Neutral Citation Number: [2012] IEHC 201

THE HIGH COURT

JUDICIAL REVIEW

[2011/764 JR]

BETWEEN

CATHERINE MCSORLEY

APPLICANT

V.

THE MINISTER FOR EDUCATION AND SKILLS

FIRST NAMED RESPONDENT

&

COUNTY KILKENNY VOCATIONAL EDUCATION COMMITTEE

SECOND NAMED RESPONDENT

Judgment of Mr. Justice Hedigan delivered the 26th of April 2012

1. The applicant resides at Annamult, Bennettsbridge, Co Kilkenny.

The first named respondent is the Minister for Education and Skills. The second named respondent is a statutory body established under the Vocational Education Acts 1930-2001 and was at all material times the employer of the applicant.

2. The applicant seeks the following relief's:-

(i) A Declaration that the Applicant is, and rightfully remains employed in the post of Principal of Kilkenny City Vocational School.

(ii) A Declaration confirming that none of the allegations the subject matter of the Inquiry established by Order of the Minister for Education & Science on 20th February, 2006 ("the Ministerial Order of 2006") were upheld against the Applicant;

(iii) A Declaration that the eight new matters purportedly investigated by the First Respondent's servant or agent, Mr Torlach O'Connor, during the course of the said Inquiry did not properly form part of the Ministerial Order of 2006 and should not have been investigated;

(iv) An Order and Declaration that the undated report of the First Respondent's servant or agent, Mr O'Connor received on 14th April, 2011 cannot be relied upon, in particular to dismiss the applicant;

(vi) An Order of Prohibition, by way of application for judicial review, preventing the respondents, their servants or agents from taking any further steps on foot of the Ministerial Order of the First Respondent dated the 28th July, 2011 and or directing the removal of the Applicant from office with effect from the 1st September, 2011. (vii) An Order of Prohibition restraining the Respondents, their servants or agents, from taking any steps in furtherance of the Ministerial Order of the 28th July, 2011 of the First Respondent;

(viii) Further or in the alternative and if necessary an Order of Certiorari quashing those conclusions and findings of, and that part of, the Interim Report which found 3 of the 8 purported new allegations to be proven.

(ix) An Injunction restraining the Respondents, their servants or agents, from terminating the employment of the Applicant or from stopping the payment of her salary, benefits, pension and emoluments;

(x) An Order directing that no further investigations be carried out in relation to the matters the subject matter of the Ministerial Order of 2006 or in relation to the period 2001-2003.

(xi) An injunction restraining the Respondents from taking any further steps giving effect to the Ministerial Order of the First Respondent dated 28th July, 2011 directing the removal of the Applicant from office with effect from 1st September, 2011.

(xii) A stay pursuant to Order 84 rule 20(7) (a) of the Rules of the Superior Courts, 1986, and or an injunction restraining the implementation of the said Order pending the determination of the within proceedings;

(xiii) An order that the respondents comply with their obligations under the Data Protection Acts pursuant to the Applicants requests of the 16th May, 2011;

(xiv) Such further or other Order as to the High Court appears just and proper and in the interests of the Applicant including such relief as may be appropriate under the European Convention on Human Rights Act 2004 as may be appropriate;

(xv) Damages;

Background Facts
3.1 The applicant is Principal of Kilkenny City Vocational School ("KCVS") and has held this position since 1999. KCVS provides learning and support in particular for marginalised and disadvantaged children and has experienced high truancy rates. There was unrest between various parties in KCVS prior to the applicant's appointment as Principal in 1999. Her predecessor resigned her post. In 2003 a number of allegations were made concerning the applicants conduct in the running of the school. Further to these allegations a number of inquiries were initiated. On the 21st December 2005 the then Minister for Education and Science decided to establish an inquiry under section 105 of the Vocational Education Act 1930. On 20th February, 2006 the Minister approved terms of reference for this inquiry as follows:-

> "I, Mary Hanafin T.D., Minister for Education and Science, in exercise of the powers conferred on me by section 105 of the Vocational Education Act 1930, hereby appoint Mr Torlach O'Connor, retired Assistant Chief Inspector of the Department of Education and Science, to-
>
> (a) carry out an inquiry into the performance by Ms Cathy McSorley, Principal of Kilkenny City Vocational School, of her duties as Principal of Kilkenny City Vocational School and such an inquiry shall include, but not necessarily be limited to, an inquiry into-
>
> (i) the organisation and administration of that school in the area of human resource management,
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> (ii) the alleged failure of Ms McSorley to effectively apply the schools disciplinary policy,
>
> (iii) the alleged engagement by Ms McSorley in the bullying of staff members of County Kilkenny Vocational Education Committee,
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> (iv) the alleged failure of Ms McSorley to comply with the lawful orders of the Vocational Education Committee as directed from time to time by the Chief Executive Officer,
>
> (v) the administration of the school by Ms McSorley with regard to recording of the roll books in the school and the supervision of a foreign trip by the school in February 2001, and
>
> (vi) the alleged payment by Ms McSorley to students enrolled in Kilkenny City Vocational School to attend such school.
>
> (b) to report to me the outcome of the inquiry as speedily and in as efficient a manner as possible, having regard to the circumstances of the case.,
>
> (c) to provide an interim report if requested by me to do so.
>
> The terms of reference may be subject to such addition or amendment as I consider appropriate."

