

BETWEEN

KIERAN BYRNE

PLAINTIFF

AND

WATERFORD INSTITUTE OF TECHNOLOGY

DEFENDANT

JUDGMENT of Mr. Justice Allen delivered on the 22nd day of January, 2019

1. On 14th May, 2001 the plaintiff was appointed as the chief officer of Waterford Institute of Technology for a term of ten years. The plaintiff's title on his appointment was Director but following the coming into force of the Institutes of Technology Act, 2006 the plaintiff's title was changed to President.

2. In late 2010, in anticipation of the expiry of the plaintiff's term of office, the defendant applied itself to identifying and appointing his successor.

3. By s. 7(1)(b) of the Regional Technical Colleges Act, 1992 (as amended), the appointment of the President was a function of the governing body. By s. 7(2) the governing body was required to develop such interview and other procedures as in its opinion would best ensure participation in the selection process by candidates of a high calibre from both within and outside the college, and to publish such procedures in such manner as it considered appropriate.

4. By s. 9 the governing body of the college was required to ensure that the President was selected in accordance with the procedures determined from time to time by the Higher Education Authority. By s. 9(2) of the Act, those procedures were required to include the composition of a selection board.

5. At a special meeting of the governing body of Waterford Institute of Technology on 20th December, 2010 a sub-committee, under the chairmanship of then chairman of the governing body, Mr. Redmond O'Donoghue, was established to oversee the process for the appointment of the new President. Mr. O'Donoghue had already met with the chief executive officer of the Higher Education Authority, the Secretary General of the Department of Education and Skills, and the college's solicitors. The minutes noted that it was intended to engage the Public Appointments Service to support the recruitment process.

6. The sub-committee came to be styled the Presidential Appointments Committee but as the minutes made clear, the role of that committee was limited to overseeing the appointment process.

7. By s. 7(4) of the Act the governing body was empowered to appoint as many committees, consisting either wholly or partly of members of the governing body, as it thought necessary to assist it in the performance of its functions. By s. 7(5) any committee was required to act in such manner as the governing body might direct and its acts were subject to confirmation by the governing body, unless the governing body otherwise directed.

8. By s. 21A of the Act, the appointment of the President was a "*reserved function*" which was required to be performed by a resolution of the governing body.

9. On 18th January, 2011 the governing body approved a proposal from the sub-committee to advertise the position of President for a five-year term. A proposed timetable had been prepared which would see the recommended candidate come before the April meeting of the governing body for "*formal approval*".

10. A meeting of the Presidential Appointments Committee, of the same day, approved the advertisement of the position, the establishment of a selection board based on the criteria set out in paragraph 5 of the Higher Education Authority selection procedures, and the broad outline of an application form. The proposed timetable envisaged interviews of candidates in the week commencing 7th March, 2011 with the recommended candidate coming before the meeting of the governing body on 12th April, 2011 for approval.

11. The position was advertised on 21st January, 2011 with a closing date for applications of 17th February, 2011.

12. The term of office of Mr. Redmond O'Donoghue as chairman of the governing body expired in February, 2011 and on 15th February, 2011 the governing body resolved that the deputy chairman, Counsellor Jack Walsh, should deputise pending the appointment of a replacement. At the same meeting, the governing body resolved that Counsellor Walsh should replace Mr. O'Donoghue as chairman of the Presidential Appointments Committee.

13. The Candidate Information Booklet explained that the governing body of Waterford Institute of Technology was the appointing entity. The governing body would convene an expert board, as prescribed by the Institutes of Technology Acts 1992 – 2006 to carry out the competitive stages of the selection process, and the Public Appointment Service would assist with the running of the recruitment campaign. The Booklet spelled out that:

"Until all stages of the recruitment process have been completed a final determination cannot be made nor can it be deemed or inferred that such a determination has been made."

14. Unknown to the governing body (and to the incoming new chairman) until a couple of days later Dr. Donie Ormonde was appointed as chairperson of the governing body for a period of five years with effect from 14th February, 2011 but Counsellor Walsh continued as chairman of the Presidential Appointments Committee.

15. There were eight applications for the position of President, including the plaintiff, who applied on the last day permitted.

