THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 987 J.R.]

BETWEEN

JOAN WOODCOCK

APPLICANT

AND

BOARD OF MANAGEMENT OF MOUNTRATH COMMUNITY SCHOOL

RESPONDENT

JUDGMENT of Mr. Justice Binchy delivered on the 29th day of March, 2019

1. These proceedings came before the Court by way of a single "telescoped" hearing, whereby the applicant seeks leave to take proceedings by way of judicial review against the respondent and, in para. D of her statement of grounds, seeks the following reliefs against the respondent:-

> "(1) An injunction by way of judicial review restraining the respondent from taking any further steps in a disciplinary hearing involving allegations of misconduct against the applicant purportedly pursuant to s. 24(3) of the Education Act 1998;
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> (2) A declaration by way of judicial review that the requirements of natural and constitutional justice require that any disciplinary hearing into the applicant's conduct must be conducted by an independent person, other than the School Principal, who, by reason of being the complainant in the matter and by reason of past differences with the applicant is conflicted in the inquiry and cannot act as judge in her own cause;
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> (3) A declaration that any disciplinary hearing into the applicant's conduct must be governed by the principles nemo iudex in causa sua and audi alterem partem, such that the process must be carried out by an independent person who is not conflicted by actual or objective bias;
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> (4) A declaration that s. 24 of the Education Act 1998, does not provide for the disciplinary process which the respondent has threatened to conduct against the applicant, namely a process involving the procedures set out within the document entitled '*Towards 2016 – revised procedures for suspension and dismissal of teachers';*
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> (5) *Certiorari* of the decision of the respondent Board communicated to the applicant by letter dated 8th June, 2016, rejecting the applicant's complaint against the School Principal;
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> (6) An order pursuant to O. 84 of the Rules of the Superior Courts extending time for the relief at paragraph d(v) above …"

Background

2. According to the applicant, in 2011, she was concerned about the behaviour of one of her teaching colleagues towards her, and she discussed this with the then Principal, Mr. Gleeson. The applicant maintains that she mentioned this in confidence only and was not making a complaint, but the then Principal treated it as a complaint, as a result of which the complaint was disclosed to other members of staff in the respondent school. The applicant says that this led to her becoming somewhat marginalised and isolated within the school, as a result of which she became stressed and anxious.

3. Mr. Gleeson retired in January 2015, and was replaced by the then Deputy Principal, and the now current Principal, Ms. Siobhan McCarthy. In October 2015, on medical advice, the applicant took sick leave owing to stress. At the end of November, 2015, she was requested to attend for medical assessment by a company called Medmark, to determine whether or not she was fit to continue working. This assessment was compulsory because of the number of sick days already taken by the applicant in the course of that year, but that aside, Ms. McCarthy deposed that she considered it desirable in view of the nature of the reason behind the applicant's most recent absence from work, *i.e.* stress. She was assessed firstly by a Dr. Ryan of Medmark, and secondly, upon Dr. Ryan's recommendation, by a psychiatrist in St. James's Hospital, a Dr. Cooney. It is not in dispute that each of these doctors considered that the applicant was fit for work, although Dr. Ryan had reservations to which I refer to below. Their reports are dated 8th December, 2015, and 23rd February, 2016, respectively.

4. The applicant was examined by Dr. Ryan on 2nd December, 2015. She claims that following upon her return to work, she was asked by colleagues how she had fared at the medical assessment and she had replied that she thought that the assessment went well and that she found Dr. Ryan to be friendly and well disposed towards her. She claims that these comments must have filtered back to Ms. McCarthy because on 7th December, 2015, before Dr. Ryan issued his report, but after his examination of the applicant, Ms. McCarthy sent a letter to Dr. Ryan in which she expressed concern about the mental well being of the applicant by reference to the behaviour of the applicant. Ms. McCarthy gave particular instances of this behaviour and expressed concern about what she described as elements of paranoia and erratic behaviour on the part of the applicant. In the letter, Ms. McCarthy also says that while she has yet to see the report of Dr. Ryan, the applicant had given the school to understand that Dr. Ryan's report would be "sympathetic towards" the applicant.

5. This letter is of some considerable importance in these proceedings, because it is the applicant's contention that this letter was sent by Ms. McCarthy with the intention of influencing the findings of Dr. Ryan in a negative way. In the letter, Ms. McCarthy states, *inter alia*:-

> "Ms. Hallissey [the applicant's family name prior to marriage] has been pursuing a case of bullying against members of the staff and the management of Mountrath Community School since February 2014. During this time Ms. Hallissey has

produced no substantiating evidence of the alleged bullying. During this time, Ms. Hallissey has also displayed varying degrees of anxiety and paranoia. Prior to your meeting with Ms. Hallissey on 2nd December, 2015, I rang you to alert you to my concerns, while all the time trying not to colour your examination of Ms. Hallissey. Since your meeting with Ms. Hallissey, Ms. Hallissey returned to work on 3rd December ….

..... Over the weekend of 4th December, 2015, Ms. Hallissey rang at least three members of staff to complain that she had been bullied by certain members of the staff and that management was not dealing with the situation. Each of these members of staff were very concerned for Ms. Hallissey and her mental wellbeing, as she seemed overwrought and very upset. On Sunday, 6th December, 2015, Ms. Hallissey called to teacher A's home crying and very distraught. She had her two children in the car. She informed teacher A of the name of the person, who was supposed to be bullying her and was asking for help. Teacher A offered to bring the children in from the car but Ms. Hallissey refused and continually complained that she was being treated badly in the school…."

6. The letter goes on to discuss incidents that occurred in the school on Monday, 7th December, 2015, in which the Principal describes conversations that other teachers in the school claimed to have had with the applicant during the course of that day. The letter then concludes with the following paragraph:-

"Later on that day we had a parent/teacher meeting. I asked Ms. White, the Deputy Principal, to keep an eye on Ms. Hallissey as her behaviour was increasingly erratic. She had blanked one of the teachers that she had contacted over the weekend in the corridor. Ms. White sat down with Ms. Hallissey during the parent/teacher meeting and talked about the weekend. Ms. Hallissey told her how she had brought her children to Bunratty to see Santa on Sunday and what a great day they had had. Ms. Hallissey showed Ms. White photographs from her iPad and was enthusing about the day they had spent. Yet at 6 o'clock on the same day, Ms. Hallissey was on teacher A's doorstep distraught and upset. The behaviour and upset that she had exhibited to teacher B earlier on in the day was not in evidence.

I am increasingly anxious of the elements of paranoia and erratic behaviour, which seem to characterise Ms. Hallissey's behaviour at the moment and has actually characterised her behaviour for quite a while. Several members of the staff have expressed concern about her and also expressed concern about her children. They feel that she is increasingly paranoid and erratic and that nothing can persuade her of the lack of conspiracy against her. Indeed, the only thing that has been exhibited to her is concern.

