

## THE HIGH COURT

## JUDICIAL REVIEW

[2016 No. 708 J.R.]

BETWEEN

MICHAEL LYONS

APPLICANT

AND

LONGFORD WESMEATH EDUCATION AND TRAINING BOARD

RESPONDENT

**JUDGMENT of Mr. Justice Eagar delivered on the 5th day of May, 2017**

1. On the 9th September, 2016 Baker J. gave leave to the applicant to apply for judicial review and granted an order that the proceedings be stayed until the determination of the application for judicial review.

**Facts**

2. In May, 2015 the applicant was notified that a complaint of bullying had been made against him by his colleague, a teacher called Ms. Michelle Spence. This complaint cited a number of alleged incidents, some of which dated back to 2008. Notwithstanding the fact that the applicant's principal had been aware of the 2008 allegations for some years, the applicant first learned of their existence in 2015.

3. An investigation into the complaint was launched in accordance with the "Bullying Prevention Policy – Complaint Procedure for Education Training Board Staff". This procedure is specifically described as an industrial relations procedure and is not a legal procedure.

4. The respondent engaged a private limited company called Graphite Recruitment HRM Limited to carry out the investigation. The applicant was asked by the two investigators to submit his written response, to attend various meetings and interviews, with which he duly complied. On or about the 4th April, 2016 the applicant was furnished with a copy of the report of Graphite Recruitment HRM dated 24th March, 2016. As was apparent from the report, the two investigators of Graphite Recruitment HRM Ltd. had "upheld" the allegations of bullying against the applicant insofar as it related to four specific instances (only) alleged to have occurred between January and April 2015 as follows:

- (i) the applicant's alleged failure to include Ms. Spence's in the transition year Art Plan in January, 2015;
- (ii) the applicant's failure to "acknowledge" Ms. Spence at a staff meeting in April, 2015;
- (iii) the applicant's alleged failure to include Ms. Spence in a community arts project in April/May 2015; and
- (iv) a dispute between the applicant and the respondent in relation to the use of a camera for school photographs from September 2014 to June 2015.

None of the other allegations were upheld. At no stage was the applicant permitted to cross-examine his accuser.

5. On the 21st April, 2016 the applicant received a letter from the respondent dated the 20th April, 2016 advising that the report of Graphite Recruitment HRM Ltd. was to be adopted by the respondent. The applicant was advised that he had fifteen working days to make a limited appeal to the decision. He appealed but his appeal was rejected.

6. By letter dated 30th August, 2016 written by the Chief Executive of Longford Westmeath Education and Training Board, Christy Duffy, the applicant was advised that as his appeal had not been upheld that the investigation report "stands" together with the "findings" against him. The applicant was advised as follows: -

"Bullying behaviour in an ETB workplace is unacceptable misconduct which properly falls to be addressed under the appropriate provisions of Circular Letter 71/2014 Disciplinary Procedures for Teachers Employed in Education and Training Boards. (herein "ETB")

In the light of findings/conclusions of the investigation report (copy enclosed) you are required to attend a Stage 4 Disciplinary Meeting to be convened for the purpose of determining the disciplinary action if any, which may arise from the finding of the investigation referred to above."

The applicant was further advised that the meeting was scheduled to take place at 11:00am on Thursday the 15th September, 2016.

7. It was within this context that the applicant applied ex parte by way of application seeking a number of reliefs as set out below, to be presented before Baker J. on the 9th September, 2016.

**Submissions on behalf of the Applicant**

8. Counsel for the applicant indicated that the applicant was the Deputy Principal at Lanesboro Community College and that in or about May 2015 the applicant was notified that a complaint of bullying had been made against him by his colleague, a teacher called Michelle Spence. This complaint cited a number of alleged instances, some of which dated back to 2008. The applicant first learned of their existence in 2015. Notwithstanding this, the applicant's principal had been aware of the 2008 allegations for some years.

9. An investigation into the complaint was launched in accordance with the 'Bullying Prevention Policy – Complaint Procedure for ETB Staff' dated the 1st September, 2013. This procedure does not have any status under the Education Act 1998 (as amended by section 6 of the Education (Amendment) Act 2012) as it is not a disciplinary procedure and does not afford the subject of any investigation the safeguards provided for in Circular 71/2014. It is specifically described as an 'Industrial Relations Procedure' and not

a legal procedure. Section 1.1 states:-

"Agreed procedure is an industrial relations procedure and not a legal procedure. It will be conducted within the norms of industrial relations custom, practice and procedure and as such is not a judicial process. In circumstances where legal action is evoked, the policy will be suspended and the operation of law will take precedence." (this Court's emphasis).

10. The respondent engaged a private limited company called Graphite Recruitment HRM Ltd. to carry out the "investigation".

11. The applicant was asked by members of staff of Graphite Recruitment HRM Ltd. to submit his written response by the 21st May, 2015. He complied with this request. He was also requested to attend various meetings and interviews and he duly complied. The procedures designed and adopted by Graphite Recruitment HRM Ltd. did not permit the applicant to confront his accuser or challenge by way of cross examination the allegations against him. According to the agreed policy document it was expected that this investigation would take five to six weeks. The process eventually concluded on the 4th March, 2016 having been in existence for forty-three weeks (this Court's emphasis).

12. On or about 4th April, 2016 the applicant was furnished with a copy of the report of Graphite Recruitment HRM Ltd. dated 24th March, 2016. As was apparent from the report, the two employees of Graphite Recruitment HRM Ltd. had "upheld" the allegations of bullying against the applicant insofar as it related to four specific instances alleged to have occurred between January and April 2015. None of the other allegations were upheld. On the 21st April, 2016 the applicant received a letter from the respondent dated 20th April, 2016 advising that the report of Graphite Recruitment HRM Ltd. was to be adopted by the respondent. Such "adoption" has no and can have no legal implications for the processes provided in Circular 71 of 2014. The applicant was advised that he had fifteen working days to take a limited procedural appeal to the decision and his appeal was rejected.

13. By letter dated 30th August, 2016 from the Chief Executive of Longford Westmeath Education and Training Board, Mr. Christy Duffy, the applicant was advised that as his appeal had not been upheld and that the investigation report "stands" together with the "findings" against him. As set out above, the applicant was required to attend a "Stage 4 Disciplinary meeting".

This was the first indication of any disciplinary process.

14. By letter dated 31st August, 2016 the applicant's solicitors wrote objecting to the course of action proposed and followed this letter with a further letter of the 2nd September, 2016 outlining the detailed basis for the applicant's objections to the respondents proposed course of action. The applicant requested assurances that any steps that the respondent proposed to take in respect of the as yet unspecified allegations against him would be taken entirely in accordance with Circular 71/2014 and by letter dated the 6th September, 2016 the respondent solicitor responded that the applicant concerns were unfounded and that the disciplinary meeting would proceed.

## Legislation

15. By virtue of the provisions of the Vocational Educational Act 1930, the respondents' predecessor in title was established to perform the functions conferred on it by the Act.

16. By virtue of the Education and Training Boards Act 2013 the existing Vocational Educational Committees were dissolved and replaced by a number of ETB's including the respondent.

17. Section 24 of the Education Act 1998 as amended by s. 6 of the Education (Amendment) Act 2012 provided:-

(11) The board of a recognised school may, in accordance with procedures determined from time to time by the Minister following consultation with bodies representative of patrons, recognised school management organisations and with recognised trade unions and staff associations representing teachers or other staff as appropriate, appoint, suspend or dismiss any or all of the principal, teachers and other staff of a school, who are remunerated or who are to be remunerated out of monies provided by the Oireachtas."

(12) Where the employer of the principal, teachers and other staff of a recognised school is a person other than the board of the school concerned, a reference in this section to a board shall be construed and have effect as if the said person were substituted for the said reference wherever it occurs.

(13) In applying subsection (11) to the principal, a teacher or other member of staff of a recognised school which is established or maintained by a vocational education committee, the board of the recognised school concerned shall comply with the provisions of the Vocational Education Committee Acts 1930 to 2006 in relation to suspension and dismissal."

18. Counsel submitted that the respondent is required to carry out its functions in accordance with the provisions of Education Act 1998 as amended that "procedures determined from time to time by the Minister" and the requirements of natural and constitutional justice and fair procedures. In particular, the respondent is bound to invoke any disciplinary process against a teacher strictly in accordance with the procedures set out in Circular 71 of 2014, which has been issued by the Minister in accordance with the above provisions of the Education Act 1998 as amended. The applicant submitted that separately, outside the scope of s. 24 of the Education Act 1998 as amended and without departmental approval or sanction, the respondent has adopted a "non-legal" industrial relations procedure – a bullying prevention policy or complaint procedure for ETB staff. The document in question or the processes outlined therein do not constitute substitution for the procedures contained in Circular 71 of 2014 issued by the Minister pursuant to s. 24 of the Act of 1998.