16. In accordance with the Higher Education Authority procedures a selection board was established, under the chairmanship of Counsellor Walsh. The other members were Prof. Terri Scott, the President of Sligo Institute of Technology, Prof. Tom Collins, the President of the National University of Ireland, Maynooth, Ms. Julie Lydon, Vice-Chancellor of the University of Glamorgan, and Ms. Danuta Gray, chairman of O2 Ireland, a senior person drawn from business.

17. On 18th March, 2011 the selection board made a shortlist of five candidates for interview of whom four, including the plaintiff, presented for interview on 31st March, 2011. The selection board conducted its interviews at the offices of the Public Appointment Service in Abbey Street, Dublin.

18. On 31st March, 2011 the selection board reported to the Public Appointments Service that one only of the four candidates interviewed, the plaintiff, possessed the qualifications declared for the office and the requisite knowledge, ability, skills and experience for the proper discharge of the duties of the office, and thereby selected the plaintiff for recommendation to the governing body. The selection board's recommendation was unanimous.

19. On the evening of 31st March, 2011 the plaintiff had a telephone call at home from the Chairman, Dr. Donie Ormonde. Dr. Ormonde had earlier in the evening telephoned Counsellor Walsh to enquire as to the outcome of the selection board procedure and had been told that the plaintiff was the selected candidate. The plaintiff's recollection is that Dr. Ormonde congratulated him on his interview and told him that he was the selected candidate. Dr. Ormonde's recollection was the same. The evidence was significantly short of the plea in the statement of claim that Dr. Ormonde had congratulated the plaintiff *"on being appointed President of WIT for the next 5 years"*. Even if Dr. Ormonde had congratulated the plaintiff on being appointed President, it would have made no difference. The appointment of the new President was a matter for the governing body.

20. On the following afternoon the plaintiff was on official business in the office of the Mayor of Waterford, preparing for a mission to Chicago which was to depart over the following weekend. The plaintiff left the meeting he was in to take a call from the Public Appointments Service. The plaintiff's evidence was that he was told that he was the successful candidate and the only candidate going forward to the governing body. The plaintiff asked whether he could share the news with family and close friends. He was told that he could tell his family, but cautioned to be discreet. It was quite clear from the plaintiff's evidence that he understood the need for discretion. If there was no obvious reason why the governing body might not accept the recommendation of the selection committee, the appointment was ultimately a matter for the governing body.

21. Having finished his telephone call with the Public Appointments Service, the first person the plaintiff met was the Mayor of Waterford, Counsellor Mary Roche, who, besides being Mayor of Waterford, was a member of the governing body of Waterford Institute of Technology and a member of the Presidential Appointments Committee. Counsellor Roche asked the plaintiff whether he had any word yet from Dublin. The plaintiff answered that he had just taken a call from the Public Appointments Service and that he was the successful candidate. Counsellor Roche embraced and congratulated the plaintiff. Albeit with the benefit of hindsight, the plaintiff's announcement was not terribly discreet.

22. Again the evidence was short of the case pleaded, which was that the plaintiff had been told that he was to be nominated by the governing body and had been told that his appointment was official, but at that time there appeared to be no reason to apprehend that the selection board's recommendation would not be accepted by the governing body. Again, even if the plaintiff had been told that he had been appointed and that his appointment was official, it would have made no difference.

23. On 1st April, 2011, the day after the selection board had met and made its recommendation, one of the members of the board, Ms. Danuta Gray, the industry leader, circulated an email to all of the others. Acknowledging that it might not be either welcome or *"protocol"*, Ms. Gray, who on the day before had signed off on the recommendation of the plaintiff, expressed grave concern about the process *"and that an appointment to such a senior public post would be made on the back of it"*. Ms. Gray wrote that she was not comfortable if the governing body was relying on the endorsement of the selection board and asked that her serious concerns be brought to the attention of the chairman of the Institute *"and the whole process reconsidered"*.

24. On the afternoon of 1st April, 2011 Dr. Ormonde and Counsellor Walsh met at the Tower Hotel in Waterford. Counsellor Walsh mentioned that he had had an email from one of the members of the selection board expressing some concern at the selection process which he had been asked to bring to the chairman's attention. It was probably at that meeting that Counsellor Walsh told Dr. Ormonde of his intention to reconvene the Presidential Appointments Committee to debrief it on the outcome of the selection board.