It is this concern that precipitates my writing to you. I have yet to see a report but Ms. Hallissey has given us to understand that it will be sympathetic towards her. I have a board of management meeting tomorrow night and I have to furnish an honest account of my understanding of the events. I feel anxious about Ms. Hallissey's mental wellbeing and am increasingly aware of her growing paranoia. I have failed on all counts to allay her fears and remain at a loss as to what to do. I would ask that you bear all that I have said in mind and also consider furnishing your report before the board meeting tomorrow on 8th December so that we can make an informed decision as to how we should act."

7. Dr. Ryan's report is dated 8th December, 2015, and presumably was available for the board meeting that day. In his report, he states:-

"I found this lady a sincere historian who has clearly experienced difficulties over the past year. Although I listened at length to her grievances and the ways in which she feels others have acted against her, I wondered as the consultation progressed whether or not part of the problem might be her possible misinterpretation and misperception of her environment and the actions of others. In such circumstances, one could readily understand how she would exhibit a stress response and also a cycle of negative feedback with both of (sic) factors augmenting the other. I tried to share with her my thoughts on whether or not her difficulties might relate to her interpretation of events, but she retains a fixed view that she is the victim of a campaign of systematic bullying and would not entertain any other possibility.

I am concerned about this lady's wellbeing.

It is arguable as to whether she is fit to remain in work or not, but if possible and if she is capable of delivering on her duties, I have no objection to her staying in employment as I fear that a withdrawal from work will not necessarily improve the situation."

8. In order to obtain further clarity on what he described as the nature and severity of her medical complaints, Dr. Ryan referred the applicant for consultation with Dr. Cooney, Consultant Psychiatrist. As mentioned above, Dr. Cooney considered the applicant fit for work.

9. The applicant disputes the narrative set out by the Principal in the letter sent to Dr. Ryan. When the applicant subsequently became aware that Ms. McCarthy had sent this letter to Dr. Ryan she requested a copy of the same, and this was furnished to her by way of letter from Ms. McCarthy dated 19th May, 2016. Upon receipt of this letter, the applicant took exception to its issue and made a complaint to the board of management of the respondent in relation to the conduct of Ms. McCarthy in sending the letter to Dr. Ryan. Having taken legal advice, the respondent decided to appoint a two-person subcommittee to consider the complaint. Solicitors acting on behalf of the applicant then wrote to the respondent expressing concern that the respondent had not been interviewed in connection with the complaint, and requesting the terms of reference given to the two-person subcommittee. This was by way of letter of 18th May, 2016, and the respondent replied on 25th May, 2016, setting out the terms of reference. By letter of 27th May, 2016, the applicant's solicitors wrote to Ms. McCarthy stating, *inter alia*, that she should not act as secretary to the board of management of the respondent in connection with this matter since the complaint was made against Ms. McCarthy herself. Ultimately, the board of management of the respondent considered the matter at a meeting on 7th June, 2016, and Ms. McCarthy, as secretary to the board of management wrote to the applicant on 8th June, 2016, rejecting the applicant's complaint and stating, *inter alia*, that "the board finds that Ms. McCarthy acted within her duty of care and professionally with the advice from ACCS and the school solicitor when she contacted the Medmark doctor, an act that was prompted by the events of the weekend of 5th and 6th December, 2015."

10. By letter of 15th June, 2016, the solicitor for the applicant wrote to the respondent complaining about the conduct of the investigation and this was replied to by solicitors acting on behalf of the respondent on 24th June, 2016. There matters rested as regards this investigation until the issue of these proceedings. Since these proceedings were not issued until 21st December, 2016, it will be apparent that the application to quash the decision of the board of management made on 7th June 2016, and communicated to the applicant on 8th June, 2016, being one of the reliefs sought by the applicant in these proceedings, was brought three months and thirteen days after the expiration of the time permitted by O. 84, r. 21(1) of the Rules of the Superior Courts ("RSC") for the issue of

applications for leave to apply for judicial review. Hence, the application of the applicant for an order pursuant to O. 84, r. 21(3) of the RSC extending time for the issue of an application to quash the decision of the respondent of 7th June, 2016.

11. On 29th September, 2016, Ms. McCarthy wrote to the applicant on behalf of the respondent requesting the respondent to attend a disciplinary meeting on 7th October, 2016. The letter stated that the purpose of the meeting was to discuss concerns that Ms. McCarthy had in relation to the conduct of the applicant and specifically identified this conduct as:-

> "• Speaking disrespectfully about other members of staff; and
>
> • Treating the Principal disrespectfully."

12. The letter went on to state that the applicant would be given an opportunity to respond to these conduct issues. It also stated:-

> "This meeting will be held in accordance with the disciplinary procedures for teachers (s. 24.3 of the Education Act 1998), a copy of which is attached. Please be advised that this meeting is at stage 1 of the disciplinary procedures and could give rise to the imposition of disciplinary sanction against you. You may be accompanied by your Trade Union representative or a work colleague at this meeting."

13. Correspondence then ensued between the solicitors for the parties. In the applicant's statement of grounds, it is claimed that despite demand, no particulars of the alleged conduct issues were initially presented to the applicant, and that the particulars of the complaint that the applicant spoke disrespectfully about other members of staff were only furnished by the Principal on 7th November, 2016. It is claimed that no particulars of the complaint that the applicant treated the Principal herself disrespectfully have ever been furnished. Notwithstanding this, however, it is the applicant's claim that the issues the subject of the intended disciplinary hearing are, in substance, the same as the issues the subject of the applicant's earlier complaint about the Principal to the Board of the respondent. It is claimed that at a minimum, there is a substantial overlap between the issues raised by the Principal in her letter to Dr. Ryan in relation to the conduct of the applicant, and the conduct of the applicant that was to be discussed at the disciplinary meeting. The solicitors for the applicant wrote to the solicitors for the respondent requesting that the disciplinary meeting would not take place, and further requesting that the respondent would appoint an independent person to investigate any concerns that the respondent had in relation to the conduct of the applicant, having regard to previous correspondence over the preceding months. This request was expressly stated to be having regard to the fact that the procedure proposed by the respondent is a disciplinary procedure and that it is being undertaken pursuant to s. 24(3) of the Education Act 1998 (As amended) (the "Act of 1998"). The solicitors for the applicant also requested the contract of employment of the applicant, and further requested the solicitors for the respondent to indicate on what basis it is contended that the document "*Towards 2016, Revised Procedures for Suspension and Dismissal of Teachers"* is deemed to apply to the applicant or to be incorporated in the terms and conditions of the applicant (this document was issued by the Department of Education and Skills by way of Government Circular 60/2009, following consultation with managerial authorities of schools and teacher unions. I refer to it hereafter as "*Towards 2016*"). The solicitors for the applicant also stated that an application to court would be made to restrain the conduct of the disciplinary meeting unless the respondent agreed to defer the same.

14. Further correspondence ensued. In the course of this correspondence, the solicitors for the respondent stated that s. 24 of the Act of 1998, clearly provides that the terms and conditions of employment of State paid teachers, such as the applicant are determined by the Minister for Education and Skills. Such terms and conditions are sent out by the Minister and the Department of Education and Skills by way of circular letter. They stated that the revised procedures for suspensions and dismissal of teachers comprise a nationally agreed set of procedures, following agreement between the teacher unions, management bodies and the Department, and accordingly, are binding on all State teachers.