3.2 On the 14th February, 2008 the first named respondent requested Mr O'Connor to forward an interim report. The applicant was made aware of this at the time and raised objections in correspondence with the Inquiry, however she fully and actively engaged with the Inquiry. A report was furnished to the first named respondent in August 2010. The report made a number of findings against the applicant. On the 6th April, 2011 the Minister's advisor, Mr Matthew Ryan prepared a Departmental memorandum with advices for the Minister and provided him with the Interim Report. Appended to that memorandum is the Minister's hand-written decision to remove the applicant dated one day later, 7th April, 2011. The Minister wrote to the applicant on 12th April, 2011 informing her that he had considered the Interim Report prepared by Mr Torlach O'Connor, on foot of the Ministerial Order, and the conclusions he formed therein and he had formed the provisional opinion that the applicant was "unfit to hold office". The Minister invited representations regarding this opinion, which representations were forwarded on behalf of the applicant on the 13th June, 2011.

3.3 On the 18th July, 2011 Mr Ryan created a further Departmental memorandum. The Minister wrote a letter to the applicant on the 28th July, 2011 in which he stated that "I remain of the opinion that you are unfit to hold office." The V.E.C. wrote to the applicant on 2nd August, 2011 informing her that her salary would cease on 1st September, 2011. As the school was closed, and the applicant was on annual leave, she did not receive these letters until her return on 16th August, 2011. In the within proceedings the applicant seeks various reliefs aimed at preventing the implementation of the Ministers decision of the 28th July, 2011.

Relevant Law
4. The Minister has the power under Section 105 of the Vocational Education Act, 1930 to direct that an inquiry into the performance of an officer of a V.E.C. be set up and to appoint an officer to conduct such an inquiry. Section 105(1) provides as follows:-

> "105(1) The Minister may at any time cause an inquiry (in this Act referred to as a local inquiry) to be held in relation to the performance by a vocational education committee of its duties under this Act or in relation to the performance by an officer or a servant of a vocational education committee of his duties as such officer or servant (as the case may be) and for that purpose may appoint an officer of the Minister to hold such local inquiry."

Where the Minister considers an officer of a V.E.C. to be unfit to perform his or her duties, Section 27 of the Vocational Education Act 1930 empowers the Minister to remove this person from office. Section 27 provides as follows:-

> "27.-(1) The Minister may by order, either upon or without any suggestion or complaint from a vocational education committee, remove from his office or employment any paid officer or servant of a vocational education committee (whether appointed by or transferred by this Act to such committee) whom he considers unfit or incompetent to perform his duties, or who at any time refuses or wilfully neglects to perform his duties or any of them, and may direct that a fit and proper person be appointed in his place in accordance with the law relating to appointments to such office or employment.
>
> (2) The Minister shall not remove under this section from his office an officer or servant of a vocational education committee unless and until he has caused a local inquiry to be held under this Act in relation to the performance by such

officer or servant ofhis duties as such officer or servant and considered the report of the person who held such local inquiry."

The statutory basis for the Minister's power to remove an officer of a V.E.C. from that office is set out in Section 8 of the Vocational Education (Amendment) Act 1944, which provides for two specific grounds for removal:-

> "8.-(1) For the purposes of this section, the following shall be the statutory grounds for the removal of the holder of an office from such office, that is to say:
>
> (a) unfitness of such holder for such office,
>
> (b) the fact that such holder has refused to obey or carry into effect any order lawfully given to him as the holder of such office, or has otherwise misconducted himself in such office,
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> and, in this section, the expression "statutory grounds for removal from office" shall be construed accordingly.
>
> (2) Where the Minister is satisfied as a result of a local inquiry that any of the statutory grounds for removal from office exists as regards the holder of an office, the Minister may by order remove such holder from such office.
>
> (3) Where the Minister is satisfied that the holder of an office has failed to perform satisfactorily the duties of such office and is of opinion that he is unfit to hold such office, the Minister may-
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> (a) send by registered post to such holder at the principal office of the vocational education committee under which he holds such office a notice stating the said opinion, and
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> (b) on the day on which he sends the notice, send by registered post a copy thereof to the said vocational education committee,
>
> and if the Minister, after the expiration of fourteen days from the day on which he sends the notice and the copy thereof and after consideration of the representations (if any) made to him by such holder or the vocational education committee, remains of the said opinion, he may by order remove such holder from such office.
>
> (4) Where the holder of an office is convicted of an offence which, in the opinion of the Minister, renders him unfit for such office, the Minister may by order remove such holder from such office."

