burke confirmed that he does not accept transgenderism very publicly in the Chapel in front of the students and staff and other school stakeholders. This has implications not only for the particular student, but other students who may wish to transition in the future and, indeed, the entire student body. Mr Burke's position runs counter to the Code of Professional Conduct for Teachers issued by the Teaching Council, which sets out the standard that are expected of all registered teachers regardless of their position. Section 1 addresses professional values and relationships as follows:

"1. Professional Values and Relationships

Teachers should:

1.1 be caring, fair and committed to the best interests of the pupils/student entrusted to their care, and seek to motivate, inspire and celebrate effort and success.

1.2 acknowledge and respect the uniqueness, individuality and specific needs of pupils/students and promote their holistic development.

1.3 be committed to equality and inclusion and to respecting and accommodating diversity including those differences arising from gender, civil status, family status, sexual orientation, religion, age, disability, race, ethnicity, membership of the traveller community and socio-economic status, and any further grounds as may be referred in equality legislation in the future.

1.4 seek to develop positive relationships with pupils/students, colleagues, parents, school management and others in the school community, that are characterized by professional integrity and judgment.

1.5 Work to establish and maintain a culture of mutual trust and

respect in their schools."

The Code of Professional Conduct for Teachers recognise the important role that teachers play in the social and personal development of the students in their care beyond teaching. The "demand" communicated to staff in my email of 9th May 2022 was entirely in keeping with the Code of Professional Conduct for Teachers and was entirely consistent with its expectation of a commitment to inclusion and the accommodation of diversity. In addition, it was in keeping with the ethos of the school. As such, it was a reasonable and legitimate instruction to staff.

III Conclusion

CL 0049/2018 provides that, although disciplinary action will normally follow the progressive stages, the procedure may be commenced "at any stage of the process if the alleged misconduct warrants such an approach". I have invoked stage 4 of the disciplinary procedures due to the fact that, in my opinion, Mr Burke's behaviour, as alleged, may amount to gross misconduct. In challenging a legitimate instruction of the principal, Mr Burke has acted in an inappropriate and unacceptable manner. He has shown total disregard for the school management not only in front of his colleagues, but also in front of students and the members of the wider school community. It is not acceptable for a teacher to seek to challenge a school policy in such a public manner, regardless of the subject matter of the policy. Teachers are role models to students. Had a student interrupted a public school event in a similar manner that student would undoubtedly have been subjected to disciplinary action.

Whereas Mr. Burke contends that my actions as principal in this matter run counter to the ethos of our school, I would contend that Mr. Burke's public statement regarding his non-acceptance of transgenderism is not in keeping with the ethos of the school or the expected standards of teachers, as set out in the Code of Professional Conduct for Teachers. Schools are supposed to be safe places for students who should be able to rely on teachers to look out for, and act in, their best interests. While their children are at school, parents entrust their children to the care of teachers and other staff at the school who act in loco parentis to those students. It is well established that schools have a legal duty of care to students who are in their care. This duty of care applies to students on both a collective and an individual basis. I have

serious concerns about how Mr. Burke may act in the school in future in circumstances where he has stated his personal views on transgenderism in school and at a public event after the school term had ended. These concerns extend to the student concerned and the entire student body".

106. Mr. Burke has maintained that he was dismissed because of his objection to the principal's instruction to all staff to address the student by a new name and the 'they' pronoun and for his expression of his religious beliefs (for example in ground (v) of his grounds of appeal). There is simply no basis in the evidence at this stage to conclude that Mr. Burke has established a serious question either that he was dismissed for doing so or that a reasonable person having knowledge of the relevant facts, including the board of management's letter, the principal's Report, and the grounds of appeal, would apprehend that he was dismissed for those reasons. On the state of the evidence and the facts at this stage, a reasonable person reading the principal's Report could only conclude that the *"conduct issues"* in the report (which were the stated grounds for his dismissal) were the fora, timing and manner in which Mr. Burke raised his objections to the principal's instructions and not the fact that he objected to the instruction, or that he held certain religious beliefs, or even that he expressed his views. This is reflected in paragraph 45 of the judgment of Edwards J in the Court of Appeal in *Board of Management of Wilsons Hospital School v Burke [2023] IECA 52.* Edwards J was dealing specifically with the decision to put the plaintiff on administrative leave but had to consider the substance of the complaint against Mr. Burke. He said *"There was no evidence before the court that the constitutional rights identified by Mr. Burke in his counterclaim as rights to be enjoyed by him, were even engaged by the placing of him on administrative leave, much less breached. There was no evidence whatever that he was placed on administrative leave, because of the views that he holds, or because he maintains a conscientious objection to the school's inclusive policy. Rather the gravamen of the complaint received by the Board of Management, and the sensible basis for the decision to put him on administrative leave, was that he had misconducted himself in how he had sought to ventilate and publicise his grievance, doing so at time and places and in a manner that was considered inappropriate and disruptive and inimical to the orderly running of the school"* [emphasis added].

107. The contemporaneous documentation would also lead the reasonable person to understand that the *"conduct issues"* related to Mr. Burke's behaviour and not the fact that he objected to the instruction, that he held certain views, or that he expressed them. For example, by email of the 10th May, i.e after Mr. Burke had

raised his objection, the principal stated *"If you are not willing to include [name] in your classroom going further, please make an appointment to see me at our mutual convenience".* As noted by Birmingham J at paragraph 25 of his judgment in *Board of Management of Wilsons Hospital School v Burke [2023] IECA 52,* this seemed to him, and it seems to me, that *"the suggestion of a meeting at the mutual convenience of the appellant and the principal is indicative of a willingness to seek an accommodation ...".* Birmingham J also noted *"indeed in the course of the oral appeal hearing, the appellant appeared to concede as much."* There was a subsequent meeting, which seems to have been convened by the principal. Owens J states at paragraph 59 of his judgment following the plenary hearing of the school's proceedings against Mr. Burke *([2023] IEHC 288)* that *"the purpose* [of this meeting] *was to discuss what Enoch Burke had stated at the staff meeting"* and that the principal *"wanted to find an area of compromise which would accommodate Enoch Burke's personal beliefs, the needs of the student and the inclusive ethos of the school."* The principal did subsequently write to Mr. Burke in which she concluded that *"I expect that you will communicate with this student, in accordance with the wishes of the student and student's parents"* but this was only after the principal had asked Mr. Burke how he would address the student at roll call, for example, and he did not give a direct answer (see paragraph 60 of Owens J's judgment in *Board of Management of Wilsons Hospital School v Burke [2023] IEHC 288.* These interactions, the details of which the reasonable person must be taken to know, seem to me at this stage to completely undermine the establishment of a serious question that Mr. Burke was or is being disciplined for holding or even expressing an objection based on his religious beliefs.

108. Of course, that conduct may have been motivated by his religious belief but there is no fair question that a reasonable person would apprehend that he was dismissed for holding a religious belief, for refusing to follow an instruction due to his religious beliefs, for objecting to the principal's instruction or even for objecting to using a different pronoun or a different name. At this stage, the evidence is entirely to the contrary. His religious beliefs were part of the background as Edwards J put it in his judgment in the Court of Appeal: "...*They are all part of a tapestry that forms the backcloth to the present proceedings, but they are no more than that..."* and at paragraph 36 - *" ...there is of course a background to the matter, in which the appellant's views concerning, and the registering of him of a conscientious objection to, the school's policy to support a student who is transitioning from one gender identity to another, undoubtedly features, but the injunction applications were not about that."*

109. Of course, in assessing what has to be determined in the appeal regard

has to be had to the notice/grounds of appeal. However, care must be taken in this regard in the context of an appeal from a particular decision where the appellant is limited to an appeal on specified permitted grounds. An appellant can not self-define what the decision being appealed against and, therefore, the appeal itself are about. The appeal can only be based on the decision and the decision-making process under appeal. What the appeal is in fact about must be assessed objectively.

110. The statement of grounds which is exhibited in Mr. Christie's replying affidavit is a very detailed document running to thirteen pages (together with appended documents) and sets out Mr. Burke's case on his appeal very comprehensively. While I have considered it in full, it is not necessary to quote the entire document.