15. The respondent also took the position that these procedures did not make any provision for the conduct of the proposed procedure by anybody other than the school Principal. The solicitors for the respondent also pointed out that the procedures which it was intended to invoke were those set out in stage 1 of the disciplinary procedures, the point being made that the proposed investigation was at the lowest end of the scale as regards disciplinary procedures.

16. The applicant did not accept that her contract with the respondent was governed by the *Towards 2016* document. The applicant asked for evidence that this document had been made by the Minister for Education with the concurrence of the Minister, as required by s. 24(5) of the Act of 1998. That subsection in its original form i.e. at the time *Towards 2016* was drawn up and circulated provided:-

> "The terms and conditions of employment of teachers and other staff appointed by a board and who are to be paid from monies provided for by the Oireachtas shall be determined by the Minister, with the concurrence of the Minister for Finance."

The applicant asked for evidence of such concurrence, but did not receive any reply to this request.

17. However, on 8th December, 2016, the solicitors for the respondent wrote to the solicitors for the applicant stating that, although the respondent did not consider that it was obliged to do so, it would agree that the Principal would not be involved in the disciplinary meeting, and that instead it would be convened by a Mr. Joe Cunningham, CEO, Laois and Offaly Education Training Board. In response to this proposal, the applicant asserted that there is no provision in the procedures relied upon by the applicant *i.e.* the *Towards 2016* document for such appointment, and nor do the procedures provide any role for the board of management. Effectively, the position taken by the applicant was that even if this procedure applies (which the applicant did not accept) it could not be invoked in relation to the issues raised by the respondent, because of the position previously adopted by Ms. McCarthy in relation to the complaint of the applicant. This difficulty could not be overcome by asking an independent person to conduct the disciplinary meeting (rather than the Principal) because there is no provision in the procedures for such a process. The applicant also asserted that the respondent was utilising a disciplinary process in order to punish the applicant for having made a complaint against the Principal. By letter of 13th December, 2016, the solicitors for the applicant requested the respondent not to proceed with the disciplinary procedure, and instead asked for a proper and fair investigation of the conduct of the Principal in sending the letter to Dr. Ryan of Medmark. They indicated that failing a positive response to these and other requests, an application for appropriate relief would be made to court. By letter of 19th December, 2016, the solicitors for the respondent replied and, *inter alia*, declined to give the assurances requested, following which these proceedings were issued.

18. Finally, by way of background, following upon the issue of proceedings, the applicant obtained, by way of discovery, documentation that included, *inter alia*, minutes of certain board meetings of the respondent, upon which the applicant places some reliance. These are minutes dated 8th December, 2015, and 8th March, 2016. In the former minutes, it is recorded "the Principal is

looking to keep the teacher in the school until the end of the calendar year" and later on in the same minute, it is recorded that the "board agreed that the best approach was to nurture the teacher until the end of term".

19. In the latter minutes, while the note is very perfunctory, it appears that the medical reports of Dr. Ryan and Dr. Cooney were considered, and the minute states "declaring fitness to work. The matter now becomes a discipline issue. This was discussed at length". While these extracts are, of course, out of context, they appear in each case in a section of the minutes that is clearly a summary of a discussion that took place at each board meeting concerning the applicant, her behaviour, her referral to Medmark and legal advice obtained by the respondent.

Relevant Legislation and Related Provisions
20. Central to these proceedings is whether or not the applicant is bound by *Towards 2016* pursuant to s. 23 of the Act of 1998. I set out below, subs. 24(3) and (11) of the Act of 1998. Insofar as the *Towards 2016* is concerned, the following is of relevance to these proceedings. Firstly, p.1 of the document states that: "the procedures are designed to deal solely with issues of employment and supersede all disciplinary procedures in existence prior to this agreement."

21. Secondly, on p. 2, it is stated:-

> "The procedures are intended to comply with the general principles of natural justice
>
> and provide:
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> • 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.
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> • 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.
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> • 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."

22. The procedures are divided into two categories, procedures relating to professional competence issues and procedures relating to work, conduct and matters other than professional confidence. These proceedings are concerned with the latter.

23. In relation to the disciplinary procedures, there is an informal stage, followed by five other possible formal stages, comprising a verbal warning, a written warning, a final written warning, a stage after the final written warning where it is perceived that the conduct has continued after the same, and an appeal stage. The process which the applicant is attempting to stop by these proceedings is stage 1 in the procedure i.e. the verbal warning stage. As regards this stage, *Towards 2016* states as follows:-

> "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.
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> 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.
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> A copy of the verbal warning will be retained on the personnel file by the Principal and a copy will be given to the teacher. The verbal warning will be active for a period of 6 months and subject to satisfactory service will cease to have effect following the expiry of the 6 months period. The record will be removed from the file after the six months period subject to satisfactory improvement during the period.
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> There may however be occasions where an employee's work or conduct is satisfactory throughout the period the warning is in force only to lapse very soon thereafter. Where such a pattern emerges and there is evidence of an undermining of the disciplinary process, the employee's previous conduct and pattern of behaviour may be considered as a whole in a future disciplinary procedure."

As regards an appeal, it is stated that it is open to a teacher to appeal a sanction imposed at stage 1. The appeal is to be a nominee of the board of management.

Grounds on which relief is sought and Submissions

Submissions of Applicant
24. I will address the grounds upon which relief is sought in the context of the applicant's submissions. Four main arguments are advanced on behalf of the applicant:-

(i) Absence of Fair Procedures
25. It is submitted that the Principal should have had no involvement either in the applicant's own complaint regarding the letter that the Principal sent to Medmark or in relation to the proposed investigation into the conduct of the applicant. While the respondent has agreed that the Principal should not partake in the investigation process, the respondent has not agreed that the Principal will have no other involvement, such as, in the selection of sanctions, if the investigation concludes that the complaints are well-founded.

(ii) Prejudgment
26. It is submitted that the respondent has already prejudged the issue of the applicant's guilt or innocence and that this is clearly demonstrated by the letter of the Principal to Medmark, and also by the board minutes of 8th December, 2015, and 23rd February, 2016.

(iii) Bias/Objective Bias
27. It is submitted that the procedures followed by the respondent around the investigation into the applicant's complaint in connection with the Medmark letter were flawed, because the applicant herself was not interviewed, she was not given a copy of the response of the Principal, she does not know the materials to which the Board had regard and she was not given any opportunity to test the case put forward by the Principal. On the other hand, the Principal, it is submitted was connected to the process which give rise to a concern of objective bias on the part of the respondent in the handling of the applicant's complaint. Furthermore, it is submitted that the manner in which the applicant's complaint was handled feeds into the subsequent decision of the respondent to initiate a disciplinary process against the applicant, which the applicant contends arises from the rejection by the respondent of the applicant's complaint against the Principal. The applicant apprehends that the inevitable outcome of the disciplinary process will be the sanction of a verbal warning being imposed upon the applicant, and that this warning will, in turn, be used as a stepping stone to further disciplinary proceedings being taken against the applicant, leading ultimately to her dismissal from her employment. It is submitted that this is a reasonable apprehension on the part of the applicant.