25. On the following day, 2nd April, counsellor Walsh forwarded Ms. Gray's email to Dr. Ormonde. On the same day Dr. Ormonde spoke with another member of the selection board, Prof. Terri Scott, the President of Sligo Institute of Technology. Prof. Scott on the one hand expressed annoyance that Ms. Gray had communicated with the other members of the selection board after it had concluded its meeting but on the other hand said that she agreed with the sentiment of the email.

26. On Saturday 2nd April, 2011 the plaintiff left for Chicago and Dr. Ormonde and others followed on the Sunday. There was a difference in recollection between the plaintiff and Dr. Ormonde as to how much time they had spent together in Chicago. The plaintiff thought that they were almost exclusively together. Dr. Ormonde recalled a busy schedule of group events and that the only time that he and the plaintiff had been alone was once when they had lunch together. Whatever the level of private interaction may have been, it was common case that Dr. Ormonde did not convey to the plaintiff that there was any doubt about his appointment and did not mention Ms. Gray's email.

27. The plaintiff in evidence said that it was remarkable that Dr. Ormonde had not said anything about the email. Far from there being any doubt about his appointment, the plaintiff said that he was embarrassed because people were congratulating him and he felt that he had given an undertaking to be discreet. The plaintiff said that the information was not coming from him but did not suggest who otherwise might have been the source. The leader of the delegation, of course, was Counsellor Roche.

28. Inferentially, at least, the plaintiff was critical of the fact that Dr. Ormonde said nothing to him in Chicago about Ms. Gray's email. I can see why the plaintiff might think that Dr. Ormonde might have said something. Dr. Ormonde had, after all, telephoned the plaintiff on the evening of 31st March to congratulate him on his selection, and the email, at least potentially, cast a shadow over his selection and his prospects of appointment. On the other hand, Dr. Ormonde, who had had no role in the appointment process, found himself in a position in which two members of the selection board (which was required by the Higher Education Authority selection procedures to operate on the basis of unanimity) had expressed doubts in relation to an apparently unanimous recommendation. In my view it would have been quite inappropriate for Dr. Ormonde to have discussed with the plaintiff the merits of the selection process for an office for which the plaintiff was a candidate. It would have been a very delicate matter for Dr. Ormonde to have conveyed to the plaintiff that there was a potential problem with the appointment process without saying what the potential problem was, or getting caught up in a discussion as to what it was or might be, or what importance might be attached to it by the governing body. I am sure that if there had been any doubt or shadow over the recommendation of the selection board at the time it was made and conveyed to the plaintiff he would not have answered Counsellor Roche's question on the afternoon of 1st April in the way that he did, but by the time everyone was in Chicago it was too late to qualify the announcement.

29. I do not believe that Dr. Ormonde is to be criticised for failing to bring Ms. Gray's email to the plaintiff's attention in Chicago. In

any event, there was nothing that the plaintiff could have done about it that would have changed the course of events.

30. Counsellor Walsh reconvened the Presidential Appointments Committee, which met on 11th April, 2011. His evidence was that his object in doing so had been to report the outcome of the selection process and to "share" the views which had been expressed by Ms. Gray but a further issue arose.

31. According to the minutes of the meeting:-

"Counsellor Walsh shared some helpful insights and reservations provided by the other members of the selection board in relation to the selection process for such a senior post and how the process might be more effectively streamlined in the future."

32. If the *"insights and reservations"* in relation to the selection process were helpful, the timing certainly was not. Moreover, the reservations expressed in the email were not merely suggestions as to how the process might be improved or streamlined in the future but were directed to the process which had led to the recommendation by the selection board. Ms. Gray, after all, had disavowed the selection process and recommended that the whole process be reconsidered.

33. The second issue that arose at the Presidential Appointments Committee meeting of 11th April, 2011, was a newspaper article that had been published in the *Irish Examiner* that morning under the headline *"College Chief's €20,000 office Furnishing Bill"*.