111. In an introduction section Mr. Burke refers to the stage 4 Report having been compiled by the principal because of his *"objection to a demand by the principal to all staff to address a student by a new name and the "they" pronoun and because I publicly expressed my Christian belief on transgenderism."*

112. He then addresses each of the grounds of review as follows.

(i) The agreed procedures were not adhered to

Under this first ground he appealed under four separate headings:

- First, that there was no serious misconduct to warrant a Stage 4 disciplinary process or suspension. He sets out a number of bases for this. In summary, these are as follows: (i) contributing to a staff meeting, speaking for two minutes at the close of a Chapel service, and asking the principal a question after dinner are not matters that warrant any disciplinary action, much less a Stage 4 disciplinary process, (ii) in taking those steps he was responding to *"a demand by the Principal to all staff to address a student by a new name and the "they" pronoun i.e. to affirm and accept transgenderism. This demand is wholly unlawful, unconstitutional, and contrary to the ethos of the school".* He then sets out the basis as to why he says it is unconstitutional and contrary to the ethos of the school and goes on to say that in those circumstances he was *"entirely justified in objecting both privately and publicly to the Principal's demand and indeed it was my duty to do so having regard to the law, the Constitution, and the ethos of the school in which I work";* (iii) the school did not attempt to address matters through

informal means as provided for under the Circular; (iv) nor did it seek to move through the stages provided in the disciplinary procedures; and (v) the alleged misconduct was not misconduct at all and did not warrant any disciplinary procedures let alone Stage 4.

- The second heading is that the principal's report was not on the facts in that it contained findings and conclusions which were made without providing him an opportunity to respond, thereby depriving him of natural justice and fair procedures and those findings and conclusions were highly prejudicial to him.

- The third heading is that the meetings of the board of management on the 15th August 2022 (at which it is claimed the Report was read and discussed) and the 22nd August 2022 (at which it was decided to suspend him) were devoid of natural justice and contrary to the Circular. He gives further particulars of procedural deficiencies in respect of the meetings. He says he was not treated reasonably and fairly as required under the Circular because his *"unblemished employment record and excellent service of four years at the school did not even factor in the Board's considerations nor did the irreparable damage that the decision to suspend would have on* me."

- The fourth heading is that the disciplinary meeting of the 19th January was a *"sham, devoid of natural justice and contrary to the Circular."* Again, there are very detailed particulars given of this ground which he relies on to submit to the Appeal Panel that the provisions of the Circular that the Board has a duty to act reasonably and fairly in all interactions with staff and that a teacher has the right to a fair and impartial examination of the issues being examined, to natural justice and to a presumption of innocence, were not adhered to.

(ii) All the relevant facts were not ascertained.

Under Ground 2, Mr. Burke sets out 2 separate headings:

- The first is that his *"unblemished employment record and excellent service of four years at Wilson's Hospital School were entirely disregarded by the Principal in her decision to start a Stage 4 disciplinary process against me and [the Principal's] compilation of the Stage 4 Report''* and he gives particulars of his record and service.

- The second is that the principal's report contains false allegations and significant omissions and that the principal has completely mischaracterised the staff meeting, the Chapel service, and the dinner afterwards, and therefore failed to ascertain the facts, present them fairly and failed to include facts which tend to disprove the allegations or minimise the seriousness of what is alleged. He sets out his account of these events. He also refers to the absence of any reference to his employment history.

  Under this ground, he also points to *"the complete lack of any acknowledgement in the Report of my rights under the Constitution to equality, freedom of expression, freedom of conscience and freedom of religion, or my rights under the Employment Equality Acts 1998 - 2015. The Report has been framed in such a manner as to imply that those rights do not exist. The only reference to my Christian beliefs is that they created a "challenging" situation, seeming to infer that they are unacceptable and must be gotten over. The Report does not reference the fact that the school's mission statement states that the school "maintains a distinctive Church of Ireland ethos, fostering distinctive Christian practice and teaching", or that the Church of Ireland's teaching recognises two genders - male and female."*

(iii) All the relevant facts were not considered and/or not considered in a reasonable manner

Under this third ground he says that he repeats the matters under the first and second grounds and goes on to say that the report contains false allegations and significant omissions and that the failure to adhere to the procedures and to natural justice at each step of the process indicates that there was pre-judgment. He also says that there was no genuine consideration or examination or pondering of the facts.

(iv) The teacher concerned was not afforded a reasonable opportunity to answer the allegation.

Mr. Burke relies on the matters set out in Ground 1 and further says that there was no informal process and stages 1-3 were by-passed. He also points to deficiencies in the report and that the board considered the report

at a meeting to which he was not invited. He repeats his submission that there was no misconduct to warrant disciplinary action.

(v) The teacher concerned could not reasonably be expected to have understood that the behaviour alleged would attract disciplinary action

It is worth quoting what Mr. Burke says about this ground in full:

> *"As I stated at I(a) above, contributing to a staff meeting, speaking for two minutes at the close of at Chapel service, and asking the Principal a question after a dinner are not matters that warrant any disciplinary action, much less at Stage 4 disciplinary process. More importantly, in taking those steps I was responding to a demand by the principal to all staff to address a student by a new name and the "they" pronoun i.e. to affirm and accept transgenderism. This context is critical. The principal's demand was wholly unlawful, unconstitutional, and contrary to the ethos of the school. I was therefore entirely justified in objecting both privately and publicly to the principal's demand and indeed it was my duty to do so.*
>
> *The school staff meeting is a place where robust discussion of issues is to be expected. The chapel service, being a religious service, was the most appropriate place to make an appeal about a serious and pressing religious matter affecting the school community. I was fully within my rights in speaking briefly with the Principal after the dinner which followed. I note that during that very brief conversation, Ms. McShane said to me, "we'll talk about it tomorrow". However, this did not happen. Rather, the next I heard from Ms. McShane was the Stage 4 Report issued approximately two months later - the week before school returned after the summer holidays.*
>
> *My actions were at all times protected by the Constitution (in particular Articles 40.1, 40.6.1(i), 44.1 and 44.2) and by the law. The Principal initiated disciplinary proceedings against me on the basis of (i) my objection to her demand to address a student by a new name and the "they" pronoun, and (ii) my expression of my Christian belief on transgenderism. That is clear from the Report, where she has set out her findings and conclusions in the second part of the Report under two headings, namely (i) "Mr Burke's objection to the direction to staff regarding the social transitioning of a student", and (ii) Concerns around Mr. Burke's public statement of his refusal to accept transgenderism". However, neither of these grounds justify*

disciplinary proceedings, given the constitutional guarantees for equality, freedom of expression, freedom of conscience and freedom of religion. The disciplinary process is therefore in breach of, and an unlawful interference with, my constitutional rights.

I could not reasonably have anticipated disciplinary action, and indeed was shocked to receive a copy of a Stage 4 Report on 15 August 2022. As already mentioned, there was no informal process and Stages 1-3 were bypassed. I had therefore no expectation or warning of disciplinary action."

(iii) The sanction recommended is disproportionate to the underperformance or misconduct alleged

Mr. Burke states that the alleged misconduct is not misconduct at all, therefore no sanction at all is justified and a proportionality analysis is not appropriate but he goes on in the alternative to effectively contend that the sanction is disproportionate.

113. The purpose of setting out the dismissal decision, the principal's report and the notice of appeal at such length is to identify precisely what, even on Mr. Burke's grounds of appeal, is the subject of the appeal. It would be immediately apparent to the reasonable person considering those grounds of appeal that they are overwhelmingly concerned with procedural and, in some instances, purely procedural matters. They are that (i) on his account, his behaviours at the staff meeting, at the chapel service or after the school dinner do not amount to serious misconduct; (ii) the school did not adhere to the Circular because they did not attempt to address matters informally and did not move through the different stages; (iii) the meetings of the 15th and 23rd August 2022 and the 19th January 2023 were procedurally fundamentally flawed; (iv) the general principles governing the procedures were not complied with; (v) the principal's Report (and the meetings) were flawed because they did not contain or ascertain or take account of the relevant facts and contained false allegations and significant omissions; and (vi) no sanction should have been imposed and if any sanction was to be imposed the one that was imposed was disproportionate. This is obviously merely a summary. The first of these, i.e. whether his conduct at the chapel service or after the school dinner amounts to or can amount to misconduct, is not a pure procedural matter.

114. A reasonable person considering the grounds of appeal will understand

that three points about Mr. Burke's religious beliefs, the use of a different pronoun, the principal's instruction and "transgenderism", are contained in the grounds:

(i) The "demand" of the principal, as Mr. Burke describes it (which description was rejected by the Court of Appeal), was wholly unlawful, unconstitutional and contrary to the ethos of the school and he was therefore entirely justified in objecting and, indeed, under a duty to object, both privately and publicly to the principal's instruction. He also says that his actions were protected by the Constitution and by law;

(ii) There is no acknowledgement in the principal's report of Mr. Burke's constitutional rights, including his right to equality, freedom of expression, freedom of conscience and freedom of religion, which are protected by the Constitution and the only reference to Mr. Burke's religious views is that they created a "challenging" situation (in fact what the principal said was she appreciated that the decision of the school may be challenging for Mr. Burke);

(iii) The principal initiated disciplinary proceedings against him on the basis of (a) his objection to the principal's demand to address the student by a new name and the 'they' pronoun and (b) his expression of his religious belief on what he terms "transgenderism".