(iv) Disciplinary Process is *Ultra Vires*
28. It is submitted that the process to which the applicant is being subjected is not provided for in s. 24 of the Act of 1998, which provides procedures limited to the suspension and dismissal of teachers from the school, but not anything less. It is further submitted that the disciplinary procedure provided for in *Towards 2016* required at the time of issue the concurrence of the Minister for Finance, (this has since been changed in 2012, to the Minister for Public Expenditure and Reform) and that no evidence of such concurrence has been produced by the respondent, in spite of requests on behalf of the applicant.

29. It is the applicant's contention that she is entitled to rely on her contract of employment dated 1st August, 1996, which she entered into with one of the schools that amalgamated to form the respondent community school. That contract was made subject to the provisions of "the general agreement" made on 11th May, 1957, between the Catholic Headmasters Association and the Association of Secondary Teachers in Ireland. Neither the applicant's contract of employment nor that general agreement contained any mechanism for a procedure of the kind invoked by the respondent.

30. The applicant submits that the wording of s. 24 of the Act of 1998 is clear and unambiguous. The most relevant provisions of the same for the purpose of these proceedings are ss. 24(3) and (11) which provide as follows:-

> "(3) The terms and conditions of employment of the teachers and other staff of a recognised school, appointed by the board and who are, or who are to be, remunerated out of monies provided by the Oireachtas, shall be determined from time to time by the Minister, with the concurrence of the Minister for Public Expenditure and Reform.
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> …
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> (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."

31. It is submitted that nowhere in the Act of 1998 is any provision made for the imposition of sanctions, or for procedures leading to the imposition of sanctions that are anything less than suspension or dismissal. Furthermore, insofar as the respondent may argue that such procedures are contained in *Towards 2016* and that that has become a term or condition of the employment of the applicant, it is expressly provided in s. 24(3) of the Act of 1998 that the Minister for Expenditure and Public Reform must concur with terms and conditions of employment as determined by the Minister for Education. No evidence was advanced that the Minister for Finance has so concurred. For these reasons, it is submitted the procedure invoked by the respondent is *ultra vires*.

32. It is submitted that this Court should give effect to the plain meaning of the statute. The applicant relies upon the decision of Noonan J. in *Fingleton v. The Central Bank of Ireland* [2016] IEHC 1, in which he said at paras. 71 and 72:-

> "71. At its heart, this case is essentially concerned with statutory interpretation. The court's task in construing any piece of legislation is to give effect to the intention of the legislature. The legislation in this case and in particular s. 33 AO (2) of the Act was minutely parsed and analysed by the parties by reference to a number of different well settled cannons of construction to assist the court in determining the legislative intent. The applicant referred to these and other matters as 'hurdles' that the respondent had to surmount to establish the meaning contended for by the respondent. It was said that if the respondent fell at any of these hurdles, the court would be left with no option but to prefer the applicant's construction.
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> 72. However, many, and perhaps all, of these aids to construction do not arise if the natural and ordinary meaning of the words of the section is otherwise readily ascertainable. In construing any statute, the provision as a whole must be examined to determine the context in which particular words or expressions are used so as to accord them their natural and ordinary meaning. Individual words or phrases may mean different things in different contexts and often cannot be analysed in isolation. To have regard to the scheme and purpose of a statute to construe its meaning is not necessarily the same thing as adopting a purposive approach to an otherwise doubtful provision. In construing statutes, as in understanding ordinary language, context is everything."

33. The applicant also relies upon the decision of Haughton J. in *Newbridge Credit Union (In Liquidation) & Companies Acts* [2017] IEHC 542, where, referring to the passage quoted above from the decision of Noonan J. in *Fingleton*, he said, at para. 6.2:-

> "I respectfully adopt this statement. It follows that the Court should first look to the ordinary and natural meaning of the words that are to be construed. It should do so in context, and in particular in the context of the relevant sections read as a whole"

34. So, therefore, since s. 24 of the Act of 1998 confers powers only in relation to the suspension or dismissal of teachers and not in relation to any lesser form of disciplinary action, the respondent has no power to invoke the stage 1 procedure in *Towards 2016*.

Response to Respondent's Case
35. Insofar as the respondent argues that the applicant is out of time in which to challenge the decision of the respondent of 7th June, 2016, it is argued on behalf of the applicant that that decision should be seen as part of the continuum of events, culminating in the decision of the respondent to subject her to disciplinary meeting. It is submitted that her solicitors aired concerns about the decision of 7th June, 2016, at an early stage (on 24th June, 2016), and that after receiving the request to attend the disciplinary meeting (by letter dated 29th September, 2016), her solicitors engaged with the solicitors for the respondent and the respondent itself with a view to avoiding proceedings if at all possible. It is submitted that relevant events took a number of months to unfold, and that these events were not within the control of the applicant. On this basis, the applicant makes application for an extension of time in relation to the relief sought at para. D(5) of the statement of grounds *i.e.* an order for *certiorari* of the decision of the respondent communicated to the applicant by letter dated 8th June, 2016.

36. Finally, in response to the assertion that the decisions of the respondent are not amenable to judicial review, the applicant relies upon a number of authorities which it is submitted establish otherwise. In particular, the applicant relies upon the decision of this Court (O'Malley J.) in *Kelly v. Board of Management of St. Joseph's National School*, [2013] IEHC 392, as well as the decisions of the Supreme Court in the cases of *Beirne v. Commissioner of An Garda Síochána* [1993] ILRM 1, and *O'Donnell v. Tipperary (South Riding) County Council* [2005] 2 I.R. 483. In *O'Donnell*, Denham J. (as she then was) held as follows:-

> "12. In *Geoghegan v. Institute of Chartered Accountants in Ireland* [1995] 3 I.R. 86, factors relevant to the issue as to whether or not the decision was amenable to judicial review were analysed. A number of those factors are relevant to this case and I apply those principles. First, this case relates to the fire service and to a station officer of that service, a service of importance in the community …. Such a service is necessary within a state, either to be provided by the State or delegated by the State. Secondly, the sources of the general powers of the County Council are to be found in legislation. Thirdly, the functions of the County Council, the fire service, and the station officer come within the public domain of that State. Fourthly, the consequences of the County Council's decision may be very serious for the applicant. Amongst these factors, I lay emphasis on the functions of the County Council, the fire service, and the station officer as functions manifestly in the public domain of the State.
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> 13 In conclusion on this issue, I am satisfied that the employment of the station officer of a fire station is a matter within the public domain and amenable to judicial review. While there was a contract between the applicant and the County Council, it has a significant public element and the decision to terminate was amenable to judicial review."