Applicant's Submissions

5.1 The original Terms of Reference contained in the Ministerial Order set out 6 specific matters to be investigated. The matters all related to the period 2001-2003. These related to human resource management and discipline at the school, complaints of bullying and maladministration at the school and lastly an allegation regarding payments purportedly made to students to attend school. The Inquiry Officer Mr Torlach O'Connor decided not to make any findings on any of the six matters expressly set out in the Terms of Reference as too much time had elapsed. However Mr O'Connor decided to investigate certain new matters concerning possible financial improprieties. In his interim report Mr O'Connor explained his decision as follows:-

> "... I determined to stay as focussed as possible on the precise terms of reference of the inquiry and, with one exception, not to pursue the many subsidiary issues that emerged from witness' evidence and other sources"

The 'one exception' according to Mr O'Connor related to:-

> "allegations made by a number of witnesses in relation to financial improprieties". Mr O'Connor acknowledged that there was no mention of financial issues in the

Terms of Reference of the Inquiry but he took the view that he was empowered to expand the Terms of Reference to take account of these new allegations. The applicant submits that it was wrong, in excess of jurisdiction, *ultra vires*, unfair and in breach of natural justice and fair procedures for the new matters to be introduced against her as they fall outside the purview of the Ministerial Order and the jurisdiction of Mr O'Connor. The Ministerial Order clearly stated that the Minister, and the Minster alone, could add to or amend the Terms of Reference as the Minister considered appropriate. The Minister did not add to, amend, or in any way enlarge the Terms of Reference of the Inquiry. The applicant submits that Mr O'Connor acted *ultra vires* the powers granted to him by the Minister in deciding to amend the Terms of Reference without the express permission or sanction of the Minister. The applicant continually objected to Mr O'Connor changing the Terms of Reference but to no avail. In his interim report Mr O'Connor stated that :-

> "the allegations set out in the original Terms of Reference largely relate to events of up to nine years' standing and, of these, it is clear that many were known to but not appropriately acted on by the Committee and/or the management of the VEC in the interim ... it would (not) serve any useful purpose and would probably be unsound to proceed any further with this Ministerial Inquiry".

Notwithstanding this finding Mr O'Connor deemed it appropriate to investigate and make findings on new matters which related to precisely the same period of time, 2001-2003. It is submitted that this was an irrational and unfair methodology to apply.

5.2 The respondents complain that the applicant did not seek to judicially review the decision to expand the terms of reference when this decision was made in November 2007. The applicants however submit that the decision to expand the terms of reference was not a decision amenable to judicial review. It was only when this decision was used as the basis of the Minister's decision relating to the applicant's career and profession that the decision became open to judicial review. The applicant's rights were not affected by Mr O'Connor's decision to enlarge the Terms of Reference until the Minister purported to remove the applicant. Without prejudice to this submission, it is submitted that the reasonable approach to adopt was not to commence another set of legal proceedings but to await an actual decision (if any) which affected the applicant's rights. The applicant fully expected and was entitled to expect that the

report of Mr O'Connor would limit itself to the Terms of Reference but when, in late 2007, the applicant became aware of Mr O'Connor's enlargement of the Terms of Reference, although she complied at all times with the Inquiry, she did so under protest, the applicant wrote on numerous occasions objecting to this decision and to his issuing an Interim Report on the new allegations only. However, it was not until the applicant became aware of all the matters which Mr O'Connor investigated and the conclusions he came to in his Interim report that she sought to challenge the enlargement. The Interim Report did not contain any recommendation to remove the applicant from her post and in fact found that 5 of the 8 new purported allegations were not upheld against the applicant. The applicant disputes the findings purported to have been made by Mr. O'Connor in relation to the 3 new allegations which he upheld against her. Mr O'Connor also did not uphold any of the 6 allegations contained in the original Terms of Reference. The Minister did not purport to act on the findings contained in the Interim Report until April, 2011. His purported 'final' decision was made on 28th July, 2011, although not received by the Applicant until 16th August, 2011 and by the applicant's solicitor until 22nd August, 2011. The respondents were aware of the school holidays, and the applicant's holidays, and the school was closed. Also, her solicitor was out of the country until 22nd August, 2011. The applicant submits that in these circumstances there is no question of delay.