115. In addition, in conducting a proportionality analysis in respect of the sanction, the Appeals Panel may have to have regard to Mr. Burke being motivated by his religious beliefs.

116. None of these require a decision on the rights or wrongs of "transgenderism" or of the principal's instruction and the plaintiff's objection to it, or whether a student should or should not be referred to by a different pronoun or whether a teacher can or should be required or compelled to use a different pronoun, particularly where that is contrary to his religious beliefs or whether *"holding and expressing the Christian belief on male and female amounts to gross misconduct."* Taking them in turn, the issue to be decided in relation to the first is whether, even assuming the principal's instruction was unlawful, unconstitutional and contrary to the ethos of the school, Mr. Burke was entitled (or indeed under a duty) to raise his objection in the places and at the times and in the manner in which he is alleged to have done. Of course, it will be a matter for the Appeals Panel to review the board's decision that Mr. Burke acted in the way alleged in

accordance with the prescribed grounds of appeal. In relation to the second, this is a purely procedural question of whether the principal properly treated of certain matters in her report. Finally, the core of the third ground is the question of the basis upon which the principal initiated disciplinary proceedings against the principal. This is a purely factual matter.

117. Thus, I am not satisfied that a fair or serious question has been established that a reasonable person would apprehend that the issue(s) which Mr. Burke believes are at the heart of the appeal (i.e. transgenderism and the profession and practice of religious beliefs) are actually the core issues or are the issues to be decided. This, of course, has consequences for whether there is a cogent and rational link between the grounds of alleged bias and the issues to be decided but first I should conclude the process of identifying the relevant facts.

Evidence of the ASTI/Mr. Christie's position and of evidence of bias

118. What is the position of Mr. Christie and/or the ASTI that Mr. Burke claim gives rise to the apprehension of bias? As noted above, Mr. Burke has used different language to describe the position(s) which he claims these parties have taken and which he says give rise to the apprehension of bias. These range from simply describing them as having publicly adopted a position on the opposite side to Mr. Burke's position to describing them as 'promoters of' and 'activists for' transgenderism and as having adopted a radical campaigning role and as becoming a vehicle for the promotion of transgenderism. The use of different language is unfortunate because it makes it more difficult to identify what Mr. Burke's case is, i.e. what the precise position is that he says gives rise to the reasonable apprehension of bias. I am taking it that it is in fact either and both of these alleged positions.

119. There are two aspects to Mr. Burke's claim.

120. The first is that Mr. Christie personally would be perceived as biased and the second is that he would be perceived as biased because, as General Secretary, he would be associated with the position held by the ASTI or matters which the plaintiff says are at the core of his appeal.

Objective bias of Mr. Christie personally

121. I am satisfied that there is no evidence to support the claim that a reasonable person would have a reasonable apprehension that Mr. Christie personally is objectively biased (as distinct from through his association with the ASTI'S position). Mr. Burke's claim is that (i) Mr. Christie is a *"promoter of transgenderism"* or *"an activist for transgenderism"* within the ASTI (Mr. Burke went so far as to say in his oral submissions that Mr. Christie had his beliefs on transgenderism and that the ASTI, under his leadership, was *"becoming a vehicle for the promotion of transgenderism");* (ii) he awarded those who advance transgenderism in schools because he presented an ASTI achievement award to a teacher in Cork who helped a group of students to establish a sexuality and gender acceptance group in their school; and (iii) he has worked closely with Transgenderism Equality Network Ireland *("TENI"')* over many years. Mr. Burke advances (ii) and (iii) as evidence that Mr. Christie is a promoter of or an activist for transgenderism within the ASTI and also as separate grounds in themselves.

122. Insofar as Mr. Burke relies on the allegation that Mr. Christie has worked closely with TENI over many years either as a standalone ground or as evidence of him being a promoter of or activist for transgenderism, the only evidence before the Court of Mr. Christie working with TENI is contained in Mr Christie's own affidavit. In that affidavit he volunteered that he met with a representative of TENI once only, in 2016, when he attended a seminar for principals and deputy principals which included a talk on how schools might deal with transgender children. This was addressed by a TENI representative. One meeting with a TENI representative seven years ago would not cause the reasonable person to consider that Mr. Christie has a close working relationship with TENI over many years. Mr. Burke added to this basis for his claim in his replying affidavit by saying that the presentation received praise in the ASTI magazine and that Mr. Christie is one of the seven members of the editorial board of the union magazine. It seems to me that these in fact relate to the claim against Mr. Christie on the basis of his association with the ASTI rather than his own alleged promotion of a particular point of view. In any event I do not believe that when assessed by the standard of the reasonable person there is any substance to these points and I return to them below. Mr. Burke also placed some emphasis on the fact that Mr. Christie's reference to this event was misleading in that it did not mention that it was an official ASTI event and, according to Mr. Burke, gave the impression that Mr. Christie simply came across the event as he was passing through the hotel where the event was being held. It is correct to say that Mr. Christie did not refer to it being an official ASTI event but that does not make it misleading. The context in which Mr. Christie referred to the event was in response to Mr. Burke's claim that he, Mr. Christie, had a close relationship with TENI and Mr. Christie was making the point that he had only ever

met a representative of TENI on one occasion.

123. In relation to the claim of objective bias against Mr. Christie personally on the basis that he presented an award to a teacher, Mr. Christie's uncontested evidence is that he was invited to present the award. In my view, a reasonable observer would readily appreciate that Mr. Christie was acting in his capacity as General Secretary in presenting this award. Mr. Burke also points to the fact that Mr. Christie is one of eight members of the ASTI Awards Committee that decides on such awards. In my view no reasonable person would have a reasonable apprehension on the basis of those facts that Mr. Christie personally was a promoter of or activist for transgenderism within the ASTI or otherwise or was personally biased against Mr. Burke's position. I will have to return to this award when considering whether there is a serious question that Mr. Christie is objectively biased by association with the ASTI's position.

124. Absent these, there is simply no evidential basis for alleging or concluding that Mr. Christie has acted as a promoter of or activist for transgenderism within the ASTI. It is a mere assertion or expression of belief by Mr. Burke. It is largely based on the allegation that the ASTI has been a promoter of transgenderism (the basis of which is discussed below) since 2016 and Mr. Christie has been General Secretary since 2016 and therefore he must be a promoter of transgenderism within the ASTI. There is no evidence of that.

125. There is not even a sound starting point for the claim. I should say that the following discussion also applies to the claim that the ASTI is a promoter of transgenderism. Mr. Burke does not he say what he means by *"a promoter of"* or *"an activist for"* 'transgenderism' (which he defines as *"the ideology that each person has a 'gender identity' which may or may not align with their biological sex*"). It is abundantly clear that Mr. Burke has his ideology based on his religious belief and it appears that he believes that anyone who does not subscribe to the same position as him on this issue has a contrary ideology, ie. *"transgenderism".* That does not follow. Even if 'transgenderism' is (and it is important to remember that it has been defined by Mr. Burke) is taken to be an ideology, it is possible and, I venture to suggest, commonplace for a person to not subscribe to a particular ideology but it does not follow that they subscribe to, let alone promote, or are active in the cause of another ideology. Even in the area under discussion, the reasonable person will appreciate that a person can be prepared to accede to a request by an individual, be it an adult or child or the child's parents, to be called by a different name or referred to by a different pronoun (they may even believe that such a request should be acceded to) without being a promoter

of or activist for an ideology. Mr. Burke relies on Mr. Christie's own statement at paragraph 31 of his affidavit that he accepts that *"a person's gender identity and their biological sex may not necessarily be the same thing in all cases".* Mr. Burke says that this is a declaration of bias. This in itself cannot be a ground upon which a reasonable person would conclude that Mr. Christie is a promoter of or an activist for *"transgenderism"* (and therefore biased against Mr. Burke). Firstly, the Oireachtas has, by making provision in the Gender Recognition Act 2015 for a person to change gender from what is recorded on their birth certificate, acknowledged that a person's biological sex may not necessarily be the same as that person's gender. This statement by Mr. Christie reflects the legal position in the State. Mr. Burke makes the point that Mr. Christie's statement goes further than the 2015 Act because it is not restricted to two genders - male and female - whereas the Act is and because the Act does not refer to 'gender identity'. But this is to miss the point. The Act is based on the premise that a person's gender may not be the same as their biological sex, as is Mr. Christie's statement. Secondly, and related to this, even if Mr. Burke's statement goes further than the 2015 Act, the mere acceptance of something by a person does not make that person a promoter or activist for that position. This statement and Mr. Christie's preparedness to use a different name and a different pronoun does not make him *"a promoter of"* or *"an activist for"* an ideology, as described by Mr. Burke. Even if *"transgenderism"* is taken to be an ideology, there is not a shred of evidence that Mr. Christie personally promotes or promoted it within the ASTI.