37. The applicant further relies upon the decision of Quirke J. in this Court in *Brown v. The Board of Management of Rathfarnham National School* [2008] 1 I.R. 70, which case concerned the appointment and selection process for the role of a Principal under s. 23 of the Act of 1998. Quirke J. identified a number of factors at para. 69 that should be considered when determining whether or not a matter is amenable to judicial review. These are:-

> "1. this case relates to a major profession, important in the community, which is responsible for the provision of primary education for children within the State pursuant to policies implemented by successive governments with the sanction of the Oireachtas;
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> 2. the original source of the power to appoint the principal teacher of a national school is the Act of 1998 and in particular s. 23 thereof. The power is conferred upon the first respondent and may only be exercised '… subject to such terms and conditions as may be determined from time to time by the Minister with the consent of the Minister for Finance' and 'in accordance with procedures agreed from time to time between the Minister, the patron …*etc.*';
>
> 3. the functions of the first respondent have a statutory genesis. The decision sought to be impugned was made by the first respondent in exercise of a power conferred upon it by the provisions of s. 23 of the Act of 1998. Those facts strongly, *inter alia*, suggest that the decision can be said to come within the public domain;
>
> 4. the method by which the contractual relationship between the first respondent and the notice party was created is expressly regulated by a statutory regime."

38. Finally, on this point, the applicant relies upon the decision of O'Malley J. in *Kelly*. In that case, O'Malley J. adopted the analysis of Quirke J. in *Brown* and stated as follows at para. 133:-

> "I am satisfied that the dispute between the parties meets the criteria set out in *Beirne* and *O'Donnell* and cannot in any reasonable sense be described as arising solely out of a private contractual relationship.
>
> I adopt the analysis of Quirke J. in *Brown* as to the public importance of the teaching profession and as to the statutory source for procedures within the sector. The analysis applies as appropriate to the dismissal or demotion of a principal as to the appointment of one. These are decisions which manifestly have a public element. Every aspect of the procedure which must be followed derives its authority from statute rather than from contract. The decision is also very serious for the individual concerned.
>
> I do not find it necessary to disagree with the judgment of Peart J. in *Becker*. As pointed out by Quirke J., that case concerned an issue that did indeed arise out of a contractual agreement. It also predates the publication of Circular 60/2009, which mandatorily replaced all previous procedures. Having regard to the provisions of that circular, which is part of the statutory regime established by the Education Act, I do not feel that the hiring and firing of teachers pursuant to procedures prescribed by the Act can now be described as a private contractual issue."

Submissions of Respondent
39. Firstly, the respondent argues that the attempt to challenge the decision of the respondent made on 7th June, 2016, was brought out of time. The respondent relies in this regard on O. 84, r. 21 of the RSC which requires the application for judicial review of that decision to be made within three months. It is submitted that no good or sufficient reason to extend the time limit has been advanced by the applicant. There is nothing to suggest that matters were outside the control of, or could not reasonably have been anticipated by, the applicant who had access to legal advice at all times.

40. It is submitted that the time limit for judicial review is regarded as akin to a statutory time limit and in this regard, the respondent relies upon the decision of the Supreme Court in *Shell E&P Ireland Limited v. McGrath* [2013] 1 I.R. 247.

41. Secondly, it is argued that certain reliefs sought by the applicant are now moot, because the respondent has agreed to the appointment of an independent person to conduct the disciplinary process. The respondent did so before the institution of these proceedings.

42. Thirdly, it is submitted on behalf of the respondent that in circumstances where the only possible sanction that may be imposed is a verbal warning, the disciplinary proceedings are not amenable to judicial review. In this regard, the respondent relies upon the decision of Peart J. in *Becker v. Board of Management St. Dominick's Secondary School Cabra* [2005] IEHC 169, the decision of O'Malley J. in Kelly and the decision of Baker J. in *Conroy v. Board of Management of Gorey Community School* [2015] IEHC 103.

43. It is submitted that the dispute between the parties arises out of matters covered by the contract of employment between the parties and for that reason is not amenable to judicial review. In this regard, the respondent relies upon the following passage from the decision of Peart J. in *Becker*:-

> "I have set out these matters in some detail in order to highlight the extensive public nature of education. However, it is not sufficient for the applicant simply to show that the nature of the job she performs is of such importance to the advancement and development of society as a whole in order to bring her present claim within the reach of judicial review. There is a distinction to be drawn between the wider aspects of education, and the statutory provisions, such as those to which I have referred, and the narrower aspects of this particular case, such as the employer/employee relationship between her and the respondent which is based, as has been pointed out, solely on a contract of employment entered into between the parties. The decision sought to be impugned in this case, namely one to give her a written warning, is one made by her employer as part of a disciplinary procedure applicable in the school. The applicant has a grievance in relation to that decision to issue a warning letter. The merits of that dispute are not in issue in this case at this stage. What is at issue is simply whether the applicant is confined to a purely private law remedy, rather than remedy by way of judicial review. Let us suppose that she had been dismissed, and not simply warned in writing. In such a situation, would the decision to dismiss her be amenable to judicial review or must she rely on her private law remedy? The answer must be that the dispute is not amenable to judicial review, as lacking that public law element which is essential to judicial review relief.
>
> I draw an important distinction between the various public functions of the school which are involved in the provision of education to the public, and what I might describe as the private functions of that body, such as the hiring and firing of a teacher. One could think of other private functions of a school, such as entering into a contract for the supply of food, or school books, or the building of an extension to the school, which have a similar private law element to the hiring and firing of a teacher. Disputes arising in such private contracts are to be dealt with under private law remedies, such as breach of contract, unless there is some particular public law element to the dispute.
>
> Simply because a school may be established, and its functions and obligations set forth in an Act of the Oireachtas, is not of itself sufficient to bring every dispute emanating from the school's activities within the reach of judicial review."

44. The respondent then relies on the following passage from the decision of O'Malley J. in *Kelly* at paras. 137 and 138, where she stated:-

> "I do not wish to be taken as saying that every aspect of school disciplinary procedures is a suitable matter for judicial review. There is a very significant difference between, for example, the giving of an oral or written warning, as in Becker, and the appointment, demotion or dismissal of a principal. This is so partly because of the profoundly more serious consequences for the individual concerned, but also because of the wider, public implications for the whole school and the community which it serves.
>
> I therefore conclude that the applicant is entitled to seek judicial review in this matter."

45. In *Conroy*, Baker J. adopted the analysis of O'Malley J. in *Kelly*, and having done so then concluded that the decision to remove a person as a chaplain to the respondent school was not one amendable to judicial review, because the employment of the chaplain in that case was a matter entirely between the Board of the respondent school and the applicant, and had no ministerial involvement, nor did it have any community or education purpose, it being a very distinct role from that of a teacher of religion. However, she also concluded that the decision to employ the same person as a teacher of religion in the school was one with a sufficient public law element to attract judicial review.

46. Even if the disciplinary procedure is amenable to judicial review, it is submitted that a court should not intervene having regard to the legal *maxim de minimis non curat lex*. The only real dispute between the parties relates to the proposed stage 1 meeting. The only possible sanction that can be imposed as a result of any adverse finding against the applicant is a verbal warning. The applicant has an appeal against any such adverse outcome. Moreover, in the event of an adverse outcome standing, it is removed entirely from the record of the applicant after six months.