## The Essential Aspects of Fair Procedure

19. Counsel for the applicant stated that it was one thing for a preliminary investigation to ascertain the background to an allegation, or to assemble competing contentions in respect of disputed issues of fact. Such a process can facilitate a disciplinary process being conducted in an efficient and manageable way, still observing fair procedures. It is quite another thing for an investigation not in compliance with mandated procedure, or on a more basic level, not in compliance with fair procedures, to form the factual basis of an investigation on which disciplinary sanctions can be imposed. He quoted *Millick v. Irish Casing Co. Ltd.* [2007] 18 ELR 229 where Clarke J. discussed the difference between investigations that do not involve any findings of fact (to which all rules and natural justice need not apply) and inquiries which can make formal findings (to which rules of justice do apply). He also quoted *Marie Fuller v. the Minister for Justice* [2005] 1 I.R. 529 in which McGuinness J. commented obiter dictum in relation to the differences between

statutory powers applicable when disciplining civil servants and industrial relations procedures of the State:

*"in my view ss. 13 to 16 of the Act of 1956 were intended by the Oireachtas to deal with matters of discipline concerning individual civil servants. The Oireachtas has two other legislations provided a framework for the resolution of industrial disputes and has established bodies such as the Labour Relations Commission, the Labour Court and other specialist negotiation and arbitration bodies to this end. These means are available to the applicants and respondents as the means of resolving their dispute."*

### **The Bullying Prevention Policy**

20. While this document is described as "nationally agreed", it is evident from the terms of the document itself that it is in no sense a "national agreement". It is simply an agreement between the relevant Trade Unions and the ETBs. It covers both teachers and non-teaching staff. The document has no capacity in law to impact upon the terms of Circular 71/2014. The two documents are entirely different and distinguishable. At page 14 of the bullying prevention policy, it is indicated that breaches of the policy "will be regarded as misconduct and maybe subject to disciplinary action under the disciplinary procedure relevant for the staff member concerned". This merely indicates that an alleged breach of the policy may form a disciplinary charge under the disciplinary procedures and no more. Where a complaint of bullying is "upheld, it is clear that disciplinary action will be taken in accordance with the appropriate stage of the ETB Disciplinary Policy for Staff". It is clear as a matter of law that if the disciplinary proceedings are indeed to be taken, these must be under, and have as their legal basis, Circular 71 of 2014. The Bullying Prevention Policy cannot affect or render *otiose* any provision of Circular 71/2014.

21. The bullying prevention policy outlines an informal process. Under the heading "Failure by a Staff Member to attend Meetings under the Formal Stages of the Procedure", it is clear that the only sanction for a staff member who fails to cooperate with the procedures is that the procedure continues in their absence.

22. There is mention of the ETB nominating two investigators from a panel of "approved investigators".

23. Counsel on behalf of the applicant submitted that the "investigation" which is to be subcontracted is to be conducted in accordance with the terms of reference and protocol provided for in Appendix II. It is evident from a consideration of the protocol that the requirements of natural justice have not been incorporated into the protocol. It would be essential for natural justice to be complied with, if reliance were to be placed on "findings" for the purposes of dismissing an employee.

24. The following is provided by Counsel for the applicant by way of example of how the protocol lacks compliance with fair procedures. Individual witnesses are invited to a "meeting". A draft minute of the interview conducted will then be prepared and provided to the witness. The witness can apparently review the draft minute and suggest changes, this even in respect of matters on which they have given evidence. The investigator then makes a "determination" on the amendments suggested.

25. The witness is entitled to attend at an interview accompanied by a work colleague or trade union representative (but not a legal representative). The following is set out in the protocol:

*"conflicting witness accounts - where the investigators are presented with conflicting accounts of an incident and where no additional witnesses are available or where evidence is not persuasive, the case rests upon which version of the events the investigator considers the more credible, but a rationale must be provided".*

26. Counsel for the applicant submitted that it was far from clear where this understanding of 'fair procedures' had come from - it does not obtain any support from principle nor from the case law of the High Court to Supreme Court in the past half century. Counsel further submitted that the final investigation report must include "an assessment of credibility for each party in witness" along with the investigators "findings of fact". He said that the subject of an allegation, such as the applicant would not be entitled to challenge including by way of cross-examination the evidence against him.

### **Case Law relating to Fair Procedures**

27. Counsel for the applicant submitted that the law in respect of fair procedures was clear, particularly where an individual is liable to be dismissed from his or her employment. When a Stage 4 process under Circular 71 to 2014 is invoked, it follows that a teacher may be dismissed.

28. He submitted that cross-examination is clearly necessary in bodies which are administering justice. The entitlement to cross-examine allegations is not confined to a court body administering justice. In *Borges v. Fitness to Practice Committee* [2004] 1 I.R. 103 Keane C.J. stated:-

*"It is beyond argument that, where a tribunal such as the first respondent is inquiring into an allegation of conduct which reflects on a person's good name or reputation, basic fairness of procedure requires that he or she should be allowed to cross-examine, by counsel, his accuser or accusers. That has been the law since the decision of this court in *re Haughey* [1971] I.R. 217 and the importance of observing that requirement is manifestly all the greater where, as here, the consequence of the tribunal's finding may not simply reflect on his reputation but may also prevent him from practising as a doctor, either for a specified period or indefinitely."*

Keane C.J. continues:-

*"The applicant cannot be deprived of his right to fair procedures, which necessitates the giving of evidence by his accusers and their being cross-examined, by the extension of the exceptions to the rule against hearsay to a case in which they are unwilling to testify in person."*

29. Counsel also cited the comments of Hardiman J. *Maguire v. Ardagh* [2002] 1 I.R. 385 who also quoted from Ó Dálaigh C.J. in *re Haughey* [1971] I.R. 217 wherein Ó Dálaigh C.J. said:-

*"In proceedings before any tribunal where a party to the proceedings is on risk of having his good name, or his person or property, or any of his personal rights jeopardised, the proceedings may be correctly classed as proceedings which may affect his rights and in compliance with the Constitution the State, either by its enactments or through the courts, must outlaw any procedures which will restrict or prevent the party concerned from vindicating these rights."*

30. He also quoted a recent case of *E.E. v. Child and Family Agency* [2016] IEHC 777 a decision of the 14th November, 2016 where

Humphreys J. summarised the matter as follows:-

*"To require, as a matter of mandatory constitutional law, a right to cross-examine politicians and businesspeople in a tribunal or mere inquiry whose findings are 'legally sterile', but to refuse to accept such a right at the suit of a 'man of no property' such as this applicant, where there are huge and fundamental issues of human, natural, constitutional and ECHR family rights at issue, would be an egregious form of judicial doublethink and an abdication of the judicial function to vindicate the rights of the individual."*

31. Counsel for the applicant submitted that it was evident therefore that where a deputy principal of a school in the management of the ETB is notified that he is to be subjected to a disciplinary procedure under Circular 71/2014, whether at Stage 4 or at any of the formal stages, fair procedures manifestly indicate that he will have the right to confront and cross-examine the individual who has made the allegations against him.

32. He said that Circular 71 of 2014 expressly provides for the entitlement of a person in the position of the applicant to challenge any evidence which is to be relied upon at a Stage 4 hearing - this is a mandatory requirement of Circular 71/2014. He submitted that it was clear as a matter of law and as a matter of fair procedures, an individual whose job was at stake and against whom allegations were to be made would be entitled to challenge and cross-examine the evidence to be relied upon in the case against him. He then quoted Circular 71 which this Court will deal with in more detail.

33. He submitted in particular in relation to Stage 4, the following appears to be the essential aspects:

(1) If the conduct is of a "serious nature", a comprehensive report on the facts of the case will be prepared by the principal and forwarded to the chief executive. A copy will be given to the teacher.

(i) It does not appear that any such report is being prepared, and no such report has been given to the applicant in this case.

(ii) Following the provisions of the comprehensive report prepared by the principal there are a number of essential procedural steps that must be taken.

(iii) If the chief executive decides to proceed to a disciplinary process, the teacher will be provided with an opportunity to attend at a meeting with the chief executive accompanied by his or her trade union representatives or a colleague subjected to an overall maximum of two. It is clear at this stage that there is no question of the chief executive proceeding to a disciplinary sanction but rather to a disciplinary process as provided for in Circular 71/2014.

(iv) It is entirely possible that upon receipt of a comprehensive report and the practice of the case which will have been forwarded in the interim to the teacher, the chief executive will decide not to proceed to a disciplinary process.