126. Thus, I am satisfied that there is no basis upon which a reasonable person would have an apprehension that Mr. Christie personally is a promoter of or activist for transgenderism within or outside the ASTI and therefore I am not satisfied that Mr. Burke has established a serious question on that basis that there is a reasonable apprehension that Mr. Christie would not decide the appeal impartially.

Bias by association - imputed with the ASTI's position

127. At paragraph 19 of his written submissions, Mr. Burke submits that *"As General Secretary of the ASTI [Mr. Christie] is publicly associated with the aforementioned views on transgenderism and specifically in relation to the Plaintiff's case. A reasonable and impartial observer would have a grave concern that Mr. Christie could not approach the Plaintiff's appeal from a neutral and unbiased standpoint''.* The defendants submit (at paragraph 49 of their written submissions) that Mr. Burke's case relies on the *"idea that Mr. Christie can personally be imputed and ascribed with (what Mr. Burke asserts are) the*

positions and actions of the ASTI and its employees" and that *"[t]here is no authority to support such an imputation, and in fact several authorities referred to above point in the opposite direction: for example, Locabail, Helow, and the judgment of Charleton J in Kelly. The fact that someone was, or is, a member of a particular organisation is not, absent something more and irrespective of that organisation's views, sufficient to maintain a claim of objective bias."*

128. Fennelly J in *Ó Ceallaigh v An Bord Altranais [2009] IEHC 470* noted that attempts had been made in a number of cases to give general guidance on assessing the presence or absence of objective bias. He referred to a frequently quoted excerpt from *Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 45.* Fennelly J said at paragraph 43:

> *"43. Many attempts have been made not so much to lay down rules as to provide general guidance to courts called upon to judge on the presence or absence of objective bias. The categories range from real or believed financial or property interest through close family connections and intimate friendships to broader categories of association, common interests, pursuits or characteristics. One passage which has been quoted in a number of Irish cases (including in several of the judgments in Orange Communications) is the joint judgment of Lord Bingham, Lord Woolf and Sir Richard Scott, V-C., in the Court of Appeal in England in Locabail (UK) Ltd -v- Bayfield Properties Ltd [2000] Q.B. 45:*
>
> *"It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any members of the judge's family; or previous political association; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extracurricular utterances... or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same inn, circuit, local law society or chambers….By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any*

member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind; or if, for any other reason, there were real grounds for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and to bring an objective judgment to bear on the issues before him....

44. Murphy J commented on the above passage in his judgment in Orange Ltd. v. Director of Telecoms. (No. 2) [2000] 4 IR 159 at p. 243 as follows: - "It is unnecessary to express any view whether all the circumstances listed by Lord Bingham as being unexceptional would be similarly treated in this jurisdiction or whether, indeed, a comparable list here would be even longer."

129. Fennelly J also referred to the judgment of Denham J in *Bula Ltd v Tara Mines (No.6) [2000] IR 412* and concluded that:

"[T]his decision of the Supreme Court makes it clear that aside from the mere fact of the relationship, there must be an additional element to the association which has the potential to affect the adjudicator's impartiality in the case, having regard to the nature of the relationship and the issues to be determined in the case."

130. In *Helow (AP) v Secretary of State for the Home Department and another (Scotland) [2008] UKHL* 62, the House of Lords had to consider a claim of objective bias against the judge who had refused the appellant's petition under section 101(2) of the Nationality, Immigration and Asylum Act 2002 seeking asylum. The basis of the claim of objective bias was the judge's association with an organisation and therefore with its views. The appellant's claim for asylum was grounded on the claim that she and her family were involved politically with the Palestinian Liberation Organisation; that in September 1982 she was living in the Sabra/Shatila refugee camp in Lebanon when it was attacked, and that she had maintained

publicly that Mr. Ariel Sharon who later became President of Israel, was implicated in the massacre through the Israeli Defence Forces; in 2001 she had assisted Belgian lawyers investigating the attack and was involved in a criminal case brought in Belgium against Mr. Sharon; was regarded as holding anti-Israeli, anti-Lebanese and anti-Syrian political opinions and would be at risk from the authorities of those countries as well as factions favourable to those countries if she were required to return to Lebanon. Her claim was rejected and it eventually ended up before Lady Cosgrove. The petition was refused by Lady Cosgrove and a challenge to that decision was brought on the basis that Lady Cosgrove was a member of the International Association of Jewish Lawyers and Jurists and had been a joint founder member of a Scottish branch of the Association. It was submitted that the Association had *"'a strong commitment to causes and beliefs at odds with the causes and beliefs espoused by the appellant', this on the basis that the Association is 'anti-Palestinian..., anti-Moslem..., anti-pathetic to the PLO..., supportive of Israel..., supportive of Ariel Sharon..., critical of the legal action against Mr. Sharon..., a campaigning organisation..., [using] immoderate expression..., one-sided..., and recruiting members as activists..."*. These epithets were alleged to be justified by the contents of various policy statements, presidential messages and contributors' articles published or reproduced in the Association's quarterly publication 'Justice' in years ranging from 1994 to 2004.

131. Lord Rodger said when considering some of the comments and articles in the quarterly publication (which had been described in the judgment of Lord Hope):

> *"18. But it is not suggested that Lady Cosgrove has ever said anything remotely comparable. Nor is it suggested that she has ever expressed support for the more extreme views expressed by the President of the Association or in any of the articles in "Justice". In that situation there is, as a matter of general principle, no basis for fixing her with the views of the President or other contributors. She is, quite simply, an intelligent and educated individual whose reaction to the articles - supposing that she had read them - is quite unknown.*
>
> *19. Moreover, those who were conducting the affairs of the Association during the relevant period were well aware that, in actual fact, members of the Association held widely differing views. The journal specifical!y says that the views of individuals and organisations published in it are their own and that inclusion in it does not necessarily imply endorsement by the Association. Even when referring to the issues confronting Israel, in her address to the international conference in December 2001, the President acknowledged that*

"We know for a fact that the members of this Association are as divided on these issues as are Israelis and Jews everywhere.

20. I am accordingly satisfied that the fair-minded and informed observer would not impute to Lady Cosgrove the published views of other members, by reason only of her membership of the Association."

132. Lord Mance in his judgment set out the substance of certain speeches, messages and policy statements issued by the President of the Association and said that these give rise to different considerations than the articles in the publication in so far as *"they are not subject to any disclaimer and came from the Association's leading figure".* He said at paragraph 53 to 55 that a Judge who has expressed, or was President of an association which had expressed, these views would be regarded by a fair-minded person as too closely committed and could not hear the case but:

"53. … *the President - when she said that she was speaking personally, when she invited solidarity and support and when she recognised the existence of internal conflicts and divisions of opinion within Israel – was, correctly, acknowledging that she could not either determine or reflect the views of any individual member. There is nothing save membership of the Association to link Lady Cosgrove and the President. There is no suggestion that Lady Cosgrove was in Jerusalem in December 2001 to hear the President's greeting. There is no question of Lady Cosgrove having committed herself expressly to any such views as the President or any other spokesperson for the Association expressed. There is nothing to show that she was even aware that they were being expressed. Lady Cosgrove is in these respects, and apart from her membership, in no different position to any judge, who may or may not have private views about issues which come before the court, but who is expected to put them aside and decide the case according to the law.*

…

55. It is no doubt possible to conceive of circumstances involving words or conduct so extreme that members might be expected to become aware of them and disassociate themselves by resignation if they did not approve or wish to be thought to approve of them. But the present material falls far short of involving such circumstances...But I cannot think that a fair-minded and informed observer would in the light of Lady Cosgrove's continuing membership alone conclude that there was a real possibility that the Association's President

was in substance speaking on Lady Cosgrove's behalf or that Lady Cosgrove was in any way endorsing or associating herself with statements of the character presently in issue made by the President or Mr Lack or anyone else speaking on the Association's behalf in public or to bodies such as the United Nations Commission on Human Rights."

133. Charleton J in *Kelly v Minister for Agriculture [2021] IESC 23* at paragraph 186, said *"...just because one is of a particular religion or national identification and is part of an association with a magazine that expresses strong views does not mean identification with those views, much less an apparent bias disqualifying a member of the association from dealing with asylum cases."*

134. Thus, it is clear from these authorities that mere subscription to or membership of an association is not sufficient to be imputed or ascribed with the views or positions of the association. Something else is required.

135. However, here we are not dealing with a mere member of the association but the General Secretary of the association. It is difficult, if not impossible, to see, how a reasonable person would not, at least to some extent, associate the head of the organisation with the views or positions taken by the organisation, at least in the area in which that organisation operates (in this case the education field). A general secretary is in a very different position to an ordinary member, or possibly even a member of the executive body, of an organisation. In *Helow,* for example, while Lady Cosgrove was a founder member of a branch of the association, the evidence did not show that she had any other active involvement other than continuing as a member and subscribing to the quarterly publication. The general secretary is the leader or head of the organisation and in many respects is the public and representative face of the organisation and it seems to me is likely to be ascribed with the views of the organisation when acting in his capacity as General Secretary.