5.3 The applicant also challenges the purported decision of the Minister in July, 2011 to declare her "unfit" to hold office and to remove her from her post. The question of the reasonableness of the Ministers decision must be considered in light of what material was available to him prior to making his decision. Mr Ryan accepts in his last Affidavit of 31st January, 2012 that the very persuasive testimony of the CEO of the V.E.C. was not before the Minister and the persuasiveness of that testimony has not been challenged by either respondent. Furthermore, it is accepted that the Minister received the Interim Report on 6th April, 2011 and yet the Minister had made his decision, and appended it in his own hand to the base of the memorandum on the 7th April, 2011.This raises the question as to how the Minister could have possibly made his decision in such a short time-frame, with so little information before him. The same can be said about his second decision of 28th July, 2011. Mr O'Connor did not recommend the removal or dismissal of Ms McSorley. In fact, Mr O'Connor made several comments of a very positive nature about the applicant and her abilities and concluded that she was "a very considerable force for good in the school" and also found that "there is no doubting her commitment to the school and her efforts to 'turn around' a school which, when she took over as Principal, was in serious decline as a consequence of both internal and external pressures." The applicant submits that the decision of the Minister, although a decision he is empowered to make, is not a decision which could be considered reasonable in all the circumstances. Mr O'Connor finds the V.E.C. culpable in failing to support and/or train the applicant in her post in relation to financial matters. No guidelines were introduced by the V.E.C. until June 2003 and no guidelines were issued by the VEC's support services unit for the management of school accounts until 2004. This finding had been ignored by the respondents. There had never been any question of personal financial gain by the applicant or loss to the V.E.C. The Interim Report is explicit in finding that no financial loss had been suffered by the school and, in fact, the applicant had to expend her own private resources for the benefit of the students and the school. The three matters upheld against the applicant refer to the period 2001-2003, a period considered too long passed to investigate the matters properly. It is submitted that the findings of the Interim Report could not rationally lead a decision maker to decide as the Minister has in this case, that she is "unfit" in 2011 by reason of three disputed matters dating back to 2001-2003, which were never raised with her by her employers and only first raised by others in the course of the investigation in late 2007. The applicant submits that the decision in this case plainly and unambiguously flies in the face of common sense.

5.4 The Minister wrote to the V.E.C. informing them of his final decision and the V.E.C. sent a copy of it on to the applicant on 2nd August, 2011. In the first letter the Minister stated:-

> "I have considered the report prepared by the Inquiry Officer and the conclusions he has formed. On the basis of the findings contained in that report, I am satisfied that you have failed to perform satisfactorily the duties of your office".

The Minister does not explain how he came to his opinion. The applicant submits that it was necessary for the Minister to explain his opinion especially given that his decision did not accord with the recommendation of the Inquiry Officer who did not recommend removal of the applicant. In *Garvey v Ireland* [1981] IR 76, the Supreme Court held that the purported removal of an officer of An Garda Síochána was void because the State had not informed him of the reason for his removal. Henchy J. found at page 102 that:- "Having regard to the relevant constitutional provisions, I conceive the law to be that when a person holds a whole time pensionable office (whether under statute, statutory instrument, charter, deed of trust, or otherwise) from which he may be removed at any time, the power of removal may not be exercised without first according him natural justice by giving him the reason for the proposed dismissal and by providing him with an adequate opportunity of dealing with the reason and of making a reply to it."

The statement of the Minister is simply that he remains of an opinion that the applicant is unfit to hold such office. This opinion it is argued, is not supported by the content of the report upon which he relies. The applicant is therefore put in the position of being unable to ascertain on what element of the report the Minister purports to rely. It is submitted that the findings of the Interim Report are fatally flawed because they are the result of an *ultra vires* act by Mr O'Connor in purporting to expand the Terms of Reference without authority or permission and, in any event, the findings of the Interim Report do not reasonably lead to a conclusion that the applicant is unfit to hold office.

5.5 It is submitted that the action of the Minister in deciding to remove the applicant from her position is not proportionate to the objective, namely the provision of a proper functioning V.E.C. and school in Kilkenny where the applicant worked tirelessly. The doctrines of unreasonableness and disproportionality have been applied together by the High Court in Judicial Review applications involving a Minister's exercise of near absolute discretion. In *S (P) & E (B) v Minister for Justice* [2011] IEHC 1, Hogan J. struck down a decision of the Minister for Justice because the Court found "that the decision was both disproportionate and unreasonable." In *Meadows v Minister for Justice & Ors* [2010] IESC 3, the Supreme Court considered the appropriate test to be applied when determining the reasonableness of a decision which affects or concerns constitutional rights or fundamental rights. Murray C.J. found as follows at 17:-

> "In reviewing the rationality or otherwise of the decision it remains axiomatic that it is not for the Court to step into the shoes of the decision maker and decide the issue on the merits but to examine whether the decision falls foul of the principles of law according to which the decision ought to have been taken. In doing so the Court may examine whether the decision can be truly "said to flow from the premises" as Henchy J., put it in Keegan, if not it may be considered as being "fundamentally at variance with reason and common sense". In examining whether a decision properly flows from the premises on which it is based and whether it might be considered at variance with reason and common-sense I see no reason why the Court should not have recourse to the principle of proportionality in determining those issues."