However, the chief executive in his affidavit states:

"I say that the fact of the matter is that a sufficient number of allegations against him were upheld as led to the investigation concluding that there had been repeated inappropriate behaviour."

Following the hearing, the chief executive formulates "his/her judgment". The chief executive will take into account the report from the principal, any other evidence and the teacher's representation if any thereon.

Counsel made the submission that there was no report from the principal.

34. Counsel for the applicant also said that from an analysis of the correspondence and the documentation generated by the respondent, it would appear to be the case that the chief executive has formed the view that the process conducted by Graphite Recruitment HRM Ltd. had made findings of fact, upon which he could rely. The fact that this process itself did not allow for the applicant to challenge evidence by way of cross-examination and to confront his accuser appears to have been regarded by the chief executive as irrelevant.

## **Bias**

35. The issue which counsel for the applicant brought to the court's attention was the issue of objective bias resulting from the chief executive having already "adopted" findings, flowing from the process conducted by Graphite Recruitment HRM Ltd.

## **Irrationality – Proportionality**

36. Counsel for the applicant stated that no consideration was given to invoking the disciplinary process at the informal stages of Stages 1, 2 and 3. Linked to this is the failure to consider what is factually accurate within the allegations already made. Whatever about process and findings lacking in fair procedure, looked at objectively, counsel for the applicant submits that the allegations made are manifestly insufficient in severity or in frequency to constitute "bullying". He cited a decision of Kearns P. in *Glynn v. The Minister for Justice, Equality and Law Reform, Ireland and the Attorney General* [2014] IEHC 133, where the President dismissed the plaintiff's claim, holding that for an allegation of bullying to be actionable, the first question the court must answer is whether the behaviour complained of, by reference to an objective test, imports that degree of calibrated inappropriateness and repetition (this Court's emphasis) which differentiates bullying from workplace stress or occupational stress.

37. In conclusion, counsel for the applicant reiterated the following points:

(1) The respondent had displayed objective bias towards the applicant;

(2) Circular 71/2014 envisages that if the disciplinary procedures provided for therein are to be implemented this will involve a number of stages moving from informal stages to formal stages, and that the respondent in its letter of the 30th August, 2016 and the chief executive's letter of the 30th August, 2013 failed to indicate upon what basis such significant stages are apparently not to be adopted.

38. No rational basis or reason had been advanced for the decision not to avail of Stage 1, Stage 2 or Stage 3 of the procedures and

the respondent has not acted in accordance with the procedural safeguards contained in Circular 71/2014.

### **Submissions on behalf of the Respondent**

39. Counsel for the respondent set out the legal framework, and stated that section 24 of the Education Act 1998 was replaced by the substitution of a new section inserted by s. 6 of the Education (Amendment) Act 2012 (the Act of 2012). At that time, the Vocational Educational Committees were still in existence and special provision was made in ss. (13) for the Application of the Provision of the EEC Acts. In addition, ss. (12) provided that the phrase "Board" would in certain circumstances mean the employer. Section 65 of the Education Training Boards Act 2013 contains a provision deleting the aforementioned subs. 13, therefore with the establishment of the ETBs, ss. 12 came to apply to them.

40. The ETBs maintain schools through the provision by it of teaching staff and a host of other services. As the employer of staff, it then performs all the staff functions provided for by section 24 of the Act of 1998 as replaced, that is an ETB can appoint, suspend and dismiss staff. The performance of these functions of appointments, suspension and removal are not reserved functions but are executive functions that fall to be performed by the chief executive.

41. Counsel for the respondent accepted that Circular 71 of 2014 refers to procedures approved by the Department of Education and Skills, the interpretation application of this Circular.

42. The Bullying Prevention Policy exists because of the legal obligation on the ETB to address its obligations under section 60 of the Safety, Health and Welfare at Work Act 2005.

43. He submitted that in 2006 the Vocational Education Committees in consultation with the trade unions adopted policies and procedures for this educational sector to prevent workplace bullying, harassment and sexual harassment. Over time these policies were amended to take account of legislative and other changes within the sector, culminating for the present purposes with a version of the bullying prevention policy which issued for implementation on the 1st of September, 2013 following the enactment of the Education and Training Boards Act 2013. The policy was later amended from the 1st of March, 2015 and again in 2016 and he said that in part what is before the court is the interplay between the two lawfully adopted policies.

44. Counsel for the respondent submitted that there was only one decision that was the subject of the judicial review and that is the decision of the chief executive to summon the applicant to a meeting. He submitted that what was not the subject of challenge was the following:

- (a) the decision to invoke the bullying policy on the foot of a complaint of the 1st of May, 2013;
- (b) any issue of compliance with the bullying policy;
- (c) the procedures adopted during the investigation;
- (d) the report of the investigation that issued on the 20th of March, 2016;
- (e) the adoption by the chief executive of the findings of the report on the 28th of April, 2016;
- (f) the rejection of the applicant's procedural appeal against the chief executive's adoption of the report by the Workplace Relations Commission;

He also said that it was important to note that the chief executive in adopting the report, adopted it in total, including those findings favourable to the applicant.

45. He suggested that the applicant now wants to urge the court that:-

- (a) he can now retrospectively seek to undermine the Investigation Report that is being adopted by including the fairness of the procedures of the investigation on foot of which was prepared;
- (b) the applicant seeks to stop the holding of a preliminary meeting on the basis that notwithstanding the conclusion of the bullying investigation that a Stage 4 disciplinary process cannot proceed on two discrete grounds:
  - (i) That the decision of the stage to invoke s. 4 is disproportionate and irrational;
  - (ii) It is a precondition of Stage 4 that the process should be grounded on a report prepared by the principal of the school. On the basis that there is no such report, the applicant seeks to exclude the chief executive from any involvement in the disciplinary processes on the basis of alleged objective bias.

46. Counsel for the respondent submitted that Circular 71 of 2014 contains two sections. One section deals with competency issues and the other deals generally disciplinary measures. Further separate routes are set out for dealing with teachers and principals. He also submitted that Circular 0071 of 2014 is in part commentary, in part advisory in tone, and in part formal. Section 1 headed "background" and s. 2 "general principles" apply to all sections of the circular. Section 3 concerns professional competence and what appears to be s. 4 (the sections are not numbered) relates to work and conduct issues. The introduction to the relevant section states:-

"Although disciplinary action will normally follow the progressive stages the procedure may be commenced by the school at any stage of the process if the alleged misconduct warrants such approach."

Circular 71 however does not address the manner in which complaints that are not dealt with by the principal of the school enter the process as set out.

47. He submitted that this is a classic case where the policy does not address precisely the circumstances in this case, in that for good and fair reasons: the policy covers circumstances where (a) the complaint is not investigated by the principal and (b) the comprehensive report on the facts of the case is not prepared by the principal. He said that it could not be the case that the employer is left in a lacuna, where no disciplinary procedure can be invoked. He said that if the applicant's logic is followed - the only process allowing a bullying investigation was one in which the chief executive had to note a report made by the school principal.

Otherwise, the chief executive would have to deal with the investigation informally with no sanction.

48. The Bullying Prevention Policy provides that:

- (1) Every employee has a right to make a formal complaint pursuant to the policy and there is no requirement to commence a complaint at the informal stage.
- (2) Where a formal complaint is made, not to the school principal but to the Head of Human Resources in the ETB head office, this removes the matter from the realm of the local school entirely.
- (3) A formal investigation is then carried out by approved persons unassociated with the employer and such investigation must conclude in findings being made.
- (4) Once such findings are made the matter is then passed to the chief executive who must, in the first instance, determine to either adopt or reject the report. No other option is available to the chief executive.
- (5) The aforementioned determination of the chief executive may be appealed by the complainant or the person subject of the complaint to the Workplace Relations Commission by way of procedural challenge.
- (6) There is a provision for invoking the disciplinary proceeding at an appropriate stage.

### **Right to Cross-Examine**

49. Counsel for the respondent submitted that the applicant's rights to natural justice were respected and this is clear from the material before the court and in particular from the full exchanges, statements and invitations to reply. He said that the applicant now raises a question of an entitlement to cross-examine witnesses. Neither before entering upon the investigation or at any stage during the investigation did the applicant request a facility to cross-examine any witness. At no stage was the applicant denied that facility and in his procedural appeal to the Workplace Relations Commission he did not identify this as a matter of concern.