136. Of course, the reasonable person will also know that the positions and policies of a democratic organisation such as a trade union, particularly one with approximately 18,000 members, will be the product of a democratic process amongst its general membership or at least amongst the executive body. It is entirely possible that a General Secretary may not personally agree with a particular decision or position taken by the organisation. The reasonable person will also know therefore that it does not necessarily follow that the General Secretary personally holds or shares the same view as adopted by the organisation. That will be patently obvious to any reasonably informed observer. (There is, of course, no evidence in this case that Mr. Christie disagrees with any relevant view or position of the ASTI).

137. It follows from this, therefore, that the reasonable person will only ascribe the organisation's position to the General Secretary in his capacity as General Secretary and therefore within the area of functioning of the organisation. There does not seem to me to be any basis for saying that a reasonable observer would conclude that the leader of an organisation who represents that organisation's views and positions, which are the product of a democratic process, necessarily personally holds those views or can be imputed with them outside his role as General Secretary or as a representative of the organisation.

138. This is of relevance in this case because the evidence is that Mr. Christie does not serve on the Appeal Panel in his capacity as General Secretary. He is, of course, nominated by the ASTI but he is not acting as a representative of the union. He is to a very large extent acting in his personal capacity and, as I note above, a reasonable person would not ascribe the views of an organisation such as a union to the leader personally in his private life.

139. However, it seems to me that it would be artificial to describe Mr. Christie's role on the appeal panel as purely personal or, more particularly, it would be artificial to believe that the reasonable observer would see Mr. Christie's role as purely personal and separate or removed from his role as General Secretary. The Appeal is very much in the educational field, which is the area of operation of the union of which he is head, and, it seems to me, within the field within which a reasonable person would, at least to a certain extent, associate him with the views or positions of the organisation.

140. Thus, I am satisfied that there is a serious question that a reasonable, informed observer would associate Mr. Christie with the views or positions of the union in the context of participation in an Appeal Panel.

Evidence of the ASTI's position

141. What then does Mr. Burke say the views, positions or actions of the ASTI are that lead to the reasonable apprehension of bias on the part of Mr. Christie by association. As noted above, he has expressed this in various ways and using various language ranging from that the ASTI is a promoter of transgenderism, is a vehicle for transgenderism, has a "*radical campaigning role*" on the issue and is an accomplice of TENI in rolling out this ideology. Even if Mr Burke does not go that far, the essence of what he says is that the ASTI has unequivocally advised schools to accept and use transgender pronouns, which is contrary to his position, and has

publicly fostered and advanced this approach since 2016 and in particular in public comments in direct response to his case and that this approach is so contrary to his position on the issues which he claims his appeal is about that there is a reasonable apprehension that he would not get a fair hearing. Mr. Burke relies on four specific matters in making these claims. As the reasonable person is to be taken as being armed with all the correct facts, I propose to set out what the facts are in relation to these specific matters and other relevant facts. I will then, in the Discussion and Conclusion section below, consider those facts further and what they mean to the reasonable person.

142. The first matter relied upon by Mr. Burke is the presentation by the ASTI of an award to the teacher who helped students to establish a sexuality and gender acceptance group in the teacher's school.

143. Mr. Burke exhibited a newspaper article which referred to the presentation. It stated that the award was *"in recognition of [the teacher's] exceptional contribution to her school community... [The teacher] was recognised for her commitment to supporting LGBTQI+ students and her work in promoting a healthy and positive environment for the entire school community. [The teacher] helped a group of students to establish a sexuality and gender acceptance group in the school. This allowed LGBTQI+ students to meet up in a safe space and voice their issues and concerns...The ASTI achievement awards recognise the outstanding contribution of second-level teachers to their students, schools, communities and society."* Mr. Christie did not seek to disagree with or distance himself or the ASTI from any of these statements.

144. This award was presented at the end of 2022/2023 school year. During that year Mr. Burke's suspension for, as he puts it, *"objecting to a demand of a Principal to call a [adjective] student by a new name and the "they" pronoun was widely reported on in the media."* He also points out that it was one of only two awards presented by the ASTI at the end of the school year 2022-2023.

145. Mr. Christie gave evidence in his replying affidavit that the ASTI confers similar awards on its members quite regularly in relation to a wide range of activities. He avers that since May 2022 the union has given awards to teachers for activities such as establishing a podcast for students in relation to the new *"Politics and Society"* school subject, managing a League of Ireland football team, creating a website for students focused on business and economics, and representing Ireland at the World Ice Swimming Championships.

146. The second matter relied upon by Mr. Burke is that the ASTI has

"unequivocally advised schools to accept and use transgender pronouns" and the approach has been publicly fostered and advanced by the ASTI over the course of Mr. Christie's term as General Secretary since 2016. He places particular reliance on public comments by the Deputy General Secretary which were reported in a newspaper article written by a well- known journalist which appeared in the Irish and Sunday Independent newspapers (print and digital versions) several days after what Mr. Burke describes as *"my case"* first appeared in the media. The subheading on this article was *"ASTI advises schools to use the pronouns that students request to be addressed by, but not everyone agrees".* It was a reasonably long article and contained the following shorter excerpt:

> *"The Association of Secondary Teachers, Ireland (ASTI), which represents more than 18,000 secondary teachers, said it generally advises schools to use the pronouns students request to be addressed by. The association's deputy general secretary, Diarmuid de Paor, said: "We don't have a written policy, but certainly we would advise schools to use the pronoun that a child wishes to be used, and that's generally what happens.*
>
> *There can be difficulties where the child says one thing and the parents say something else. We would generally encourage the parent to support the child."*

147. It is not clear whether Mr. de Paor was speaking in a formal capacity as Deputy General Secretary but I am satisfied that the reasonable person would understand that he was speaking on behalf of the ASTI or at least that his comments reflected the position of the ASTI. Indeed, it has not been suggested that they do not.

148. I deal with what Mr. Burke says about this article in the Discussion and Conclusion section below but it is necessary to refer at this stage to some of his points in order to identify some of the facts. He says that the article and Mr. de Paor's comments were a direct response to his case, came at a time when his suspension for what he claims was his refusal to use the different pronoun was in the media and his name was used twice in the article.

149. Factually, the article was published around the same time that there was reporting of Mr. Burke's case. Indeed a reasonable person would readily conclude that this is probably why the journalist wrote and the newspaper published the piece.

150. The correct facts when one reads the text of the article in full, as the reasonable person is expected to do, are that neither of the two references to Mr. Burke's name were by Mr. de Paor. One of them was by the journalist when referring to the fact that Mr. Burke had attended some sort of awareness event which the school obtained from a Department of Education-funded charity which supports LGBTQ+ youth and the other was in a quote by a person who runs an organisation that is described as not *"subscribing to gender identity theory".*

151. None of Mr. de Paor's comments were directed to what should happen in Mr. Burke's case. They did not address or touch on (i) the position that ought to obtain where a teacher objects to using a pupil's preferred pronouns on religious or conscientious grounds; (ii) whether a refusal by a teacher to use a pupil's preferred name or pronouns could ever justify the commencement of disciplinary proceedings against that teacher or ground a finding of serious misconduct under the Circular, or (iii) anything relevant to the grounds of review set out above.

152. The evidence is that the ASTI has no formal or written policy relating to transgender students.

153. The third basis upon which objective bias is claimed is alleged close links between TENI and the ASTI. Mr. Burke claimed in his oral submissions that the ASTI and TENI are *"bedfellows"* and *"accomplices"* who are intent on *'rolling out'* this ideology in schools. One basis for the allegation that there are close links is that Mr. de Paor, who is the most senior member of the ASTI's Equality Committee, sits on TENI'S Education Advisory Group. A second basis is that TENI were invited to deliver a talk at the ASTI event in 2016 and that this was reported on favourably in the union magazine.

154. The uncontested evidence and therefore the facts which the reasonable observer must be taken as knowing in relation to the first of these are as follows. TENI's Education Advisory Group is one of twelve external organisations or committees on which an individual from the ASTI sits. These include the ICTU, the National Women's Council, Amnesty International, the Educational Studies Association of Ireland, various committees of the ICTU, and the General Synod (Church of Ireland) Board of Education. Mr. de Paor is Deputy General Secretary and is chair of the ASTI's Equality Committee and the uncontested evidence is that he was invited by TENI to join its Education Advisory Group in around 2017/2018, that he sought approval from the ASTI's Standing Committee to do so, and that he only attended two or three meetings of the group, the last of which was more than three years ago.

155. The second basis for Mr. Burke's claim that there is a close relationship between the ASTI and TENI is that a representative from TENI spoke at the ASTI event in 2016 and this was reported on favourably in the ASTI's newsletter.