47. In this regard, the respondent relies upon the case of *Murtagh v. Board of Management of St. Emer's National School* [1991] I I.R. 482, in which Hederman J. stated at p. 488:-

> "A three day suspension of a pupil from a national school either by the principal or the board of management of that school is not a matter for judicial review. It is not an adjudication on or determination of any rights, or the imposing of any liability. It is simply the application of ordinary disciplinary procedures inherent in the school authorities and granted to them by the parents who have entrusted the pupil to the school.
>
> A three day suspension for an admitted breach of discipline would be no more reviewable by the High Court, than for example, the ordering of a pupil as a sanction to stay in school for an extra half hour to write out lines, or to write out lines while he is at home."

48. The respondent also relies upon the more recent decision of Twomey J. in *Dillon v. Board of Management of Catholic University School* [2016] IEHC 674, a case involving a challenge to the imposition of a final written warning on a teacher. In that case, Twomey J. considered that since the applicant had not received any sanction but was merely in receipt of a written warning, which was to be removed from his personnel file after 12 months, the measure was *de minimis* and not amenable to judicial review. I should point out, however, that this decision was subsequently overturned by the Court of Appeal, following upon the conclusion of these proceedings. I will address the decision of the Court of Appeal in my conclusions.

49. It is further submitted on behalf of the respondent that even if the disciplinary process is amenable to judicial review, the applicant has failed to identify any procedural error such as to entitle the applicant to any relief. It is submitted that the Principal acted appropriately in invoking the procedures at stage 1 of the disciplinary process. The respondent has followed, until the issue of these proceedings, the prescribed procedures, save insofar as they have retained an independent expert to conduct the disciplinary investigation to take account of a specific concern raised by the applicant herself.

50. It is submitted that the disciplinary procedures set out in *Towards 2016* are binding upon the applicant and that this is clear from cases such as *Brown* and *Kelly*. As regards rigid adherence to the procedures, Quirke J. in Brown stated at para. 95:-

> "Non-compliance with the minute detail of the agreed procedures will not invariably invalidate affected decisions. The procedures may be described as largely directory in nature. However, they may not be ignored. They must be applied by the first respondent in substance. That is clear, having regard to the principles identified earlier herein."

51. It is submitted that it was entirely within the permitted margin of appreciation for the school to request an external person to conduct the stage 1 process. However, it is further submitted that to suggest that the procedures do not form part of the terms and conditions of employment of the applicant is misconceived. If the applicant wished to challenge those procedures, the only manner in which she could legitimately have done so would have been to have brought judicial review proceedings in respect of those procedures. The respondent in such a judicial review would have been the Minister for Education and Skills.

Discussion and Decision

52. I will deal first with the application of the applicant to extend the time to bring her application to quash the decision of the respondent of 7th June, 2016. This letter rejected the applicant's complaint made against Ms. McCarthy in relation to the letter that Ms. McCarthy sent to Dr. Ryan of Medmark on 7th December, 2015. Prior to the issue of the letter on 8th June, 2016, the applicant, through her solicitors, had written to the respondent expressing her dissatisfaction with the manner in which her complaint was being investigated. Ms. McCarthy replied to this letter by way of letter dated 25th May, 2016. Following upon receipt of the letter of the respondent of 8th June, 2016, the applicant, again through her solicitors wrote a letter to the respondent expressing dissatisfaction both with the outcome of the investigation and with the manner in which the respondent had handled the investigation. That letter expressly rejected the finding that Ms. McCarthy had "acted professionally and within her duty of care". It raised issues of fair procedures in relation to the handling of the applicant's complaints. A reply to this letter was sent by the solicitors acting on behalf of the respondent on 24th June, 2016. This rejected the applicant's complaints. This letter concluded with the following paragraph:-

> "With reference to your letter of 15th June, your client has referred to "continued bullying and harassment" at work. The grievance procedure and/or dignity at work/bullying procedure can clearly accommodate a situation where a teacher brings a grievance or makes a complaint against the Principal. In such circumstances the matter is dealt with by an "officer of first recourse" / "officer of second recourse" / Board of management (depending on the policy being utilised) and the Principal is obviously absent from any meetings where a complaint against the Principal is being considered. Your client has already been advised that if she wishes to pursue a grievance or complaint against the Principal, she should utilise the appropriate procedure, and we confirm that any such grievance or complaint will be dealt in the manner set out in the procedure and otherwise in accordance with the general principles of fair procedures and natural justice."

53. It does not appear that any reply was given to this letter on behalf of the applicant. What is clear from the letter is that the applicant's complaint against the Principal as regards her sending a letter to Dr. Ryan on 7th December, 2015, was dealt with on an "ad hoc" basis as it did not invoke the grievance procedure or dignity at work procedures that were available to the applicant. By drawing those procedures to the attention of the applicant, and informing her that she could still avail of those procedures in the context of her complaint against the Principal, the applicant was, in effect, being afforded a second bite of the cherry as regards her complaint.

54. The next correspondence between the parties appears to have been the letter of 29th September, 2016 from the respondent to the applicant, whereby the applicant was informed of the intention of the respondent to convene a disciplinary meeting in relation to her conduct. There was then further correspondence between the solicitors for the parties, and numerous letters were exchanged before the eventual issue of the notice of motion commencing these proceedings, on 21st December, 2016.

55. It is common case that the applicable time limit for the issue of judicial review proceedings in connection with the decision of the respondent made on 7th June, 2016, is three months. The respondent asserts that such time limits have the status of statutory time limits and relies upon the decision of Clarke J. (as he then was) in the case of *Shell EP Ireland Limited v. McGrath*. The applicant did not dispute this proposition, but when advancing her application to extend time, submitted that the issues the subject of the intended disciplinary hearing are, in substance, the same issues as the issues the subject of the applicant's complaint about the Principal to the Board. It is submitted that it is clear from the Board minutes referred to above that the Principal and/or the respondent wanted the applicant "gone from the school", and there is therefore a significant overlap in the issues arising from the referral of the applicant for medical examination and the events the subject of the impugned disciplinary charges against the applicant. Given the close link between these events, it is submitted that the Court should exercise its discretion to extend the time within which the applicant may seek *certiorari* of the decision of the respondent of 7th June, 2016.

56. I have great difficulty in accepting the arguments of the applicant in this regard. There may be an overlap between the applicant's complaints in relation to the decision of the respondent to dismiss her complaint, and the decision of the respondent to initiate a disciplinary process, but that does not mean that the processes are the same, that the events giving rise to them are the same or that the decisions taken by the respondent are the same.

57. There are two very distinct processes involved. The first was a complaint brought by the applicant herself against Ms. McCarthy. As I mentioned above, this complaint was dealt with on an *ad hoc* basis. Even if there is some overlap between the events that gave rise to that complaint, and the events that gave rise to the subsequent disciplinary investigation initiated by the respondent, it could not be more clear that the two processes are separate and distinct from each other. The precise issue giving rise to those processes are also very different; on the one hand the applicant complained that the Principal sent a letter to Dr. Ryan intending to influence his report. On the other hand, the disciplinary process is to investigate the conduct of the applicant towards her colleagues and the Principal. Even if the applicant's complaint against the Principal were vindicated, it would not mean that the respondent's complaints in relation to her conduct might not also be vindicated.