50. He submitted that the investigation dealt fairly and evenly with both the applicant and the complainant and in doing so meet the requirements of natural justice as set out by Henchy J. in *Kiely v. the Minister for Social Welfare* [1977] I.R. 267:-

*"It would be contrary to natural justice if one side were allowed to shelter behind his controverted documentary evidence while the other side had to bring his witnesses to the hearing, where they might be required to give their evidence on oath and to be subject to cross-examination. The lack of mutuality and the potential for an unjust determination inherent in such a procedure would put it in conflict with the rule of audi alteram partem."*

He said further:-

*"This Court has held, in cases such as In re Haughey that Article 40, s. 3, of the Constitution implies a guarantee to the citizen of basic fairness of procedures. The rules of natural justice must be construed accordingly. Tribunals exercising quasi-judicial functions are frequently allowed to act informally — to receive unsworn evidence, to act on hearsay, to depart from the rules of evidence, to ignore courtroom procedures, and the like — but they may not act in such a way as to imperil a fair hearing or a fair result."*

51. In relation to the report of the bullying investigation counsel submitted that the applicant does not identify in respect of any of the adverse findings made against him any factual evidence with which he disagrees to which the case might be made that a failure to allow for cross-examination was material.

52. He submitted that the chief executive is entitled to continue with the disciplinary process, with the bullying report and the background materials properly before him as evidence. The principles of natural justice do not require that matters which have independently been investigated in a fair and balanced process be heard "*de novo*" in a further stage of a disciplinary process. In this instance, at all times it was known that the bullying policy was not purely an 'evidence gathering exercise' but also the policy implies that the investigators required to make findings. What has to be considered is how the principles of natural justice have applied in section 4 in that the Circular refers to a teacher's right to challenge the evidence that is being relied upon. In that regard, it is open at all times to the applicant to take issue with the characterisation of his conduct as bullying, to highlight any conclusions that are not supported by evidence, and the applicant can seek to introduce additional evidence.

### **The Absence of a Report from the Principal**

53. Counsel for the respondent submitted that it was self-evident that the matter proceeded without a report from the school principal, and in that respect it does not accord with its specified procedure. He raises the question: is the absence of the report from the principal fatal? He said the court may take the view that the lack of formal compliance does not justify relief by way of judicial review. He referred to administrative law in Ireland by Hogan 4th Ed. and the judicial remedies in public law by Lewis 3rd Ed. and he quoted from Laffoy J. in *McGlinchey v. Ryan* [2010] IEHC 536:-

*"It is well settled, as a matter of constitutional law and of contract law, that an employee who is involved in a disciplinary process in the course of his employment is entitled to be afforded fair procedures, although what constitutes fair procedures may vary from case to case. In this case, the inquiry was to be governed in accordance with the agreement between the plaintiff and the defendant embodied in the Terms of Settlement and in accordance with Annex 1 thereto. The conduct of the inquiry was subject to the express terms agreed between the parties and the ruling of the adjudicator falls to be considered against those terms."*

54. Counsel for the respondent submitted that it was clear in this case that all the parties concerned knew well from the outset that the process was going to be conducted within the framework of the Bullying Prevention Policy which, in turn, contains explicit and specific provisions for referral to the circular letter and the disciplinary procedure. It is immediately clear from a perusal of the extensive account given by the investigators of the manner in which they conducted their work that they paid close attention to all matter and procedural fairness and natural justice.

55. The underlining fact is that the applicant participated fully in that process without even once raising the issue of either where or to whom the report of the investigation was going to be sent. He did not raise the possibility of cross-examining throughout the

process. In such a circumstances he submitted that an estoppel arises, as to his right to cross-examine presently. The applicant's participation in the process throughout highlights the lack of importance the applicant attached to the absence of the principal's report. The absence of the principal's report may therefore be considered by the Court as not fatal to the process.

### **Objective Bias**

56. Counsel for the respondent states that objective bias is complained of solely on the basis that the chief executive has adopted the investigation report which follows the disciplinary report. Whereas it is apparent that the chief executive had no hand, act or part in the findings of the investigation report, and that his role in adopting the investigation report was administrative, his role in determining to proceed to Stage 4 hearing was equally consistent with what would happen if it had been the case that a report on this or any other matter was to come to him from a school principal.

### **The Statutory Framework**

57. The Vocational Education Act 1930 provided for vocational education committees. By virtue of the Education and Training Boards Act 2013 the existing vocational educational committees were dissolved and were replaced by a number of ETBs. Section 15 of the 2013 Act provides the following:

15(1) A chief executive of an education and training board shall perform the executive functions of the board.

58. Sections 23 and 24 of the Education Act 1998 were substituted by s. 6 of the Education Act (Amendment) Act 2012. Section 23 provides:

"In addition to the functions conferred on a Principal by section 22, the Principal of a recognised school shall—

- (a) be responsible for the day-to-day management of the school, including guidance and direction of the teachers and other staff of the school, and be accountable to the board of the school for that management,
- (b) provide leadership to the teachers and other staff and the students of the school,
- (c) be responsible, together with the board, parents of students and the teachers, for the creation in the school of an environment which is supportive of learning among the students and which promotes the professional development of the teachers,
- (d) under the direction of the board, and in consultation with the teachers, the parents and, to the extent appropriate to their age and experience, the students, set objectives for the school and monitor the achievement of those objectives, and
- (e) encourage the involvement of parents of students in the school in the education of those students and in the achievement of the objectives of the school.

(2) For the purpose of carrying out his or her functions under this Act, a Principal of a recognised school shall have all such powers as are necessary or expedient in that regard, and shall carry out his or her functions in accordance with—

- (a) such policies as may be determined from time to time by the board of the school, and
- (b) regulations made under section 33.

(3) The Principal of a recognised school shall be entitled to be a member of any and every committee appointed by the board of the school.

(4) Wherever practicable, the Principal of a recognised school shall, in exercising his or her functions under this section, consult with teachers and other staff of the school.

(5) Where the employer of the Principal, teachers and other staff of a recognised school is a person other than the board of the school concerned, a reference in this section to a board shall be construed and have effect as if the said person were substituted for the said reference wherever it occurs."

59. Section 24 states:

"(1) Subject to this section, the board of a recognised school—

- (a) shall, if not already appointed, appoint a person to be Principal of the school, and
- (b) may appoint such and so many persons as teachers and other staff of the school as the board from time to time considers necessary for the performance of its powers and functions under this Act.

...

(12) Where the employer of the Principal, teachers and other staff of a recognised school is a person other than the board of the school concerned, a reference in this section to a board shall be construed and have effect as if the said person were substituted for the said reference wherever it occurs.

(13) In applying subsection (11) to the Principal, a teacher or other member of staff of a recognised school which is established or maintained by a vocational education committee, the board of the recognised school concerned shall comply with the provisions of the Vocational Education Committee Acts 1930 to 2006 in relation to suspension and dismissal."

60. Circular 0071 of 2014 was sent to Chief Executives of ETBs and provided for the revised procedures on the suspension and dismissal of teachers and principals. Previous circulars were superseded by Circular 0071 of 2014.

61. The background to the revised procedures provided:

“(1) Background

Under the terms of *Towards 2016* the parties undertook to review and revise existing procedures for the suspension and dismissal of teachers comprehended by Section 24(3) of the Education Act 1998. Since the parties noted that the provisions of Section 24 of the Education Act 1998 did not apply to teachers in schools operated by vocational education committees (VECs) further discussions ensued involving the Department of Education and Science, the IVEA, the TUI and the ASTI in order to adapt the provisions agreed in relation to other teachers to accommodate the specific management structures and processes operating in VEC schools. These discussions concluded in procedures for the suspension and dismissal of teachers in VEC schools being agreed between the parties.

The following procedures have now been issued in that context.

ETBs and Principals have a responsibility for the quality and effectiveness of education and the management of staff in a school as set out in the Education Act 1998.

While no procedures can be definitive about the range of circumstances which might give rise to the initiation of disciplinary procedures in general these are likely to be related to misconduct, a threat to the health and safety of students and/or sustained failure to perform adequately the professional duties and responsibilities expected of a teacher.

(2) General Principles underpinning these procedures

Apart from considerations of equity and justice (this Court’s emphasis), the maintenance of a good industrial relations atmosphere at workplace level requires that acceptable procedures be in place and be observed. Disciplinary procedures are necessary to ensure both that discipline is maintained in the workplace and that disciplinary measures can be applied in a fair and consistent manner.

Such procedures serve a dual purpose in that they provide a framework which enables management to maintain satisfactory standards and employees to have access to procedures whereby alleged failures to comply with these standards may be fairly and sensitively addressed.

The essential elements of any procedures for dealing with disciplinary issues are that they be rational and fair, that the basis for disciplinary action is clear, that the range of penalties that can be imposed is well-defined and that an internal appeal mechanism is available.”