Any effect on rights should be within constitutional limitations and should be proportionate to the objective to be achieved. If the effect is disproportionate this would justify the court setting aside the decision. It is submitted that the applicant has clearly demonstrated, over an extended period of time, very considerable abilities and commitment in carrying out her duties as Principal. The applicant has managed to foster success and is responsible for a myriad of documented improvements in the school, from increased enrolment numbers and reduced truancy rates to a harmonious working environment. All this must be considered in light of the fact

that the Interim Report specifically identifies the lack of structures, support, training and procedures in place to assist a new Principal in the carrying out of her duties. In *Heaney v. Ireland* [1994] 3 I.R. 593 Costello J. found that:-

> "The means chosen must pass a proportionality test. They must (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations; (b) impair the right as little as possible; and (c) be such that their effects on rights are proportional to the objective".

Counsel for the applicant submits that the removal of the applicant from office does not achieve the aims set down in the 1930 Act which has as its aim the further and better provision in relation to education, in this case the educational needs of the students KCVS.

5.6 In this case the time which elapsed from the date the Statutory Inquiry was established to the date of the decision of the Minister was 5½ years. It is submitted on behalf of the applicant that this delay is excessive to such a degree as to cause unnecessary hardship and unfairness to the applicant. It is submitted that the Minister had a duty to ensure the expeditious investigation of the matters set out in the Terms of Reference. The Minister purported to remove the applicant from her post as Principal after 12 years' service based on 3 disputed and very late new matters raised which were never allegations or complaints raised by her employer and which date back to the period 2001-2003. It could not be considered rational or reasonable to declare her as "unfit" in 2011 after 8/10 years, especially when she is recognised as being successful in the post. This decision results from matters first raised with her by Mr O'Connor in November/December, 2007 and continuously objected to by her. For all these reasons, the applicant submits that the decision of the Minister cannot be justified, is baseless, unreasonable, disproportionate, irrational, unfair, in breach of her rights and the tenets of natural and constitutional justice and should be set aside.

Submissions on behalf of the First and Second Respondent's

6.1 It is submitted on behalf of the respondents that the applicant has identified only two issues for consideration in her Statement of Grounds. The first issue relates to whether or not Mr. O'Connor was acting *ultra vires* in investigating what the applicant has described as the eight new matters. The second issue is whether the Minister was acting *ultra vires* irrationally or in breach of fair procedures in reaching the conclusion reflected in his letter of the 28th July, 2011. The respondent's argue that Mr. O'Connor has not acted *ultra vires* in investigating the eight new matters referred to in the applicant's Statement of Grounds. Section 105 of the Vocational Education Act, 1930 provides that the Minister may at any time cause an inquiry (referred to as a local inquiry) to be held in relation to the performance by an officer of a VEC of his duties, and for that purpose may appoint an officer of the Minister to hold such local inquiry. It is submitted that the provisions of Section 105 of the Act of 1930 are clear. The function of such an inquiry is a general one. It is to conduct an inquiry into the performance by an officer of his duties under the Act. At the time of such appointment, the Minister may be aware of certain allegations against an officer and during the currency of the inquiry further allegations may come to the fore which impact upon the conduct by that officer of his duties. The Act of 1930 is silent as to "terms of reference" and it is submitted that the section itself provides the appropriate legal basis for an inquiry by the person appointed into any matters relating to the conduct by an officer of his duties.

It is submitted on behalf of the respondents that the terms of reference document provided the main initial focus of the local inquiry. In the terms of appointment of the Local Inquiry the Minister quite clearly acknowledged that the appointment of Mr. O'Connor was not just to investigate matters expressly referred to in the 'terms of reference' but was to carry out an inquiry into the performance by the applicant of her duties and "such an inquiry shall include, but not necessarily be limited to, an inquiry" into certain matters. It is submitted that the scope of the statutory inquiry is provided for by the legislation itself and is not provided by the scope of any "terms of reference". It could be said that Mr. O'Connor would have been in dereliction of his statutory duty under Section 105 if he had excluded from his consideration issues which impacted on the performance by an officer of the VEC of his duties merely because the appointing Minister had not specified such issues at the time of the appointment.

6.2 Following Mr. O'Connor's decision to investigate the additional matters, the applicant engaged, with the benefit of Solicitor and Counsel, fully and comprehensively with all aspects of the investigation. Had she wished to preclude Mr. O'Connor from investigating these matters, she should have sought relief of the High Court within a period of three months of the point in time at which her cause of complaint first arose. She did not do so and is now out of time to do so.