34. The plaintiff, in evidence, acknowledged that coincidences happen but was firmly of the view that this was no coincidence. I think that he is quite right about that. The article noted that the plaintiff's current contract was coming to an end but suggested that it was not known whether he was seeking reappointment. If the journalist did not know whether the plaintiff was seeking reappointment, the Mayor of Waterford, and most or all of the entourage who had accompanied her to Chicago and had since returned, did.

35. The newspaper article published in the *Irish Examiner*, on the front page, was more or less a rehash of a story that had been published in the *Waterford News & Star* of 6th October, 2009, which was critical of the expense incurred in fitting out and furnishing new office and boardroom accommodation in the Tourism and Leisure Building on the Waterford Institute of Technology campus. The thrust of both articles was that the expenditure on the President's offices had been extravagant.

36. As far as the members of the Presidential Appointments Committee were concerned, the expenditure on the President's office was old news but, according to the minutes, someone asked whether there were any other freedom of information requests that they should be aware of. Whether someone asked, or the information was volunteered, the Secretary of the Institute was able to say that there was a request currently being processed *"which related to the non-pay recurrent and capital expenditure charged and incurred under the cost centre of the Office of the President"*.

37. Following further deliberations, the Presidential Appointments Committee unanimously resolved to recommend to the governing body that it should defer a decision to sanction the appointment pending further clarification in relation to these issues.

38. The freedom of information request that was pending on 11th April, 2011, was first made on 4th March, 2011. It was a request by Dr. Padraig Kirwan, Branch Secretary of the Teachers' Union of Ireland for *"a complete and itemised list of all expenses and allowances claimed and/or incurred by Prof. Kieran Byrne during his tenure as President of Waterford Institute of Technology"*. In circumstances in which the plaintiff's term of office was drawing to a close and the position had been advertised, it seems unlikely that this request was a coincidence.

39. It appears that the information requested was not separately recorded and that after some discussion between the requester and the freedom of information officer, the request was *"clarified"* as a request for *"the non-pay recurrent and capital expenditure charged and incurred under the cost centre of the Office of the President from 2004 to date"*.

40. So reformulated, the request for information was bound to generate a big number. It was apprehended that the Teachers' Union of Ireland might put the information into the public domain and that this might give rise to *"potential reputational damage"*. The plaintiff was strongly of the view that the information recorded as having been *"charged and incurred"* under his *"cost centre"* was both misleading and inaccurate, and he invoked s. 9(1) of the Freedom of Information Act, 1997 to extend the period of time for consideration of the request by twenty working days to 4th May, 2011.

41. The correspondence shows that Dr. Kirwan expected a response to his freedom of information request within the statutory twenty working days from the date of his initial request, which would have been 4th April, and was disappointed not to get it. The information requested on 4th March might, if it had been made available within the twenty days, have been the basis for newspaper stories in the following week. I think that it must have been well known that the appointment of the new President was on the agenda for the governing body meeting scheduled for 12th April, so that there is substance to the plaintiff's view that the republication on 11th April, 2011 of the 2009 story is unlikely to have been a coincidence.

42. The governing body of Waterford Institute of Technology met as planned on 12th April, 2011. Its business was almost exclusively confined to the appointment of the new President. Counsellor Walsh summarised to the governing body, as he had to the Presidential Appointments Committee, the outcome of the selection process but apparently omitted any reference to the *"helpful insights and reservations"* provided by members of the selection board. He also reported the *Irish Examiner* article of the previous day, the pending freedom of information request, and the recommendation of the Presidential Appointments Committee that the governing body should defer a decision to sanction the appointment of the President pending further clarification of those issues.

43. If it was not then apparent to the governing body, it certainly was to the Secretary and Financial Controller, who was present, that the pending freedom of information request was, potentially, at least, a gathering storm. The governing body unanimously accepted a proposal by the chairman to establish a subcommittee to *"consider the concerns raised and to meet with the President to seek clarity of a number of matters"* and to adjourn until 22nd April, 2011. It was agreed that the Chairman, Dr. Ormonde, and the Deputy Chairman, Counsellor Walsh, would convey the decision of the governing body to the plaintiff who, quite properly, had recused himself from the meeting.