The general principles continue as follows:

“These procedures are intended to comply with the general principles of natural justice (this Court’s emphasis) and provide:

- that there will be a presumption of innocence. No decision regarding disciplinary action can be made until a formal disciplinary meeting has been convened and the employee has been afforded the opportunity to respond to the allegations raised (this Court’s emphasis)
- that the employee will be advised in writing in advance of a disciplinary meeting of the precise nature of the matters concerned and will be given copies of all relevant documentation. In the case of a complaint, this detail will include the source and text of the complaint as received. A complaint should be in writing.
- that details of the allegations, complaints or issues of professional competence be put to the teacher concerned
- that the right of a teacher concerned to have access to and to view his/her personnel file (to include all records in relation to the teacher in hardcopy or electronic format, held by the school/ETB) will be fully respected
- that the teacher concerned is given the opportunity to avail of representation by a work colleague or trade union representative/s
- that the teacher concerned be given the opportunity to respond fully to any such allegations, complaints or issues of professional competence (this Court’s emphasis)
- that the teacher concerned has the right to examine and challenge all evidence available and to call witnesses or persons providing such evidence for questioning (this Courts emphasis)
- that the teacher concerned has the right to a fair and impartial examination of the issues being investigated, taking into account the allegations or complaints themselves, 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
- that the ETB, as employer, has a duty to act reasonably and fairly in all interactions with staff and to deal with issues relating to conduct or professional competence in a confidential manner which protects the dignity of the teacher
- that all matters relating to the disciplinary procedure are strictly confidential to the parties and their representatives
- that it will be considered a disciplinary offence for any person to intimidate or exert inappropriate pressure on any person who may be required to attend as a witness
- that where a decision is taken to impose a disciplinary sanction, the sanction imposed will be in proportion to the nature of the conduct/behaviour/performance that has resulted in the sanction being imposed



- that these procedures are without prejudice to the right of a teacher to have recourse to the law to protect his/her employment.”

62. Circular 0071 of 2014 provides for the disciplinary procedures for teachers employed in ETBs. The procedure was developed following the discussions between the Department of Education and Skills, School Managerial Bodies and recognised Teacher Unions. It takes account of employment legislation and the Labour Relations Commission's Code of Practice on Disciplinary Procedures. This procedure superseded all existing local and national disciplinary procedures.

63. The document states:-

“This procedure relates to work and conduct issues and matters other than professional competence and applies to all teachers other than those serving in a probationary capacity.”

64. The Court notes that allegations in respect of child abuse as defined in Child Protection Guidelines for Primary and Post-Primary schools are dealt with in the first instance under these guidelines.

65. It appears to this Court that allegations of bullying should also be dealt with in the first instance under these guidelines. However, the Court will revert to this in due course.

#### “Informal Stage

It is intended that problems relating to work and conduct are resolved, where possible, through informal means (this Court's emphasis). To this end the Principal will discuss any unsatisfactory conduct with the teacher concerned and inform him/her of the required improvements. The teacher will be given an opportunity to offer explanation and comment. Where an improvement might be effected without recourse to disciplinary action, guidance will be provided as appropriate and due attention will be given to whether the shortcoming is due to personal, health or domestic circumstances. In such cases help and advice will be given where possible. The teacher will also be informed that unless the necessary improvement is made the matter may proceed to the formal disciplinary procedure.

#### Stage 1: Verbal Warning

A formal disciplinary meeting with the teacher will be convened by the Principal. The teacher will be given at least five school days' written notice of the meeting. The notice should state the purpose of the meeting and the specific nature of the complaint together with any supporting documentation. The teacher concerned may be accompanied at any such meeting by his/her trade union representative or a work colleague.”

66. The Court notes that there is no entitlement for a teacher to have a legal representative with him and the Court will revert to this in due course.

“At the meeting the teacher will be given an opportunity to respond and state his/her case fully and to challenge any evidence that is being relied upon for a decision. Having considered the response, the Principal will decide on the appropriate action to be taken. Where it is decided that no action is warranted the teacher will be so informed in writing within five school days. Where it is decided that disciplinary action at this stage is warranted the Principal will inform the teacher that he/she is being given a verbal warning. Where a verbal warning is given it should state clearly the improvement required and the timescale for improvement. The warning should inform the teacher that further disciplinary action may be considered if there is no sustained satisfactory improvement. The teacher will be advised of his/her right to appeal against the disciplinary action being taken and the appeal process.”

67. The court notes that the processes at Stages 1 to 3 were not taken by the defendant in this matter.

#### “Stage 2: Written Warning

If, having received a verbal warning, the teacher's conduct is perceived by the Principal to be less than satisfactory in relation to that required at Stage 1 a meeting will be arranged between the teacher and the Principal and another officer delegated by the Chief Executive. The teacher will be given at least seven school days' written notice of the meeting. The notice should state the purpose of the meeting and the specific nature of the complaint together with any supporting documentation. The teacher concerned may be accompanied at any such meeting by his/her trade union representative/s or a colleague/s subject to an overall maximum of two.”

68. Again the Court notes that the procedures for the suspension and dismissal of teachers and principals exclude the possibility of a teacher being represented by a legal representative.

“At the meeting the teacher should be given a clear statement of the area/s where his or her conduct is perceived as unsatisfactory. The teacher will be given an opportunity to respond and state his/her case fully and to challenge any evidence that is being relied upon for a decision and be given an opportunity to respond. Having considered the response, the Principal and the other officer delegated by the Chief Executive, will decide on the appropriate action to be taken. Where it is decided that no action is warranted the teacher will be so informed in writing within five school days. Where it is decided that disciplinary action at this stage is warranted the teacher will be informed that he/she is being given a written warning. Where a written warning is given it should state clearly the improvement required and the timescale for improvement. The written warning should inform the teacher that further disciplinary action may be considered if there is no sustained satisfactory improvement. The teacher will be advised of his/her right to appeal against the disciplinary action being taken and the appeal process.

#### Stage 3: Final Written Warning

If having received a written warning, the Principal perceives that the teacher's conduct remains less than satisfactory or there is an occurrence of a more serious offence, a meeting will be arranged between the teacher, the Principal and another officer delegated by the Chief Executive. The teacher should be given at least seven school days' written notice of the meeting. The notice should state the purpose of the meeting and the specific nature of the complaint together with any supporting documentation. The teacher concerned may be accompanied at any such meeting by his/her trade

union representative/s or a colleague/s subject to a maximum of two.

At the meeting the teacher should be given a clear statement of the area/s where his or her conduct is perceived as unsatisfactory. The teacher will be given an opportunity to respond and state his/her case fully and to challenge any evidence that is being relied upon for a decision and be given an opportunity to respond. Having considered the response, the Principal and the other officer delegated by the Chief Executive will decide on the appropriate action to be taken. Where it is decided that no action is warranted, the teacher will be so informed in writing within five school days. Where it is decided that disciplinary action at this stage is warranted, the teacher will be informed that he/she is being given a final written warning. Where a final written warning is given it should state clearly the improvement required and the timescale for improvement. The final written warning should inform the teacher that further disciplinary action may be considered if there is no sustained satisfactory improvement. The teacher will be advised of his/her right to appeal against the disciplinary action being taken and the appeal process.

The final written warning will be active for a period not exceeding 12 months and subject to satisfactory service will cease to have effect following the expiry of the 12 month period.

#### Stage 4:

If it is perceived that the work or conduct has continued after the final written warning has issued or the work or conduct issue is of a serious nature a comprehensive report on the facts of the case will be prepared by the Principal and forwarded to the Chief Executive. A copy will be given to the teacher.

In accordance with the provisions of the Education and Training Boards Act, 2013, employment matters including the suspension and dismissal of staff are executive functions. Consequently, the following procedures will apply.

4.1 If the Chief Executive decides to proceed to a disciplinary process, the teacher will be provided with an opportunity to attend at a meeting with the Chief Executive accompanied by his/her trade union representative/s or a colleague subject to an overall maximum of two. (The court notes again that there is no provision for a legal representative even though issues relating to suspension and dismissal of staff are at issue).

The teacher will be given at least 7 school days' notice of the meeting. The notice should state the purpose of the hearing and the fact that disciplinary action may be considered.

At the meeting the teacher will be given an opportunity to make his/her case in full and to challenge any evidence that is being relied upon for a decision.

Following the hearing the Chief Executive shall make his/her judgement on the matter. In formulating his/her judgement the Chief Executive will take account of the report from the Principal, any other evidence and the teacher's representation (if any) thereon.

The Chief Executive shall notify the teacher of his/her decision and any intended disciplinary action if that be the outcome of his/her deliberations. If it is decided to take disciplinary action, the Chief Executive may avail of any of the following range of sanctions.

- (a) Final written censure
- (b) Deferral of an increment
- (c) Withdrawal of an increment or increments
- (d) Demotion (loss of post of responsibility)
- (e) Other disciplinary action short of suspension or dismissal
- (f) Suspension (for a limited period and/or specific purpose) with pay
- (g) Suspension (for a limited period and/or specific purpose) without pay
- (h) Dismissal

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

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

#### 69. The next section is headed "Gross Misconduct":-

"In cases of serious misconduct at work or a threat to health and safety to children or other personnel in the school the stages outlined above do not normally apply and a teacher may be dismissed without recourse to the previous stages.