6.3 At the time leave was sought the applicant failed to seek an extension of time for seeking the relief at paragraph (d) 3 (iii) of the Statement of Grounds and reliefs dependant thereon. The applicant is out of time in commencing the within proceedings in respect of such issues. Order 84 Rule 21 states as follows:-

> "An application for leave to apply for Judicial Review shall be made promptly and in any event within three months from the date when grounds for the application first arose, or six months where the relief sought is Certiorari, unless the Court considers that there is good reason for extending the period within which the application shall be made."

It is incumbent on an applicant to move 'promptly' when applying for Judicial Review and in any event within the time limits enshrined in the Rules of the Superior Courts. The Court's discretion to extend time under Order 84 Rule 21(1) can only be exercised where it is satisfied "*there is a good reason*" for so doing. In *O'Donnell v Dun Laoghaire Corporation* [1991] ILRM 301 by Costello J stated at page 315:-

> "The phrase 'good reasons' is one of wide import which it would be futile to attempt to define precisely. However, in considering whether or not there are good reasons for extending the time I think it is clear that the test must be an objective one and the court should not extend the time merely because an aggrieved plaintiff believed that he or she was justified in delaying the institution of proceedings. What the plaintiff has to show (and I think the onus under 0. 84 r.21 is on the plaintiff) is that there are reasons which both explain the delay and afford a justifiable excuse for the delay..."

The applicant has failed to put forward any reason to justify the delay and has therefore failed to discharge the onus on her. She has failed to show either that there are reasons which explain the delay or afford a justifiable excuse for the delay. It is submitted that when the applicant became aware of the decision to include the 'new' matters in October/November 2007 she was required at that point to take steps to challenge this decision, not having done so, she is now out of time to raise such a challenge.

6.4 Without prejudice to the submission regarding the failure to obtain the necessary extension of time, it is submitted that the applicant, by fully participating in the inquiry over a period of years was acquiescent. In this regard this respondent relies on the decision of *Corrigan v. The Irish Land Commission* [1977] IR 317. The applicants appeared before a Tribunal whose jurisdiction they later challenged only after it had given a decision adverse to them. Henchy J at page 326 said:-

> "That is something the law will not and should not allow. The complainant cannot blow hot and blow cold; he cannot

approbate and then reprobate; he cannot have it both ways."

In the case of *The State (Byrne) v Frawley* 1978 JR. 326, the applicant's failure to raise alleged irregularities in his trial when appealing to the Court of Criminal Appeal was found to be prima facie evidence of acquiescence. Henchy J. stated at 356:-

> "Therefore, prior to the institution of the present proceedings on the 14th May, 1976---five months after the impugned conviction-on every occasion on which the prisoner (who, on his own admission, was aware of the effect of the *de Burca* decision) might have been expected to object to the jury, he signified by his silence his acquiescence in or acceptance of it."

He further stated at 349:-

> "Such retrospective acquiescence in the mode of trial and in the conviction and its legal consequences would appear to raise an insuperable barrier against a successful challenge at this stage to the validity of such a conviction or sentence."

The applicant participated fully in the tribunal with the benefit of legal advice throughout, The respondents submit that the applicant's conduct in this regard debars her from obtaining the relief sought by her in the within proceedings.

6.5 The second argument raised on behalf of the applicant is that the Minister acted *ultra vires* and in breach of fair procedures in making an "unjustified irrational and grossly unfair decision" on the basis of a "fatally flawed and unsound report". There is no evidence ofunreasonab1eness on the part of the first named respondent. The courts in this jurisdiction have repeatedly recognised the limits of their competence to interfere with a lawful decision made pursuant to the exercise of Ministerial discretion. The general reticence of the courts is evident in the case of in *State (Keegan) v Stardust Compensation Tribunal* [1986] IR 642 where Henchy J stated at p 568 that the courts should only interfere with an administrative decision where it :-

> "plainly and unambigiously flies in the face of fundamental reason and common sense".

This dictum was approved by Finlay CJ in *O'Keeffe v An Bord Pleanala* [1993] I IR 39:

> "The court cannot interfere with the decision of an administrative decision-making authority merely on the grounds that (a) it is satisfied that on the facts as found it would have raised different inferences and conclusions, or (b) it is satisfied that the case against the decision made by the authority was much stronger than the case for it... I am satisfied that in order for an applicant for judicial review to satisfy a court that the decision making authority has acted irrationally in the sense that I have outlined above so that the court can intervene and quash its decision, it is necessary that the applicant should establish to the satisfaction of the court that the decision making authority had before it no relevant material which would support its decision."