156. The facts in relation to this are as follows. The event was a formal ASTI seminar and the union had invited TENI to give one of four presentations at the event. The seminar, including the presentation by the TENI representative, was subsequently reported on in the union magazine. It seems from the magazine that the seminar covered four areas *"of critical interest to school leaders":* social media and the law, post of responsibility appeals, being transgender in school, and ethnic equality monitoring. It stated that the *"seminar afforded this group of ASTI members an opportunity to meet and express their views on how their union should approach the pressing issues facing it."* In relation to the presentation in question the magazine stated *"This presentation proved the real eye-opener of the day. Many principals and deputy principals expressed the view that, having thought that this issue might be of no great relevance to their schools, this was the most important session for them. Catherine Cross of TENI (Transgender Equality Network Ireland) engaged her audience in a sympathetic outline of the issues that arise in a school when a student decides to inform the school of their decision to be identified as having a gender different their birth gender.*" The magazine also named the individuals who gave the presentations on the other topics. In his oral submissions Mr. Burke placed some emphasis on the fact that the report stated that *"...this was the most important session of the day."* In fact, as is clear from this quote, the article was reporting what had been stated by the attendees and was not an editorial comment.

157. The final specific issue raised by Mr. Burke is that the ASTI is a member of the Children's Rights Alliance and that in February 2018 the Alliance made a submission to the Review Group for the Gender Recognition Act 2015 that the Act should be amended to allow children under 16 to legally change their gender, recommended that there be no minimum age requirement to do so and called for children aged 16 years and over to be permitted to change their gender without parental consent. I do not have to comment on whether this characterisation by Mr. Burke fully accurately reflects the contents of the submission. He describes this as a *"radical and disturbing submission".* Mr. Burke raised his concern about the making of this submission in his second affidavit. Mr. Christie replied on affidavit, saying that the ASTI was not involved in the preparation or consultation on this submission. Mr. Burke disputes this evidence, saying that the claim that the ASTI was not involved is ludicrous and that he does not accept it. However,

he has not adduced any evidence to the contrary or even suggested that there is evidence to the contrary. Thus, at this stage, the facts which the reasonable person must be taken to know are that (i) the ASTI is a member of the Childrens Rights Alliance; (ii) there are approximately 110 member organisations of the Childrens Rights Alliance which include groups as different as the Association for Criminal Justice Research and Development, Atheist Ireland, Barnardos, Catholic Guides of Ireland, Child Care Law Reporting Project, Department of Occupational Science and Occupation Therapy UCC, Irish Association of Social Workers, Irish Heart Foundation, Jesuit Centre for Faith and Justice, National Museum of Childhood, Scouting Ireland, Society of St. Vincent de Paul, UNICEF Ireland; (iii) in 2018, the Childrens Rights Alliance made a submission to the Review Group under the Gender Recognition Act 2015 that certain changes should be made to the Act and to the legal position relating to minors; and (iv) the ASTI was not involved in the preparation or consultation on this submission.

Other relevant facts

158. I have previously dealt with the acceptance by the State that a person may transition in their gender.

159. Mr. Christie gave uncontested evidence in paragraph 6 of his replying affidavit that the ASTI participated actively in the negotiations which led to the creation of the disciplinary procedures in the Circular and that *"during those negotiations it sought and secured robust protections for members and all teachers, including an independent appeal process, the integrity of which it is committed to upholding. The inclusion of such a process in the Circular was an important objective for the ASTI in participating in the negotiations."* He also gave uncontested evidence that the provision that a teaching union nominee would sit on a Disciplinary Appeals Panel reflects a desire to bring the perspective of teachers and their trade unions to the decision-making process and that in having its members sit on Disciplinary Appeals Panels *"the ASTI seeks to ensure that teachers are treated fairly in the decision-making process."* As this evidence is uncontested I must treat it as comprising facts of which the reasonable observer will be aware.

160. The evidence is also that the ASTI has a very well-known strong track record of protecting the interests of its members irrespective of the member's characteristics to include their sex, race, religion or political views and in a disciplinary context this includes ensuring that the right to fair procedures is vindicated.

161. The ASTI does not have any formal or written policy relating to transgender students.

162. Rule 5 of the ASTI's Rules and Constitution (April 2023) states that *"No political or sectarian topic shall be introduced or discussed at any meeting of the association"* and Mr. Christie's uncontested evidence is that as a matter of course the ASTI does not take any position on sectarian or political issues.

163. Other than possibly the Independent article (to which I return), the ASTI has never commented on or taken any position on Mr. Burke's case.

Discussion and conclusion

No cogent or rational link

164. As noted above, Mr. Burke has expressed his case against the ASTI (and Mr. Christie) in various ways, some more extreme than others, describing their position as a *'radical campaigning role'* or as the *'promotion'* of *'transgenderism'.* To put Mr. Burke's case in more neutral terms, the core of Mr. Burke's case is that the ASTI has taken a public position on matters at the heart of his appeal and a reasonable observer would therefore have a reasonable apprehension that Mr. Christie would not determine the appeal impartially or fairly, and would be perceived as having pre-judged the issues to be decided.

165. However, a fundamental flaw in Mr. Burke's case is that objectively, on a proper consideration of the dismissal letter, the principal's report and the grounds of appeal, there is not a fair question that the Appeals Panel has to decide any issue in respect of which it is claimed the ASTI has taken a position. As discussed above, on the evidence at this stage, objectively (i) the decision to dismiss Mr. Burke was on foot of those conduct issues set out in the principal's report and those conduct issues were the fora, timing and manner in which Mr. Burke raised his objections to the principal's instruction; (ii) Mr. Burke's appeal is overwhelmingly concerned with procedural matters (as set out above); (iii) the grounds of appeal concerning his religious beliefs and his constitutional rights do not require any decision on the rights or wrongs of his or the school's views on whether or not a student should be referred to by 'they' or on whether a teacher can be instructed to refer to a student by a pronoun of the student's choosing - as noted above, in light of the contents of the grounds of appeal, the Appeals Panel will have to decide whether,

assuming that the principal's instruction was unlawful, unconstitutional and contrary to the ethos of the school, Mr. Burke was entitled (or under a duty) to raise his objections in the places and manner in which he did, (iv) whether the principal properly considered Mr. Burke's claimed constitutional rights in her report; and (v) whether, as a matter of fact, the disciplinary proceedings were initiated on the basis of his objection to the principal's instruction and on the basis of Mr. Burke's expression of his religious beliefs.

166. There is therefore simply no cogent and rational link between the basis of the alleged objective bias, i.e. the ASTI's position on what Mr. Burke terms *"transgenderism",* and what has to be decided in the appeal which would cause the reasonable person who was armed with knowledge of all the circumstances and of the disciplinary process, including the appeal, to have a reasonable apprehension of bias. Thus, even if the ASTI's position is or would be perceived by the reasonable observer in any of the ways described by Mr. Burke, objectively there is no cogent link between that position and the issues to actually be decided in the appeal. Conversely, this is the case even if the Appeals Panel has to consider whether the principal's instruction was unlawful, unconstitutional or contrary to the ethos of the school because the ASTI has not taken any position on those questions.

167. That seems to me to be fatal to Mr. Burke's case. If there is no cogent or rational link between the association or the alleged ground of bias or serious question of such a link then there can be no serious question that a reasonable person would have an apprehension of bias.

168. In any event, even if I am wrong on this, or alternatively, if the fact that *'transgenderism'* and the holding and expression of religious beliefs are a sufficient part of the overall context to establish a cogent and rational link, I am not satisfied that there is a serious question that the facts relied upon by Mr. Burke when taken together with all of the other relevant facts would cause the reasonable person to have an apprehension that Mr. Christie has pre-judged the appeal and would not decide the appeal impartially or that there is a real possibility that he would not do so.

<u>Alleged position of the ASTI based on the facts above</u>

169. It is important to recall that the mere fact of holding a different opinion or position to that of the person the subject of a decision is not sufficient to ground a finding of objective bias. There must be something more. This is put in

various ways in the authorities. Fennelly J said at paragraph 551(d) of the judgment in *O'Callaghan v Mahon* that *"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 which show prejudice, hostility or dislike towards one party or his witness."* In *Helow* Lord Hope said that the reasonable person *"will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially."* Butler J in *Lally* said that the plaintiff, in order to establish objective bias, *"does not have to show that the other members of the Board of Management were actually biased; it may be sufficient to show that by virtue of their prior dealings with the issues giving rise to the allegations against, a reasonable person would be concerned that they could not approach her case with an open mind."* The reasonable person will be aware that people hold different views, opinions and positions and will know that the mere fact of holding a different view, opinion or position does not necessarily mean that a decision-maker will not adjudicate fairly. The question is whether there is a reasonable apprehension that the decision-maker can not set aside their own opinion sufficiently to adjudicate fairly on the case: to put it another way, whether there is a reasonable apprehension that there is a real possibility that the decision-maker will not be able to do so. Part of the assessment of that is how strongly the decision-maker is perceived by the reasonable person to hold that view, opinion or position.