The following are some examples of gross misconduct for which any or each of Stages 1 to 3 of the disciplinary procedure may not apply depending on the gravity of the alleged offence:

- Theft
- Deliberate damage to school property
- Fraud or deliberate falsification of documents

- Gross negligence or dereliction of duties
- Refusal to comply with legitimate instructions resulting in serious consequences
- Serious or persistent incapacity to perform duties due to being under the influence of alcohol, unprescribed drugs or misuse of prescribed medication
- Serious breach of health & safety rules
- Serious abuse/misuse of the school property/equipment
- Serious breaches of confidentiality
- Serious bullying, inappropriate behaviour, sexual harassment or harassment against an employee or customer, including students
- Violent/disruptive behaviour
- Downloading/disseminating pornographic material from the internet
- Circulation of offensive, obscene or indecent e-mails or text messages.

The above list is not exhaustive.

If there is an allegation of serious misconduct the teacher may be suspended on full pay pending an investigation and the conclusion of any appeal process.

In the course of investigation, the teacher concerned has the right to have the allegations brought to his/her attention and he/she has the right to respond to all allegations. If the investigation upholds a case of serious misconduct the normal consequence will be dismissal.

#### Stage 5: Appeals

It will be open to the teacher to appeal against the proposed disciplinary action. In the case of sanctions being imposed at Stages 1, 2 and 3 the appeal will be to an officer delegated by the Chief Executive who has not had a previous involvement with the matter and who is of an equal or higher grade to the officer who imposed the sanction for example, the Principal, APO, PO, EO or CE. In the case of serious misconduct being imposed under stage 4 of the procedure an appeal will be to a disciplinary appeal panel appointed by the Chief Executive as set out in Appendix A. The procedures for appealing are as set out in Appendix A.

#### Appendix A: Appeal Process

A teacher may seek a review of disciplinary proceedings by the panel on one or more of the following grounds:

- (1) the provisions of the procedures were not adhered to
- (2) all the relevant facts were not ascertained
- (3) all the relevant facts were not considered or not considered in a reasonable manner
- (4) the teacher concerned was not afforded a reasonable opportunity to answer the allegation
- (5) the teacher concerned could not be reasonably be expected to have understood that the behaviour alleged would attract disciplinary action
- (6) the sanction recommended is disproportionate to the underperformance or misconduct alleged."

70. The applicant was informed by letter dated 7th May, 2015 that Rose McCormack, the HR Section, Longford Office was in receipt of a formal complaint of alleged bullying from Ms. Michelle Spence. The applicant was requested to respond, giving complete details. The letter continued "the complaint will be investigated in accordance with the provisions of the formal procedure documented in Bullying Prevention Policy and Complaint Procedure for ETB staff" and the letter continues that "the applicant had a right to be accompanied" and he was referred to:

- (1) the Bullying Prevention Policy and Complaint Procedures for ETB staff;
- (2) that he had the right to avail of employee assistance service at any point during the investigation;
- (3) that the agreed procedure is an industrial relation procedure and not a legal procedure (this Courts emphasis).

71. It was stated that the procedure will be conducted within the norms of industrial relations custom, practice and procedure and as such is not a judicial process. In circumstances where a legal action is involved the policy will be suspended and the operation of law will take precedent. A series of documentation was enclosed. Finally, the letter states that the Head of HR will appoint an investigation team comprising two persons, a panel of approved organisations which can be drawn upon to undertake the investigation (under a contract for service) as approved in Appendix 1 of the Bullying Prevention Policy and Complaint Procedure for ETB staff. There was no provision for either party to a complaint, to reject a nominated investigator save in very exceptional circumstances where an investigator so nominated is related to, or a personal friend of either the complainant or alleged respondent in the complaint.

#### **Bullying Prevention Policy**

72. This Court now turns to the Bullying Prevention Policy. Therein it is stated that the new policy and procedure complies with the recommendations of the Government Task Force Report on bullying in the workplace and the following codes:

(1) Health and Safety Authorities Code of Practice on the prevention of workplace bullying

(2) The Labour Relations Commission Code of Practice detailing procedures for addressing bullying in the workplace.

Under the General Principles attaching to the Bullying Policy provides:

"All persons invoking or engaging in, the formal procedural stages of the policy are advised that

(1.1) The agreed procedures in industrial relations procedure and not a legal procedure (this Court's emphasis). It would be conducted within the norms of industrial relations custom, practice and procedure and as such is not a judicial process. In circumstances where legal action is invoked the policy will be suspended and the operation of law will take precedent.

(1.2) Any individual invoking the policy to a procedure at the Formal stage must provide written agreement to proceeding through the formal procedural stages in accordance with 1.1.

(2) The right to be accompanied at all stages of this procedure is recognised. Reference in the policy to representative includes

(i) a work colleague of the staff member's choice or

(ii) representation by an authorised trade union but not any other person or body unconnected with the particular ETB

The nature of the meetings is such that legal representation is not required."

The Court notes this legal representation is not excluded, it is just not required – however this is a matter of some considerable debate in this case.

"The following principles shall apply:

- All formal complaints shall be in writing
- Details of any complaints shall be put to the respondent staff member concerned
- Both parties to the complaint shall be given the opportunity to avail of representation during the procedure by a work colleague or by an authorised trade union but not any other person or body unconnected with the particular ETB.
- Parties to the complaint have the right to a fair and impartial determination of the issues concerned taking into account any representations made by or on behalf of the staff member and any other relevant or appropriate evidence, factors or circumstances.
- No allegations which have previously been investigated can be entered as part of the current investigation.
- Access to personal information held by an ETB shall be facilitated in accordance with the ETBs Data Protection Policy (specifically with respect to the ETBs Access Procedure) and with the principles and requirements of the Data Protection Acts 1998 – 2003. When the proceedings have been completed the Investigation Board and all associated documentation concerned to the Board will be filed, on a strictly confidential basis with the Head of HR in the ETB.
- That all matters relating to the complaint are strictly confidential to the parties and their representatives."

73. There then proceeds a definition of bullying at work:

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

74. This Court notes that complaints of bullying can often be resolved on an informal basis and no further action may be required. Mediation is a process where an independent and neutral mediator assists the parties to come to agreement through a collaborative process. However, it is a decision for the complainant in the first instance which approach to adopt. In most cases, adopting an informal approach or engaging in mediation is the preferred approach of the ETB and unions representing staff in the sector. The engagement of a mediator is a matter for the Head of HR to decide, upon receiving a request from a staff member who believes s/he is being bullied or a staff member who is a respondent to a complaint of bullying.

75. The next procedure detailed in the bullying prevention policy is the formal procedure. This is for when "attempts to resolve the alleged complaint through informal means have not succeeded or where the complainant elects to invoke the formal procedure as a matter of first instance." It continues: "an investigation will be carried out by the ETB. All complaints will be treated seriously and in confidence". (this Court's emphasis).

"Stage 1 investigation:

1. The complainant writes in confidence to the Head of Human Resources to request that an investigation under the Formal Procedure be undertaken. This letter shall include the written statement of complaint which must be signed and dated by the complainant. A formal complaint should inter alia contain: clear specific allegations against named individual(s), dates and times of incident(s), a list of witnesses if any, direct quotes if they can be recalled, a brief

description of the context of each incidence, a brief description of the impact/effect each incidence had on the complainant, any other relevant documentary evidence except for mediation details of previous approaches made to the respondent (if any) and the outcome of same.

2. Upon receipt of a written complaint the Head of HR or his/her nominee will formally acknowledge within 5 working days' receipt the complaint and advise of the right to be accompanied.

3. The respondent to the complaint will be furnished with a copy of the complaint and all accompanying documentation within the same 5 working days' and informed of his/her right to be accompanied.

4. The respondent to the complaint shall be given an additional 10 working days from the date of issue by the ETB of the complaint details and documentation to respond in writing to the complaint details. The response should be sent to the Head of HR. Any counter complaint if raised by the respondent will be processed as part of the respondent's response to the complaint under the remit of the same investigation [...]

5. The Head of HR will contact Education and Training Boards Ireland to have an investigation team nominated comprising two persons from the panel of approved investigators. The panel of improved investigators can be drawn upon to undertake the investigation (under a contract for service) [...]"

The policy document suggests that the investigation should commence no later than the expiration of 30 working days from the date of receipt by HR of the written complaint, and the official Investigation Board must issue to the Head of HR no later than 40 working days from the date of receipt by the Investigators of the complaint the documentation originally supplied by the Head of HR.