The respondent submits that it was entitled to consider the issues covered in the report and the findings thereon. Under the terms of section 8 of the Vocational Education (Amendment) Act, 1933, it is the Minister who must be satisfied as a result of the Local Inquiry that the applicant is unfit to hold office and should be removed. It is submitted that the applicant has failed to make out a case that the Minister acted unreasonably in coming to his decision on the findings contained in the report.

Decision of the Court

7.1 The applicant is principal of Kilkenny City Vocational School and has held this position since 1999. In 2003 a number of allegations were made concerning the applicants conduct. Further to these allegations a number of inquiries were initiated. On the 21st December 2005, the then Minister for Education and Science decided to establish an inquiry under section 105 of the Vocational Education Act 1930. On 20th February, 2006 the Minister approved terms of reference for this inquiry and Mr Torlach O'Connor was appointed to conduct the inquiry on the same date. On the 14th February, 2008 the Minister requested Mr O'Connor to forward an interim report. The applicant was made aware of this at the time. The applicant raised objections in correspondence with the Inquiry, however she fully engaged with it. A report was furnished to the first respondent in August 2010.The report made a number of findings against the applicant. On the 6th April, 2011 the Minister's advisor, Mr Matthew Ryan drafted a Departmental memorandum with advices for the purposes of the Minister and provided him with the Interim Report. Appended to that memorandum is the Minister's hand-written decision to remove the applicant dated the 7th April, 2011. The Minister wrote to the applicant on 12th April, 2011 informing her that he had considered the Interim Report prepared by Mr. Torlach O'Connor, on foot of the Ministerial Order, and the conclusions he formed therein and stated that he had formed the provisional opinion that she was "unfit to hold office". The Minister invited representations regarding this opinion. On the 13th June, 2011 representations were forwarded on behalf of the applicant. Mr Ryan drafted a further Departmental memorandum dated 18th July, 2011. The Minister wrote to the applicant on 28th July, 2011 stating that he remained of the opinion that she was unfit to hold office. The V.E.C. wrote to the applicant on 2nd August, 2011, informing her that her salary would cease on 1st September, 2011. As the school was closed, and the applicant was on annual leave, she did not receive these letters until her return on 16th August, 2011. The applicant sought an injunction to prevent her removal and in these proceedings she seeks various relief aimed at preventing the implementation of the Ministers decision of the 28th July, 2011

7.2 The issues that fall to be decided in this case are as follows:-

> (a) Whether or not Mr. O'Connor acted *ultra vires* in the course of his inquiry in investigating what the applicant has described as the eight new matters.
>
> (b) Whether by participating in the expanded inquiry the applicant was acquiescent and is thereby now disentitled to challenge its conclusions.
>
> (c) Whether the applicant is guilty of delay in challenging the investigation of the eight new matters.
>
> (d) Whether the Ministers decision to declare the applicant "unfit" to hold office and to remove her from her post was unreasonable and/or disproportionate.

7.3 The applicant submits that it was wrong, in excess of jurisdiction, *ultra vires*, unfair and in breach of natural justice and fair procedures for the new matters to be introduced against her as they fall outside the purview of the ministerial order and the jurisdiction of Mr O'Connor. The ministerial order clearly stated that the minister, and the minister alone, could add to or amend the terms of reference as the minister considered appropriate. The minister did not add to, amend, or in any way enlarge the terms of reference of the inquiry. The respondent's submit that Mr. O'Connor has not acted *ultra vires* in investigating the eight new matters

referred to in the applicant's statement of grounds. Section 105 of the Vocational Education Act, 1930 provides that the minister may at any time cause an inquiry (referred to as a local inquiry) to be held in relation to the performance by an officer of a VEC of his duties. The ambit of an inquiry established pursuant to statute is to be gleaned from the terms of the statute itself. The terms of reference document provided the main initial focus of the local inquiry.

Clearly during the investigation other allegations may come to the fore which can be investigated. A local inquiry can be established without any specific terms of reference and any terms of reference if provided cannot serve to restrict the scope of the inquiry. I am satisfied that in the terms of appointment of the local inquiry the minister quite clearly stated that the appointment of Mr O'Connor was not just to investigate matters expressly referred to in the terms of reference but was to carry out an inquiry into the performance by the applicant of her duties. The letter states that Mr O'Connor was to:-

> "carry out an inquiry into the performance by Ms. Cathy McSorley Principal of Kilkenny City Vocational School of her duties as Principal of Kilkenny City Vocational School and such an inquiry shall include, but not necessarily be limited to...:-.

It seems clear to me that Mr O'Connor was entitled to follow up on matters he deemed to be important or relevant to his task.