44. On 15th April, 2011, Dr. Ormonde wrote to the plaintiff inviting him to a meeting of the new sub-committee on the following Wednesday, 20th April, at 4:30 p.m., to respond to the contents of the *Irish Examiner* article and the pending freedom of information request. Dr. Ormonde sent to the plaintiff a copy of the freedom of information request and the draft documents which, it was said, would form the basis of the Institute's proposed response. Dr. Ormonde invited the plaintiff to submit a written response in advance of

the meeting. In fact, the plaintiff was aware of the application by then and already had a copy of the material that the freedom of information officer was contemplating releasing and had formed the view that they were inaccurate and misleading and should not be released.

45. The meeting between the plaintiff and the sub-committee planned for 20th April, 2011, never took place. It was cancelled on ten or twenty minutes notice to the plaintiff. Counsellor Walsh and Dr. Ormonde explained how this came about. The sub-committee had met earlier in the afternoon of 20th April but was overwhelmed by the volume of information before it and decided to engage Deloitte to review it. The plaintiff, by contrast, had carefully prepared a presentation for the sub-committee and was disappointed not to have been able to deliver it. The plaintiff spent that evening writing a response to the information which he circulated to each member of the sub-committee.

46. The fact that the sub-committee could not assimilate the information without the assistance of Deloitte meant that it could not, for the moment, make any report to the governing body, so the governing body meeting which was to have been resumed on 22nd April, had to be further postponed. Unfortunately, it appears that the plaintiff was not given due notice of this adjournment but I believe that he must have known from what he was told on 20th April that it could not go ahead.

47. Between 21st April, 2011 and 9th May, 2011 there was extensive correspondence between the plaintiff, the Secretary/Financial Controller, the Chairman, Dr. Ormonde, the freedom of information officer, and Deloitte in relation to the response to the freedom of information request. The plaintiff went so far as to seek his own legal advice as to how the request might be dealt with. The plaintiff asserted, but the finance manager disagreed, that the defendant's financial systems and processes did not properly reflect all accounting transactions.

48. In evidence the plaintiff was critical of the decision to appoint Deloitte to carry out the review of the information which it was proposed might be released. In particular it was said that Deloitte was the internal auditor of the college and so could not be independent. At the time, however, the plaintiff confirmed to Dr. Ormonde that he welcomed the review by Deloitte, which he characterised as an independent review. In evidence the plaintiff was critical of the formulation of the freedom of information request, in particular the use of the words "*charged and incurred*" but in his correspondence at the time he eventually welcomed the review of that request on the basis that it would afford him an opportunity to make his case as to the defendant's accounting practices and alleged inconsistencies.

49. Necessarily, the Deloitte review needed to be carried out urgently and speedily. On the morning of Friday 6th May, 2011 the plaintiff met with the two Deloitte staff who had carried out the review. He brought with him a list of points which he had previously prepared and given to Dr. Ormonde under cover of a letter of 3rd May. The plaintiff's recollection is that he was subjected to hostile questioning. I am not sure that he was but what is clear from the draft report provided to the plaintiff later in the day is that Deloitte did not agree with a number of the points on the plaintiff's list and that Deloitte had identified a number of matters of concern to them, with which the plaintiff did not agree.

50. The Deloitte report looked at total expenditure incurred by the office of the President between 2004 and 2011 amounting to €3,692,409. They found that significant amounts of this expenditure represented costs of the Institute generally and further amounts represented the costs of a university initiative, which did not have a separate costing category or budget. The report found that in a number of respects there had been a failure to comply with the Waterford Institute of Technology procurement, travel, and hospitality policies and identified expenditure which was said to have been incurred for the cultural benefit of the Institute and its stakeholders and/or the university initiative which they thought warranted further examination by the governing body for appropriateness.

51. On the afternoon of Friday 6th May, 2011 the plaintiff was given a draft of the report of Deloitte and in quite an angry letter of 9th May, 2011 to Deloitte, gave his comments on the draft. On 11th May, 2011 Deloitte replied. Save as to the removal of part of the wording of a standard paragraph, the plaintiff's criticisms were not accepted.