Lastly, the Court notes that the policy sets out that the final investigation report will be referred to the CE of the ETB for consideration and a determination.

This Court quotes further from the policy:

"Stage 2: Decision by the ETB as employer takes circular to reject the findings of the Investigation Report.

2.1 The Chief Executive having undertaken evaluation of the report will decide as to whether or not the Investigation Report should be adopted. The decision of the Chief Executive will be communicated to the parties to the complaint within a total of 15 days of the date of issue by the Head of HR of the final investigation report to the parties to the complaint. Such covering correspondence will advise a right of appeal to an independent third party [...]"

2.2 Importantly in arriving at a decision the Chief Executive:

(a) Is not to be regarded as making any assessment as to the merits or otherwise of the complaints made by the complainant against the respondent

(b) Shall meet with the Investigation Team by way of informing/satisfying his/her self that the terms of reference for the investigation have been adhered to

2.3 In circumstances where the Chief Executive decides to adopt the findings of the investigation report s/he shall have due regard to the procedures undertaken over the course of the investigation and the discharge of the terms of reference by the Investigation Team. Where the Chief Executive elects to adopt the Report particular regard should be had to be able to respond to the potential for a procedural appeal under the specified appeal grounds. [...]"

Section 3 of the policy sets out the following under the heading "provision for appeal" - "it is open to either party to complaint of bullying to appeal the decision of the Chief Executive of the ETB to the agreed Appeal Officer nominated by the LRC and nationally agreed between ETB and unions consultative forum."

76. The next section of the policy document deals with the following:

"Disciplinary Action Arising

Breaches of the Bullying Prevention Policy will not be tolerated by the ETB. Breaches of the Policy shall be regarded as misconduct (but not gross misconduct) and may be subject to disciplinary action under the Disciplinary Procedure relevant for the staff member concerned. Repeated policy breaches will be taken into consideration in determining the appropriate disciplinary sanction to be applied to the staff member concerned.

Where a complaint of bullying is upheld or a complaint is found to be vexatious/malicious, disciplinary action will be taken in accordance with the appropriate stage of the ETB Disciplinary Policy for staff [...]"

## **Discussion**

77. There are a number of matters for the Court to consider in this case:

(1) The issues of fair procedures in the course of the investigation

(2) whether there was bias as a result of the respondent acting on foot of the investigation process conducted by the company retained by the respondent; and finally

(3) What is the relationship between Circular 71/2014 and the bullying policy.

Counsel for the respondent makes the point that the subject matter of the judicial review is an order of certiorari quashing the decision of the respondent dated the 30th of August, 2015, insofar as the respondent has purported to uphold or rely upon a finding of bullying against the applicant for the purpose of summoning the applicant to a Stage 4 disciplinary meeting on Thursday the 15th of September, 2016 as provided for in the Department of Education and Skills Circular letter 71/2014 entitled "Revised Procedures for Suspension and Dismissal of Teachers and Principals". It is a

matter for the court to decide whether or not inter alia the procedures adopted during the investigation are contained in the grounds of the judicial review.

78. In May 2015, the applicant was notified that a complaint of bullying had been made against him by his colleague, a teacher called Ms. Michelle Spence. The complaint cited a number of incidents, some of which dated back to 2008. Ms. Spence had requested the head of human resources of the respondent to conduct a formal investigation into the alleged bullying. The allegation of bullying detailed over one hundred pages in respect of her complaint.

79. An investigation into the complaint was launched in accordance with the Bullying Prevention Policy – Complaint Procedure for ETB Staff. The respondent engaged a private limited company called Graphite Recruitment HRM Ltd. to carry out the said investigation. The applicant was asked by the investigation to submit his written response to various meetings and interviews and he duly complied. On the 4th of April, 2016 nearly one year after the complaint from Ms. Spence and the applicant was furnished with a copy of the report of Graphite Recruitment HRM Ltd. which was dated the 24th of March, 2016.

80. The two investigators of Graphite Recruitment HRM Ltd. were Ms. Louise McGonigle and Mr. Gordon Nolan. The Court has the statement of Michelle Spence which was taken by the defendant's investigator on the 4th of August, 2015. An interview with Mr. Michael Lyons held on the 22nd of September, 2015 at which he was accompanied by Brian Hyland from the Teachers Union of Ireland. A further interview was held with Ms. Michelle Spence on the 11th of January, 2016. A further interview was held with the applicant held on the 16th of February, 2016.

81. Emails were sent to Graphite Recruitment HRM Ltd. from Deirdre O'Brien. Further, a statement of Antoinette Higgins, Margaret Mullooney, and AnnMarie Keenan were taken by Graphite Recruitment HRM Ltd. A number of letters were also received by Graphite Recruitment HRM Ltd.

82. By letter dated the 4th of March, 2016 Louise McGonagall, the senior HR consultant of Graphite Recruitment HRM Ltd. indicated that they would now proceed to consider the information provided by Graphite Recruitment HRM Ltd. to date and will issue a report of their findings to the HR manager of the respondent.

83. Graphite Recruitment HRM Ltd.'s final report issued on the 24th of March, 2016 and among the findings were that:

"The investigation concludes that Mr. Lyons has withheld information in relation to Ms. Spence on two occasions. Specifically, in relation to failing to inform her about a Community Arts Project and the non-inclusion of her TY plan at the Board of Management meeting. The investigation also finds that Mr. Lyons undermined Ms. Spencer on two occasions. Specifically, in relation to failing to acknowledge her contribution at a staff meeting in addition to keeping possession of the school Arts camera".

The report also noted that the behaviour of Ms. Spence towards Mr. Lyons wife has been a contributory factor in this finding against Mr. Lyons. In addition, both parties have strong opinions on certain matters, which has lead to tensions between them. However as there has been repeated inappropriate behaviour directed towards Ms. Spence by Mr. Lyons during the course of his employment, this can be reasonably regarded as undermining her right to dignity at work as per the definition outlined in the ETB bullying policy.

84. The report does not deal with the complaints Ms Spence alleges took place from 2008, and the finding of the report is unhelpful in this light. It appears to the Court that an investigation which took a year, comprising of four interviews (two interviews with Ms. Spence and two interviews with Mr. Lyons) and a number of statements and letters from witnesses did not adequately deal with issues that predated the complaints. The report does not set out sufficiently the basis upon which the investigators concluded that Ms. Spence's right to dignity at work had been undermined.

85. On the 21st of April, 2016 the applicant received a letter from the respondent dated the 20th of April, 2016 advising that the report of Graphite Recruitment HRM was to be adopted by the respondent. The applicant was advised that he had fifteen working days to appeal the decision. The applicant duly appealed to the appeals officer whereupon his appeal was rejected. By letter dated the 30th of August, 2016 the applicant was advised that in circumstances where his appeal had not been upheld, the investigation report would be upheld, together with the findings against him as set out therein. The applicant is advised of the following:

"Bullying behaviour in an ETB workplace is unacceptable misconduct which promptly falls to be addressed under the appropriate provisions of Circular 0071 of 2014 Disciplinary Procedures for Teachers Employed in Education and Training Boards. In the light of the findings/conclusions of the investigation report (copy enclosed) you are required to attend a Stage 4 disciplinary meeting to be convened for the purposes of determining the disciplinary action if any which may arise from the finding of the investigation report referred to above."

The applicant was further advised that the meeting was scheduled to take place at 11 am on Thursday the 15th of September, 2016.

86. In correspondence, Brian Carolan, solicitor on behalf of the applicant in his first letter to the Chief Executive of Longford Westmeath Education and Training Board Dr. Christy Duffy, sought certain assurances in relation to the applicant's right to fair procedures. He also submits in his letter dated 1st August, 2016:

"Clearly any findings of the previous investigation report cannot be relied upon in any subsequent disciplinary process in circumstances where the applicable ETB policies and procedures do not permit this.

Our client is anxious to have all of his rights to fair procedures including the right to challenge the evidence against him and in particular the right to cross-examine his accuser, his right to the presumption of innocence and his right to be advised in advanced in writing of the specific allegations against him that are proposed to be the subject matter of any disciplinary procedure."

87. Further in a letter dated the 2nd of September, 2016 to Dr. Duffy he stated:

"The disciplinary process provided for Circular 71 of 2014 does not refer to or in any way impact upon the investigation you refer to and accordingly we are surprised of the suggestion in your recent letter that in some way the results of that investigation could have any relevance to the detailed procedures provided for in Circular 71 of 2014."