7.4 The respondents seek to challenge the applicant's judicial review of the decision by Mr O'Connor to expand his terms of reference. The respondents complain that the applicant did not judicially review the decision by Mr O'Connor to expand his terms of reference in November 2007, instead the applicant engaged fully with the investigation and only sought to review the decision when the report had issued as it did not vindicate the applicant. The respondents submit that in these circumstances the applicant has been guilty of acquiescence and delay. The Court has determined that Mr O'Connor was entitled to expand his terms of reference. It seems to me therefore that the objection of acquiescence to the expansion of the terms of reference is moot. This objection would only fall to be considered had the Court determined that Mr O'Connor was not entitled to expand his terms of reference. As to the delay issue, I consider that the proper date from which time should commence in relation to her challenge to her dismissal, is the date upon which the minister decided to dismiss her from her post. I accept that once she had received the decision of the Minister in August, 2011 the applicant moved promptly.

7.5 The final issue to be considered is whether the Ministers decision to declare the applicant "unfit" to hold office and to remove her from her post was unreasonable and/or disproportionate. The applicant submits *inter alia* that the action of the Minister in deciding to remove the applicant from her position is not proportionate to the objective, namely the provision of a proper functioning V.E.C. and school in Kilkenny where the applicant worked. The respondent submits that there is no evidence that the decision was unreasonable or disproportionate and that the court could only interfere with such a decision where it plainly and unambigiously flies in the face of fundamental reason and common sense which is not the case here.

7.6 The role of the Court in Judicial Review proceedings has recently been addressed in the case of *Meadows v. Minister for Justice Equality and Law Reform*, [2010] IESC 3. Denham J. articulated the core principles as follows:

> (i) In judicial review the decision-making process is reviewed.
>
> (ii) It is not an appeal on the merits.
>
> (iii) The onus of proof rests upon the applicant at all times.
>
> (iv) In considering the test for reasonableness, the basic issue to determine is whether the decision is fundamentally at variance with reason and common sense. (v) The nature of the decision and the decision maker being reviewed is relevant to the application of the test.
>
> (vi) Where the legislature has placed decisions requiring special knowledge, skill, or competence, for example as under the Planning Acts, with a skilled decision maker, the Court should be slow to intervene in the technical area.
>
> (vii) The Court should have regard to what Henchy J. in *The State (Keegan) v. Stardust Victims Compensation Tribunal*, referred to as the "implied constitutional limitation of jurisdiction" in all decision-making which affects rights. Any effect on rights should be within constitutional limitations and should be proportionate to the objective to be achieved. If the effect is disproportionate it would justify the court setting aside the decision."

7.7 Clearly the circumstances under which the Court can intervene with a decision maker involved in an administrative function such as herein are limited. However as stated above the Court must have regard to the implied constitutional limitation of jurisdiction in all decision-making which affects rights. Any effect on rights should be within constitutional limitations and should be proportionate to the objective to be achieved. If the effect is disproportionate this justifies the court setting aside the decision. Clearly the Ministers decision has a profound effect upon the applicant's rights. Thus the Court must ask was the decision reached in this case disproportionate? The objective of the inquiry into Ms. Me Sorley performance must ultimately have been to determine whether her continuance in the role was consistent with the provision of a proper functioning school where she worked. In this regard it must be noted that Ms. Me Sorley has served as principal of the school for 12 years. Her appointment in 1999 was to an extremely challenging role. The previous incumbent had resigned and the school was facing falling enrolment numbers. There was unrest between various parties at the school. The three complaints upheld against her involved events that occurred between 2001 and 2003. The incidents occurred when she was relatively new to her role. The complaints upheld were eight to ten years old when the decision to dismiss her was made. In the meantime all the evidence that this Court has heard is to the effect that she was doing a very good job. Mr O'Connor described her as "a very considerable force for good in the school" and found that: "there is no doubting her commitment to the school and her efforts to 'turn around' a school which, when she took over as Principal was in serious decline as a consequence of both internal and external pressures."

Mr O'Connor noted at page 4 of his report that:-

> "On a more positive note Ms McSorley introduced a number of initiatives aimed at tackling some of the disadvantages experienced by pupils, such as a breakfast and lunch club, especially, a programme for seriously disadvantaged students experiencing difficulties with formal schooling, established in early 2002, called KARA (Kilkenny Area Response to Absenteeism)."

It seems to me that bearing in mind the inordinate length of time since the events in question and balancing that with her apparently very satisfactory performance of her duties as principal in the time between, there is in the decision to now remove her from her post, a manifest disproportionality that requires the Court to intervene. There must be an order to quash the decision of the Minister to

dismiss the applicant from her post. These problems in this VEC have continued too long and it is in my view appropriate that there now be some finality brought in respect of the events up to 2003 which were the subject of the Ministerial Inquiry. I will hear Counsel on the form of the order that should be made.