52. On 9th May, 2011 the plaintiff was called to a meeting of the new sub-committee which had the draft report from Deloitte. The plaintiff's recollection was that he was denied the opportunity to make an opening statement and was hectorred. Dr. Ormonde contested this. He recalled that the plaintiff was given the opportunity to make an opening statement and did so and was then questioned on the issues raised in the Deloitte report. To the extent that anything turns on this, I prefer the evidence of Dr. Ormonde. The correspondence abundantly demonstrates that the plaintiff was well capable of fighting his corner and in his evidence he was very forceful. That said, I am sure that the meeting with the sub-committee was a difficult one. The plaintiff had failed to bring Deloitte around to his point of view and was probably frustrated that the members of the sub-committee could not see things his way either. It seems to me that the plaintiff must have known that the findings of the Deloitte report were going to be a real impediment to his appointment at the governing body meeting on 12th May. Incidentally, the case pleaded was not that the plaintiff was denied the opportunity to make a statement to the sub-committee but that he was not given due respect when doing so.

53. In the meantime, on 6th May, 2011, the Freedom of Information Officer released to the requester a "*Report of Capital Expenditure of the cost centre of the Office of the President*" and a "*Report of Non-Pay Recurrent Expenditure charged and incurred under the cost centre of the Office of the President from 2004 to date*" which, together, ran to some 120 pages. These reports listed "*expenditure*" amounting in total to €6.7 million and were accompanied by "*clarification notes*".

54. Each page of the lists of expenditure carried a note at the top to the effect that "*this cost centre carries a number of institutional costs and costs related to many aspects of Institute wide activity*" and at the bottom a note that "*the data given in this document is not a full representation of transactions as it needs to be viewed with other documentation to give a full understanding of the expenditure of the Office of the President*". The clarification notes pointed in particular to amounts of €1.5m for each of 2009 and 2010 "*which was generated from the letting of premises [and] was transferred to the Development Committee*". As was explained in evidence, during those years a sum of €3m was generated in revenue which was first posted to the cost centre of the Office of the President before being transferred to the Development Committee. While those transfers appeared in the lists as debits, it was not expenditure at all.

55. The release of the information, as everyone had anticipated it would, gave rise to considerable media interest. The court was referred, by way of example only, to a report dated 16th May, 2011, on *independent.ie* under the headline "*Orgy of expenditure by WIT Boss amounts to €6.7m splurge*". Prof. Byrne's position was reported in the newspaper article to have been said by an unidentified government spokesman and an unidentified government source to be untenable.

56. The news of the expenditure in Waterford Institute of Technology came to the chief executive officer of the Higher Education Authority, Mr. Tom Boland. Mr. Boland was concerned and arranged to meet the plaintiff on 11th May, 2011 at the Newpark Hotel in

Kilkenny. There was disagreement as to precisely what was said at that meeting but, in the end, I think, not much difference as to the substance of the engagement. The plaintiff's recollection was that Mr. Boland had said to him that he was a controversial figure who was unfit for office, that he would have to resign, and that if he did not he would lose his pension. Mr. Boland recalled a tense but courteous meeting at which he asked the plaintiff for his view as to what was behind the press reports and the preliminary findings of Deloitte. Mr. Boland's recollection was that he suggested to the plaintiff that if there was any substance to the allegations, it might be better that he should withdraw his candidature but that the plaintiff was adamant that there was no substance to the reports and that there would be no reputational damage. Mr. Boland was adamant that he would not have said, and did not say, that the plaintiff was a controversial figure, or that he could lose his pension or entitlement to a lump sum. He said that the question of resignation did not arise. The issue was whether the plaintiff would allow his application to progress.

57. At the time of the events the subject of these proceedings, the plaintiff was caught up in a very difficult situation. I think that at some level he must have realised, although he would not acknowledge, even to himself, that his hopes of appointment for a new term were waning fast. I think that his recollection is clouded by a sense that his ambition was (as to a degree it was) thwarted by a concatenation of unfortunate events. I found Mr. Boland to be clear, precise and measured in his evidence. Mr. Boland wondered, quite correctly as it turned out, whether the plaintiff could hope to weather the storm as President of Waterford Institute of Technology. There may have been some discussion of the plaintiff's options if he were to withdraw his candidature, but I accept Mr. Boland's evidence that he did not tell the plaintiff that he would have to resign or might lose out financially if he did not.