He relied upon the presumption of his client's innocence and the right of Mr. Lyons to challenge including by way of cross-examination all evidence which would be called at such a hearing. He further stated that his client is entitled to call witnesses. He also suggested

that Mr. Lyons is entitled to a fair and impartial examination of the issues being investigated and that it did not appear to him that the Chief Executive was in a position to provide such a fair and impartial examination given his involvement in the procedures to date and most particularly in the light of his apparent acceptance of findings made against Mr. Lyons.

88. By letter dated the 6th of September, 2016 William Egan & Associates solicitors wrote to the applicant's solicitor stating the following:

"A reading of these documents (the Bullying Prevention Policy and Circular letter 71 of 2014) makes it abundantly clear that there is an inextricable and intended link between them. It is repeatedly stated there were employees found to have behaved in an inappropriate manner towards another employee. The defending conduct may be referred to the disciplinary procedures at an appropriate stage."

It further stated:

"In the circumstances our client is now quite entitled to refer the matter to the disciplinary procedure at an appropriate stage to consider the appropriate conduct of your client and what disciplinary action, if any, may be appropriate to the circumstances.

Your client has participated in the process to date and has had access to representation and all the relevant documentation throughout that process. The now related suggestion that he is in some way a stranger to the details of the matter, that all the work to date should now be set aside to commence a *de novo* process is entirely intangible and without foundation."

89. The Court is satisfied that a finding of bullying in contravention of the Bullying Prevention Policy does amount to conduct of a serious nature. Such a finding of course, could lead in certain cases to dismissal. It is not for the Court to make any decisions in this regard as it is clearly a matter for the Chief Executive to make a determination.

#### **Fair Procedures in Relation to the Investigation by Graphite Recruitment HRM**

90. The process set out in Bullying Prevention Policy and Circular 71/2014 excludes a legal representative from acting on behalf of a teacher against whom accusations are levelled. This is the case, even though the complaints may lead to dismissal. Investigative bodies, like Graphite Recruitment HRM are utilised by employers both in the public sector and in the private sector. Generally, the processes adopted by such bodies exclude:

- (1) legal representatives from attending on behalf of their client;
- (2) cross-examination.

91. Where investigative processes can lead to dismissal, cross-examination is a vital safeguard to ensure fair procedure. In *Borges v. the Fitness to Practice Committee* [2004] 1 I.R. 103, Keane C.J. states:

*"It is beyond argument that, where a tribunal such as the first respondent is inquiring into an allegation of conduct which reflects on a person's good name or reputation, basic fairness of procedure requires that he or she should be allowed to cross-examine, by counsel, his accuser or accusers. That has been the law since the decision of this Court in In re Haughey [1971] I.R. 217 and the importance of observing that requirement is manifestly all the greater where, as here, the consequence of the tribunal's finding may not simply reflect on his reputation but may also prevent him from practicing as a doctor, either for a specified period or indefinitely."*

92. Keane C.J. discusses conduct which reflects on a person's good name or reputation:-

*"The applicant cannot be deprived of his right to fair procedures, which necessitate the giving of evidence by his accusers and their being cross-examined, by the extension of the exceptions to the rule against hearsay to a case in which they are unwilling to testify in person."*

93. In *Maguire v. Ardagh* [2002] 1 I.R. 385 Hardiman J. stated:-

*"where a person is accused on the basis of false statements of fact, or denied his civil or constitutional rights on the same basis, cross-examination of the perpetrators of these falsehoods is the great weapon available to him for his own vindication. Falsehoods may arise through deliberate calculated perjury."*

94. Hardiman J. continued:-

*"In re Haughey [1971] I.R. 217, it was said by Ó Dálaigh C.J. at p. 264:*

*"... in proceedings before any tribunal (this Court's emphasis) where a party to the proceedings is on risk of having his good name, or his person or property, or any of his personal rights jeopardized, the proceedings may be correctly classed as proceedings which may affect his rights, and in compliance with the Constitution the State, either by its enactments or through the courts, must outlaw any procedures which will restrict or prevent the party concerned from vindicating these rights."*

*Applying that general principle to the facts of that case, this Court found at p. 263 that a person against whom damaging allegations were made was entitled to the following "minimum protection":-*

- (a) that he should be furnished with a copy of the evidence which reflected on his good name;*
- (b) that he should be allowed to cross-examine, by counsel, his accuser or accusers;*
- (c) that he should be allowed to give rebutting evidence; and*
- (d) that he should be permitted to address, again by counsel, the Committee in his own defence.*

*Without these rights:-*

*"no accused - and I speak within the context of the terms of the inquiry - could hope to make any adequate defence of his good name. To deny such rights is, in an ancestral adage, a classic case of clocha ceangailte agus madraí scaoilte. Article 40, s. 3 of the Constitution is a guarantee to the citizen of basic fairness of procedures. The Constitution guarantees such fairness, and it is the duty of the court to underline that the words of Article 40, s. 3 are not political shibboleths but provide a positive protection for the citizen and his good name."*

*Accordingly, the right to cross-examine one's accusers is a constitutional right and not a concession. It applies, as In re Haughey [1971] I.R. 217 affirmatively demonstrates, in an Oireachtas committee or sub-committee as well as in any other forum in which a citizen may be accused. It is an essential, constitutionally guaranteed, aspect of fair procedures."*

95. It is quite clear to this Court that the proceedings adopted by Graphite Recruitment HRM Ltd. is in breach of Article 40(3)(1) and (2) of the Constitution of Ireland by the refusal to allow legal representatives to appear on behalf of the applicant. The processes adopted by Graphite Recruitment HRM Ltd. failed to vindicate the good name of the applicant, in their refusal to hold an appropriate hearing, whereby the applicant through solicitor or counsel may have cross-examined the complainant..Equally, the complainant ought to be entitled to then cross-examine the applicant.

96. Fair procedures manifestly indicate that the applicant has the right to confront and cross-examine the individual who has made allegations against him. It is unclear whether Stage 4 of the Disciplinary Procedure under Circular 71/2014 entitles the applicant to be accompanied by a solicitor. However, this Court finds that it is the actual investigation that requires the rights to cross-examination and representation, that takes prior to the initiation of the disciplinary procedure under Circular 71/2014.

97. It appears to this Court that the Department of Education and Skills must be aware of the importance of fair procedures, and how fair procedures must be adopted under its Bullying Protection Policy, or its 'Disciplinary Procedures' under Circular 71/2014. It is clear that as a matter of law and as a matter of fair procedures an individual whose job is at stake and against whom allegations are made would be entitled to challenge and cross-examine evidence. The Court finds that the investigation carried out by Graphite Recruitment HRM Ltd. failed to adopt fair procedures, in contradiction of the dicta of Supreme Court in the above cited decisions.

98. It is noted by the Court that this is the process adopted by many companies when dealing with complaints against employees. It is quite clear that the exclusion of solicitors and counsel, and the refusal to allow cross-examination under such policies is a breach of the Constitutional right to fair procedures.

99. It is clear to the Court that if there is a finding of bullying under an investigation that adopts constitutional fair procedures, this may amount to conduct of a serious nature. In a case such as this, such a finding would allow an employer to invoke Stage 4 of the procedures - but only if the investigation leading to such a finding had been conducted in line with fair procedure.

100. Such a finding could lead to dismissal, but it is not for the Court to make any decisions in this regard. This is a matter for the Chief Executive to determine, and the Court repeats, this is provided that the finding of bullying followed from a constitutionally sound investigative process.

101. The Court is clear that in circumstances where a complaint is made which could result in an individual's dismissal, or where it impinges on the individual's right to a good name, the individual is entitled to fair procedures, as outlined by the Supreme Court in the case law quoted above.

102. Counsel for the respondent makes the point that the order following from a judicial review case such as this is an order of *certiorari*. This would quash the decision of the respondent dated the 30th of August, 2015, insofar as the respondent upheld a finding of bullying against the applicant, for the purpose of summoning the applicant to a Stage 4 disciplinary meeting as provided for in the Department of Education and Skills Circular 71/2014.

103. However, the Chief Executive is relying on a flawed and constitutionally impermissible finding of bullying. In the Court's view, the investigative process comes foursquare within the remit and ambit of the judicial review sought by the applicant.

104. In summary, the Court holds as follows:

(1) The investigation by Graphite Recruitment HRM Ltd. was in breach of the constitutional right to fair procedures.

(2) If a constitutionally sound finding of bullying had been made, this could amount to conduct of a serious nature, and as such could be the subject matter of a disciplinary process at Stage 4 of the proceedings set out above. This would not necessitate the investigation being carried out under Stages 1 to 3 beforehand.

105. Finally, the Court will set aside the summoning of the applicant to a Stage 4 disciplinary meeting, on the basis that the findings of Graphite Recruitment HRM Ltd. are in breach of the fair procedures. The Chief Executive has no constitutionally sound basis to hold a disciplinary hearing in accordance with Circular 71/2014.