170. As discussed above, Mr. Burke relies on four specific bases in respect of the position of the ASTI and in claiming that Mr. Christie is therefore objectively biased. The facts relating to these matters are set out above. It is also important to note that these are relied on individually and cumulatively. It is important to bear in mind that while it is sometimes necessary to parse specific bases for a claim of bias, the question of whether there is a reasonable apprehension of bias (or more particularly a serious question of a reasonable apprehension) must be assessed by reference to the totality of the correct facts with which the reasonable person is taken to be armed. Because of the nature of Mr. Burke's claim, it is necessary to parse some of the individual bases advanced. This is particularly true of his reliance on the article in the Independent newspapers. I therefore do so, but ultimately my assessment is determined by reference to all of the facts taken together because that is the approach that the reasonable person with the attributes described above would take. I am satisfied that when some individual facts are taken in isolation or with some other facts there is the possibility that the reasonable person would have a reasonable apprehension of objective bias. However, this is not the way the reasonable observer will approach matters and I am satisfied that such apprehension

would be amply alleviated when the reasonable observer takes account and assess all the relevant facts.

Presentation of award

171. It will be recalled that Mr. Burke relies on the presentation by Mr. Christie of an award to a teacher for her contribution to her school community in helping students to set up a sexuality and gender acceptance group. He relies on this as a basis for his claim against Mr. Christie personally and by association with the ASTI.

172. He summarised his claim in his oral submissions when he said that this group is an exclusivist and activist group and that by the ASTI presenting an award to it, the ASTI is participating in that activism and saying that this group is in line with *"their own radical activist strategy."* At the oral hearing, Mr. Burke expanded on his description of the group as an "exclusivist" group and explained that a student or teacher who holds and expresses what he describes as *"the Christian belief on male and female"* would be excluded from such a sexuality and gender acceptance group. Mr. Burke's point appears to be that a teacher who forms such a group should not be considered for an award because some students or teachers would be excluded and that the ASTI, by deciding that the teacher does deserve an award, is deciding between two views. He also says that lots of other worthy contributions by teachers go unrecognised. He also submitted that for a reasonable observer to conclude that Mr. Christie/the ASTI are not biased an award would have to be made not just to a Christian teacher or Christian group but to a teacher or group for upholding the Christian belief in male and female, i.e. of the same view as Mr. Burke. He also pointed to the fact that this award was just one of two presented at the end of the 2022/2023 school year and that this was a school year when his suspension when is in the media.

173. At first blush, there appears to be some merit to Mr. Burke's overall point, though not some of the individual features of it. For example, it is likely that the reasonable person would believe that, in deciding to present an award to a teacher who helped establish a group, the ASTI either approves of or at least does not disapprove of the group itself and that the timing of the award is relevant. (Indeed, it is clear from the fact that Mr. Christie in his affidavit did not disagree with the contents of the newspaper report of the presentation or seek to distance himself or the ASTI from them that the ASTI does not disapprove of supporting LGBTQI+ students or of the notion of a sexuality and gender acceptance group or of facilitating LGBTQI+ students to meet up in a safe space to voice their issues and concerns.)

174. However, that is to take a somewhat superficial view of matters and is to take individual facts in isolation and without any proper analysis. That is not the approach of the reasonable person with the attributes described above. Approval of a group which offers support to LGBTQI+ students or which facilitates them meeting in a safe space to voice their issues and concerns is a far cry from the reasonable person concluding that the ASTI might be concluding that the ASTI is a promoter of transgenderism or as having a radical activist strategy. It is also a far cry from giving rise to an objectively reasonable apprehension that the ASTI has a sufficiently strong view on transgender issues that Mr. Christie might have difficulty deciding Mr. Burke's appeal fairly even if the appeal did concern such issues either as part of the context or because my assessment of the issues which fall to be decided in the appeal is wrong. This is particularly, though not exclusively so, in circumstances where the State in its laws recognises the existence of different sexualities (through, for example, equality legislation which prohibits discrimination on sexuality grounds) and that individuals may have a preferred gender (through the Gender Recognition Act 2015). The reasonable person will know that persons of different sexualities and persons who are transitioning or who might be considering transitioning may have issues or concerns of common interest. It seems to me that where the State recognises different sexualities and gender transition, there is simply no objective basis for saying that the presentation of an award to a teacher who helped establish a group to support persons who may have a different sexuality or a different gender to their biological sex and who may wish to come together for mutual support could give rise to a reasonable apprehension of bias.

175. Furthermore, the reasonable person will be aware of the fact that the ASTI presents and has presented awards to teachers who are considered to have made a contribution in a range of different ways, as set out above.

176. In relation to Mr. Burke's reliance on this group being "exclusivist" because a student or teacher who holds and expresses what he describes as *"the Christian belief on male and female"* would be excluded, I am satisfied that this could not give rise to a reasonable apprehension of bias based on recognising the contribution of the teacher who helped students set it up. That logic would mean that a teacher who gave additional time to an extra-curricular activity such as sports coaching, a school band, debate coaching or foreign language essay-writing coaching would not be qualified for such an award because students who did not participate in those sports or activities or who did not speak or were not learning that other language could not participate in or benefit from them. That is an untenable position. Of course, the point that is made by Mr. Burke is that

students or teachers are excluded from participation in the sexuality and gender acceptance group due to their religious beliefs and that this is a fundamental distinction between it and other groups, such as the examples given above. But the logic of that would be that if a teacher organised a prayer group for students of a particular religion from which those students derived great comfort and enrichment, that teacher could not be considered for such an award despite devoting personal time to that group because students of other religions could not take part.

177. I accept that the presentation of the award at the end of the school year in which Mr. Burke's case was live is a relevant factor. However, the reasonable person will also know that another award was presented at that time and that five other awards were presented from May 2022. It seems to me that the fact that other contributions by teachers go unrecognised could not lead a reasonable observer to apprehend bias. It is in the nature of awards that some achievements or contributions will be recognised while other worthy achievements or contributions will not be recognised at that time. The suggestion that the only way for a reasonable observer to conclude that the ASTI are not biased is by them presenting an award to a Christian teacher or group for upholding the Christian belief in male and female is unstateable.

Public comments by the ASTI Deputy General Secretary

178. It is under this heading that the need to take the entirety of the facts together rather than focusing on individual facts comes most sharply into focus because the temptation is to engage in a forensic analysis of the article.

179. Mr. Burke makes a number of separate but related points arising from the article in the Independent and, more particularly, arising from the report of Mr. de Paor's comments.

180. He says that Mr. de Paor's comments clearly show that the ASTI held a different position to his. As noted above, the mere fact of having a different position in itself would not be sufficient. There has to be something more.

181. Mr. Burke also claims that this article and Mr. de Paor's comments were in direct response to his case. He described it as the ASTI speaking to the nation and that it was a calculated and definitive condemnation of him (not just of his position) at a time when his case was in the media. It is correct that the article

was published around the same time that there was reporting of Mr. Burke's case. Indeed, a reasonable person would readily conclude that this is probably why the journalist wrote and the newspaper published the piece and even sought Mr. de Paor's comments. However, there is no objective evidential basis that Mr. de Paor's comments were a direct response by him or the ASTI to Mr. Burke's case and certainly no objective basis for concluding that it was a *"calculated and definitive condemnation of him"* or a *"deliberate and highly significant intervention by the ASTI."* Mr. Burke emphasises the references to his name in the article. However, as discussed above, the correct facts, when one reads the text of the article in full, as the reasonable person must be taken as doing, are that neither of the two references to Mr. Burke's name were by Mr. de Paor. One of the references was by the journalist when referring to the fact that Mr. Burke had attended training which the school obtained from a Department of Education-funded charity that supports LGBTQ+ youth and the other reference was in a quote by a person who runs an organisation that is described as not *"subscribing to gender identity theory".*