58. Moreover, even before the issue of the letter of 8th June, 2016, the applicant had expressed her concern in relation to the manner in which her complaint was being conducted by the respondent. She clearly considered her concerns in this regard were well-founded, at the time her complaint was dismissed. These complaints were grounded upon issues relating to fair procedures. She did not need access to minutes of Board meetings or to receive the letter of 29th September, 2016 in order to challenge the decision of

the respondent to dismiss her complaint. But even if she did, there was a further delay from that date of almost another three months before she issued these proceedings. Even on her own case, if she needed to receive the letter of 29th September, 2016 before she could challenge the decision of the respondent of 7th June, 2016 (and I do not accept that this is the case) she should have moved with alacrity to challenge the decision from 29th September, 2016 onwards. While I accept that it is reasonable for parties to engage in correspondence with a view to avoiding litigation if at all possible, this cannot be so at the expense of time limits which have the equivalent of statutory force.

59. Finally, on this point, it appears that the applicant had an alternative remedy offered to her by the solicitors for the respondent in their letter of 24th June, 2016, which I refer to above. This was a tailor-made grievance procedure which she was informed she could still avail of, notwithstanding the decision already made by the respondent. The applicant might reasonably have been expected to exhaust this alternative remedy before seeking to challenge the decision of 7th June, 2016 by way of judicial review. For these reasons therefore, I refuse the relief sought in paras. D(5) and (6) of the applicant's statement of grounds.

Is *Towards 2016 Ultra Vires?*
60. Next, I think it is appropriate that I should address the argument that the disciplinary proceedings being following by the respondent are *ultra vires* of the Education Act, 1998. The applicant relies upon the express wording of s. 24(11) of the Act of 1998 which states:-

> "The board of a recognised school may, in accordance with procedures determined from time to time by the Minister …, 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."

61. The applicant contends that the express wording of the statute does not confer any power in relation to disciplinary sanctions short of suspension or dismissal and, therefore, the procedures provided for by *Towards 2016* dealing with any sanctions short of suspension or dismissal are *ultra vires*. The applicant further invites the Court to find Towards 2016 ultra vires on the grounds that no evidence was produced as to the concurrence of the Minister for Expenditure and Public Reform with the disciplinary procedures provided for therein, as required by statute.

62. In response to this argument, it is submitted on behalf of the respondent that any relief on these grounds would have to have been on notice to the Minister for Education and Skills. It is submitted that the procedures were issued by way of a departmental circular, No. 60/2009 (i.e. *Towards 2016*) and as such are binding on all recognised schools and department paid teachers including the applicant.

63. It is at the very essence of the concept of ultra vires, that the act complained of must be the act of a specified person. In this case, *Towards 2016* and the disciplinary procedures created thereby were clearly the product of an agreement between a number of parties, including the Minister. It follows therefore that if the applicant wished to challenge *Towards 2016*, the Minster should have been made a party to these proceedings.

64. Moreover, the circular has been considered and applied in subsequent cases, such as *Kelly*, in which O'Malley J. referred to the publication of the circular and noted that it "… mandatorily replaced all previous procedures". It is true that the argument advanced by the applicant in this case may not have been canvassed before O'Malley J. in *Kelly*, but the observation is nonetheless of some relevance. O'Malley J. went on to observe that the circular is "part of the statutory regime established by the Education Act". In my opinion there can be no doubt but that to challenge that regime it would be necessary for the Minister or his Department to be a party to the proceedings, not least because of its application to all department funded schools throughout the State.

65. Finally, the applicant also argues that *Towards 2016* forms no part of her contractual relationship with the respondent, which she claims is governed only by the contract that she entered into in 1996, with one of the schools that came together to form the respondent school. However, as noted above O'Malley J. in *Kelly* stated that circular 60/2009 mandatorily replaced all previous procedures. She went on to say at para. 135:-

> "I do not feel that the hiring and firing of teachers pursuant to procedures prescribed by the Act can now be described as a private contractual issue."

66. It is true that in this passage she refers only to "hiring and firing" but the circular itself provides for a graduated disciplinary process leading up to suspension and dismissal, including a stage 1 verbal warning. All of the procedures of *Towards 2016* in my opinion, apply to department funded schools, unless and until such time as they are for any reason set aside or declared invalid in proceedings to which the Department or the Minister for Education is a party. To this I would add that while there are of course cases in which suspension or dismissal may arise out of a single act, those sanctions may also result from continuous breaches of rules or other forms of inappropriate behaviour. For that very reason, it is necessary for procedures relating to suspension and dismissal to incorporate steps along the way that, in cases of continued misconduct, may lead to suspension demotion or dismissal. In my view such steps logically form part of the procedure relating to suspension, demotion or dismissal. For these reasons, I reject the argument that *Towards 2016* was made *ultra vires*, and that it does not form part of the applicant's contractual relationship with the respondent. The relief sought in para. D. (4) of the statement of grounds must therefore be refused.

Is the conduct of the respondent amenable to judicial review?
67. I was referred by both parties to a wide range of authorities on the circumstances in which a decision taken or a process under way may be amenable to judicial review. The weight of those authorities in my view leans in favour of the proposition that the disciplinary proceedings initiated by the respondent against the applicant are amenable to judicial review. I think that this is clear from the decisions of O'Malley J. in *Kelly* and Quirke J. in *Brown*, the relevant passages of which are set out in the submissions of the parties above. Paragraph 37 above in particular could be applied in totality to the circumstances of this case. Somewhat ironically however, although the applicant relied on this extract from the decision of Quirke J., the fourth sub-paragraph from the judgment of Quirke J. states that the method by which the contractual relationship between the first respondent (in that case) and the notice party was created is expressly regulated by a statutory regime, something which the applicant in this case denies when making other arguments relating to the applicability of *Towards 2016*.

68. However, that is not the end of the matter when considering whether or not the procedures invoked by the respondent pursuant to *Towards 2016* are amenable to judicial review. In this regard para. 137 of the decision of O'Malley J. in *Kelly*, to which I have referred at para. 44 above, is of some relevance. The distinction drawn by O'Malley J. is of particular significance to these proceedings, insofar as she draws a distinction between disciplinary action involving an oral or written warning on the one hand, and the appointment, demotion or dismissal of a Principal on the other. This brings into focus the other limb of the argument made on behalf of the respondent under the heading of *de minimis non curat lex.*

69. The respondent relies upon two authorities in support of its argument that the matters complained of are de minimis. The first of these is *Murtagh v. the Board of Management of St. Emer's National School* arising out of the suspension from school of a student for a period of three days and the passage quoted from the decision of Hederman J. at para. 47 above.