182. In relation to the substance of the comments, Mr. Burke describes them as the ASTI forcefully coming out against his position in way that was a calculated and definitive condemnation of him and as the ASTI issuing a statement which *"had the effect of a directive which the ASTI expected would be uniformly obeyed by schools and teachers without exception."* I am satisfied that this is an entirely subjective view and is not based on a reasonable assessment of all of the facts. Mr. Burke also emphasised that in one place in the article reference was made to the ASTI *"generally"* advising schools to use the pronoun requested by the student and in another it was reported that Mr. de Paor said that the ASTI would *"certainly"* advise schools to use the requested pronoun. Mr. Burke placed emphasis on the difference between these two and on the fact that *"certainly"* was contained in a direct quote from Mr. de Paor while the reference to the ASTI *"generally"* advising was not in a direct quote and was therefore in the journalist's words. The point that Mr. Burke was making was that the ASTI's advice was not general advice and was more focused and formal (and therefore, presumably, considered and weighty) because Mr. de Paor was quoted as saying that they *"certainly"* advise schools. It seems to me that this is an entirely over-sensitive reading of the article when all of the other facts are taken into account, including that the ASTI has no written of formal policy. It also calls on me to conclude that a reputable journalist when writing that the ASTI *"generally"* advises schools to use the requested pronoun was misreporting what was said to him by Mr. de Paor. Mr. Burke also placed significant emphasis on what Mr. de Paor said in relation to where parents do

not agree with the use of the student's choice of pronouns. He said that the *"There can be difficulties where the child says one thing and the parents say something else. We would generally encourage the parents to support the child."* Mr Burke described Mr. de Paor saying that they encourage parents to *'instead'* support the child. As a matter of fact, the word *'instead'* is not part of the quote. It is undoubtedly the case that the quote in the article conveys the position that calling a child by their chosen pronoun is supportive of the child but I do not believe that the reasonable person would understand it as conveying that not calling a child by their chosen pronoun is necessarily a failure to support the child or is a breach of the child's rights or is a criticism or condemnation of a parent or person who does not do so. This is particularly so when the quote is read correctly, i.e., without the word 'instead', because without that word it does not present two mutually exclusive options. Parents can and do support their children in various different ways.

183. The reasonable person will also know that the ASTI has no formal policy or position on transgender issues or on the use of names or pronouns (that is the uncontested evidence) and will therefore understand the advice being referred to as being general in nature and representing no more than a general position.

184. All of that being said, it is clearly the case that the ASTI has taken the position that students should generally be referred to by the pronoun of their choice and to that extent they differ from the position taken by Mr. Burke. That in itself is not sufficient to ground a serious question that there is a reasonable apprehension of bias where it is clearly not a formal position or policy adopted following a consideration of the types of issues which Mr. Burke has raised following the principal's instruction.

Close links between the ASTI and TENI

185. Mr. Burke claims that there is a close working relationship between the ASTI and TENI. In fact, he goes a lot further and describes them as *"bedfellows"* and *"accomplices"* in rolling out this ideology in schools. He does so on two bases. Firstly, that the Deputy General Secretary is on the TENI Education Advisory Group; and secondly, a TENI representative spoke at the ASTI event in 2016 and it was reported on favourably in the ASTI newsletter/magazine.

186. In relation to the first of these, Mr. Burke claims that officials of the ASTI

sit on a relatively small number of external committees and they are carefully selected, thereby suggesting a particular significance to Mr. de Paor being on the TENI Education Advisory Group.

187. Mr. Christie says that there are no formal or direct links between the ASTI and TENI and that the relationship is insubstantial. I do not accept that it can be said that the relationship (such as it is) is not a formal or direct link in circumstances where the Deputy General Secretary is a member on TENI's Education Advisory Group and this is listed on the ASTI website. I believe this would be understood as giving a degree of formality to the relationship. The evidence is, however, that it is an 'insubstantial' relationship in that the only link of which there is evidence is Mr. de Paor's membership of the Advisory Group and that he has only attended two or three meetings, the last of which was more than three years ago, facts which the reasonable person must be taken as knowing.

188. The reasonable person will also know that membership or representation on or participation in a committee of another organisation does not in itself amount to an indorsement of or identification with each and every position adopted by that organisation. The reasonable person will know this as a matter of fact. It is also clear as a matter of law from the authorities referred to above. On Mr. Burke's own case in relation to the religious tenets of the Church of Ireland this also naturally follows from the ASTI having a relationship with both TENI and the General Synod Board of Education. If membership or participation has the effect of an indorsement then, on Mr. Burke's case, by having a representative on both the TENI Advisory Group and the Church of Ireland (General Synod) Board of Education, the ASTI is indorsing two inconsistent positions. It seems to me to be beyond doubt that a reasonable person, in the absence of some other evidence, would understand them to be indorsing neither. Mr. Burke rejects any similarity between the ASTI's relationship with TENI and its relationship with the Church of Ireland. He says there *"is clear evidence that the ASTI promotes the causes and beliefs of TENI. However, there is no evidence whatsoever that the ASTI promotes the teaching of the Church of Ireland in relation to transgenderism, which is that there are two genders - male and female."* The fact that the ASTI is on the General Synod Board of Education and does not promote the teaching of the Church of Ireland's religious beliefs underlines the point that membership of an external body does not make the union synonymous with the beliefs or agenda of that other body.

189. In relation to the fact that a TENI representative spoke at an ASTI event the claim seems to be that the mere fact that a TENI representative spoke at the

event in 2016 and it was reported on in the terms set out above is evidence of a close relationship. I am satisfied that there is no serious question that a reasonable person would believe that to be evidence of or to constitute a close relationship. It is one event, seven years ago. The talk given by the TENI representative was one of four talks given to the meeting on various different topics. The favourable comments in the newsletter were in fact made by attendees at the event and are not editorial comments. It can not be suggested that reporting on what other people say can be a ground for objective bias unless it can be shown that the reportage is significantly and materially inaccurate.

Childrens Rights Alliance

190. Mr. Burke also relies on the ASTI's membership of the Children's Rights Alliance and the submission by that Alliance to the Review Group under the Gender Recognition Group. He places particular emphasis on the making of this submission.

191. It seems to me that neither of these facts i.e membership of the Children's Rights Alliance or the making of this submission by the Alliance, either separately or cumulatively when taken together with the other facts which the reasonable person must be taken to know, gives rise to a fair question of a reasonable apprehension of bias. The evidence is that the ASTI did not participate in the discussion or consultation around this submission (though Mr. Burke disputes this). Thus, the question is whether there is a serious question that the ASTI would be ascribed with the views set out therein purely on the basis that it is a member of the Childrens Right Alliance. The authorities set out above, *Locabail, Helow* and *Kelly,* make it clear that the mere fact of membership of an association does not in itself fix the member (in this case the ASTI) with ownership of the views of the association. This is particularly so in this case when one considers the range of organisations which are members of the Childrens Rights Alliance. As noted above 110 bodies are listed as being members of the Alliance and include groups with vastly different interests. With such a number and range of member bodies, there is no basis upon which the reasonable person would ascribe all views or positions taken by the Childrens Rights Alliance to each and every one of the member bodies.

Other facts

192. It seems to me that what a reasonable person would draw from these facts is that the ASTI undoubtedly has a taken the general position of advising

schools/teachers to refer to students by their preferred pronouns and, it follows from this, have accepted that a person's gender may not align with their biological sex. The reasonable person armed with the facts will also know that the ASTI does not have a formal policy or position. They will also know that they have not adopted any position in relation to Mr. Burke's case and have not expressed any such position. That is all a long, long way from being a promoter of transgenderism or a radical campaigning organisation as those phrases would be understood by the reasonable person. It seems to me that while the ASTI's acceptance of the legal position in the State and its willingness to refer to students by their chosen pronouns is, of course, different to Mr. Burke's, that is not in itself sufficient to establish a fair question that the ASTI holds such a strong opinion or position that there would be a reasonable apprehension that there is a real possibility that Mr. Christie would not decide the case fairly.

193. As part of this consideration, the reasonable person will take account of the fact that the ASTI negotiated for the inclusion of an independent appeals process in the disciplinary procedures, and that the inclusion of a teaching union nominee on a panel is to ensure the inclusion of a teacher's perspective in the process and to ensure that teachers are treated fairly in the decision-making process. What Mr. Burke's claim amounts to is that the ASTI has such a considered and strong view on the question of whether a student should be referred to by the 'they' pronoun that its nominee would disregard the very purpose of him being on the Appeal Panel and would decide the appeal on the basis of this position and not on the merits. I do not believe that a serious question has been established that the reasonable person would have a reasonable apprehension on the basis of the matters raised by Mr. Burke and the totality of the facts that he would do so.

Conclusion

194. In all of those circumstances, on the basis of the evidence and facts at this stage, I am not satisfied that Mr. Burke has discharged the burden of establishing that there is a fair question of a reasonable apprehension of bias even having regard to the fact that the fair question test is a low bar.

195. It is therefore not necessary to consider the application of the alternative approach suggested on behalf of the defendants.

196. It is also not necessary to consider the balance of convenience/balance of

justice.

197. I therefore refuse the relief sought.

198. My provisional view on costs is that the defendants are entitled to their costs including any reserved costs having been entirely successful in resisting the application. If either of the parties wishes to make submissions as to why this proposed order should not be made they should advise the Court, copied to the other side, within twenty one days and should deliver written submissions within a further fourteen days of that notification. The other side shall then deliver replying written submissions within a further fourteen days.