70. The second decision relied upon by the respondent in relation to this argument is the decision of Twomey J. in the case of *Dillon v. Board of Management of Catholic University School.* In that case, Twomey J., in applying the decision in *Murtagh* to the facts before him, considered that a 12 month final written warning given by the respondent to the applicant to be *de minimus*, and not a matter that should give rise to judicial review. He held at para. 20:-

> "When this case commenced before this Court in June of this year, it was in essence an application by the applicant teacher to have the final written warning, that had *prima facie* expired, declared null and void. While the 12 month final written warning of the applicant might appear at first instance to be more serious than the three day suspension of a pupil in the *Murtagh* case purely on the basis of length of time, in fact the 12 month final written warning could be viewed in some ways as less serious than the three day suspension in the *Murtagh* case. This is because in the case before this Court, there has been no actual suspension or other punishment of the applicant (unlike the pupil in the *Murtagh* case who was forced to leave school for three days), since the written warning was simply that, a warning. Furthermore, by its express terms the final written warning was to be removed (and thus treated as if it had not existed) from the applicant's personnel file after 12 months. For this reason, this Court is of the view that despite its apparent length, the final written warning of the applicant teacher was *de minimis* in nature, on the grounds that it was simply a warning and was not, in the words of Hederman J., an imposition of any liability."

71. At the time of the hearing of these proceedings, counsel drew to my attention that the decision of Twomey J. was under appeal. That appeal has since been heard and determined, and the Court of Appeal came to a different conclusion to that of Twomey J. In his judgment of 27th August, 2018, (*Dillon v. The Board of Management of Catholic University School* [2018] IECA 292), Hogan J. considered that the finding made against the applicant by the respondent in that case *i.e.* a finding of "inappropriate behaviour" concerning a pupil, which resulted in a formal written warning, could not "be regarded as anything other than a serious and reputationally damaging finding", which could result in a serious impact on the applicant's employment prospects and his future opportunity to earn a livelihood. He concluded at para. 24:-

> "These are not trivial issues and they cannot, with respect, be reduced to the level of mere technicality or insubstantiality."

72. In response to the *de minimus* argument, it is urged on behalf of the applicant that the Court should assess the realities of the situation and the true intentions of the respondent, as disclosed in the minutes of the Board meetings referred to above. It is submitted that there is a clear intention on the part of the respondent to remove the applicant from her position, and that this is clear from the statement in the Board minute of 8th December, 2015 in which it was stated: "the Principal is looking to keep the teacher in the school until the end of the calendar year …". Similarly, reliance is placed upon the remark in the later minute dated 8th March, 2016 in which it is stated that "the matter now becomes a discipline issue".

73. In the course of the hearing, counsel for the respondent, while not objecting to the production of the minute before the Court, objected to the minutes being used as evidence. He submitted that if the applicant wished the minutes to be used as evidence, then the applicant should have served notice to cross-examine the Principal. I consider that the submissions of counsel for the respondent in this regard must be correct. Minutes amount to no more than a summary of a discussion. It is almost impossible for them to reflect the full context of the discussion and, absent agreement between parties to litigation, may well require explanation by oral testimony.

74. If, for example, the Principal was cross-examined as to the minute of 8th March, 2016, she might well explain that entry in the minutes by saying that the respondent initially considered that the conduct of the applicant could be explained by a medical condition, but when this was rejected following upon medical assessment, it followed that the conduct complained of required to be treated as a disciplinary matter, because it could not be explained away on medical grounds. This of course is entirely speculative and I merely put that forward to illustrate that the minute does not necessarily reflect *mala fides.*

75. While it might be more difficult to explain the content of the minute of 8th December, 2015, it is nonetheless possible that the Principal could provide a satisfactory explanation to this minute, but she was not afforded the opportunity to do so because the issue was not raised on affidavit and nor was any notice to cross-examine the Principal served. That being the case, the Court is being invited to form a conclusion as to the meaning of the minutes without any evidence as to the discussion recorded in the minutes, and on the basis of legal submissions only. I am not prepared to adopt this approach. It would in my opinion be wholly inappropriate for this Court to form any conclusions as to the "true intentions" of the respondent based on the minutes of the Board meeting alone. I will address proceedings and the *de minimus* argument advanced by the respondent on the basis of the complaints actually advanced by the respondent that the applicant, and not on the basis that there is a furtive intent of the part of the respondent to bring the applicant along a road to dismissal.

76. Having rejected those arguments, I return now to the substance of the point and to the decision of the Court of Appeal *Dillon*. There are two significant differences between the facts in *Dillon* and the facts in this case. The first is that in this case the respondent has invoked stage 1 of the disciplinary procedure, which can only result in a verbal warning and not a written warning. In the scheme of things, a verbal warning is considered to be less serious in character than a written warning. Moreover, the procedure provides that the verbal warning, subject to satisfactory conduct on the part of teacher in the meantime, ceases to have effect and shall be removed from the record after six months, and not twelve months as in the case of a written warning.

77. Secondly, in *Dillon* the respondent had arrived at the point of having made an adverse finding against the applicant, and that adverse finding was one of "inappropriate behaviour" concerning a student. The behaviour concerned was calling the student an offensive name, but it is unclear from the decisions of either Hogan J. or Twomey J. if the written warning itself reflected the nature of the "inappropriate conduct". In this case, the charges against the applicant are that she has spoken disrespectfully about other members of staff, and that she has treated the Principal disrespectfully. There can therefore be no question of a finding that carries the somewhat sinister connotations of a finding of "inappropriate behaviour concerning a pupil". This is not to be dismissive of the complaints facing the applicant but it goes without saying that some complaints are more serious than others and not all complaints have the potential to cause long term damage to the reputation or career prospects of a teacher.

78. *Towards 2016* provides a graduated mechanism for the handling of complaints concerning teachers. The respondent has chosen to invoke stage 1 of the procedure, the verbal warning procedure, below which there is just one other stage, the informal warning procedure. If the complaints are sustained, they will remain on the applicant's record for six months, following which they are effectively expunged, unless there is further misconduct by the teacher concerned. In her decision in *Kelly*, O'Malley J. made it clear

that she did not wish to be taken as saying that every aspect of school disciplinary procedures are suitable for judicial review. She went on to say that "there is a very significant difference between, for example, the giving of an oral or written warning, as in *Becker*, and the appointment, demotion or dismissal of a principal." It seems to me that if the kind of complaints that have been advanced by the respondent against the applicant in this case in the context of a stage 1 verbal warning procedure are amenable to judicial review, then just about every complaint made against a teacher is likely to be so amenable. In my view, having regard both to the nature of the complaints made against the applicant and to the fact that they are advanced in the context of the stage 1 verbal warning procedure, they are not amenable to judicial review on the grounds of *de minimus non curat lex.*

79. It is also appropriate to observe that any concerns the applicant has about fair procedures and bias or pre-judgment are adequately addressed by the appointment of an independent person to adjudicate upon the respondent's complaint. While the applicant has expressed a concern that the Principal should have no role in the selection of any sanction, (in the event of a finding adverse to her) the sanction it appears is limited to a verbal warning only, and the stage 1 procedure does not provide for other sanction.

80. Accordingly, leave to bring proceedings seeking the reliefs sought at paras. D (1)-(3) of the statement of grounds by way of judicial review should be refused.