58. The case pleaded was that Mr. Boland came to the meeting in the Newpark Hotel with the object of persuading the plaintiff to resign ahead of the governing body meeting scheduled for the following day. I think that both men were acutely aware of the impending governing body meeting. I think that Mr. Boland was better able to assess dispassionately the difficulties that the plaintiff would likely encounter and might very well have been understood by the plaintiff to be encouraging him to withdraw, but in the end he did not. While I have a clear picture of what in fact happened in the Newpark Hotel, I do not understand how, on either or any version of events, that meeting might be relevant to the case. There is no suggestion that there was any link between that meeting and the fact that the plaintiff was not re-appointed.

59. The twice postponed meeting of the governing body to consider the appointment of the new President was reconvened on 12th May, 2011. Dr. Ormonde, as chairman, updated the members on the sequence of events since the most recent adjournment. He advised that a draft report had been obtained from Deloitte which highlighted significant breaches of budgetary procedures and policies in relation to procurement, hospitality, and travel expenditure incurred by the President's office which, he suggested, was extravagant expenditure unsuited to an institute in receipt of public monies. He reported that the committee members had met with the President who did not accept the findings of the report, which he had termed "*mean spirited*" and had advised that he would be taking legal advice on the matter.

60. Dr. Ormonde also brought the attention of the governing body to the email from a member of the selection board, Ms. Gray, which had expressed grave concerns in relation to the overall appointment process. That email was circulated to the members of the governing body and a copy was sent out to the plaintiff, who was in his office, awaiting the outcome of the meeting. The minutes record that after a lengthy discussion the members unanimously resolved not to ratify the nominated candidate.

61. As the minutes of the governing body meeting record that they would, Dr. Ormonde and Counsellor Walsh met with the plaintiff to convey to him the decision of the governing body. The plaintiff thought that they were unsympathetic but it could never have been an easy meeting for any of them. The plaintiff was told that the position would be re-advertised and that he could apply. The plaintiff's recollection is that he was told that "*even you can apply*". That would have been to rub salt into the wound and I do not accept that it happened.

62. One of the plaintiff's complaints is that he was not given an opportunity to respond to Ms. Gray's email. It was common case that during the governing body meeting the Secretary/Financial Controller gave a copy of the email to the plaintiff, who was waiting in his office. The plaintiff's evidence was that he understood that he would be called into the meeting to comment on the email but was not. I do not understand why the plaintiff was given a copy of the email if he was not to be invited to comment on it. On the other hand, the plaintiff, because he was a candidate, had stood out of the governing body meetings at which the appointment of the new President was to have been, and was, discussed. It seems to me that it would not have been appropriate for the plaintiff to have participated in a discussion of the substance of Ms. Gray's email or its impact on the recommendation of the selection committee. In any event, it seems to me that all that the plaintiff could have said about the substance of the email was that Ms. Gray should have either declined to agree to the selection of the plaintiff or qualified her concurrence in his selection before the selection committee meeting broke up: which was something the email more or less acknowledged.

63. The plaintiff's case is that he was entitled to be reappointed and that the governing body was not entitled to do anything other than to ratify his appointment.

64. In support of his case, the plaintiff called three witnesses.

65. The first was Mr. Redmond O'Donoghue who chaired the governing body until 12th February, 2011 and who had overseen the establishment the Presidential Appointments Committee. The public appointments process, said Mr. O'Donoghue, is a very delicate flower which is carefully crafted to avoid clientelism and any risk of outside interference. I pause here to observe that the defendant agreed with that.

66. In Mr. O'Donoghue's opinion and experience the role of the Presidential Appointments Committee came to an end the minute a candidate had been chosen. He thought that the sub-committee would not have been entitled to know the identity of the candidates once the selection board had been established and the Public Appointments Service engaged. He said that the minute that the selection has been made and written down on a piece of paper, the process is over. In Mr. O'Donoghue's view, neither Ms. Gray's email, nor the article in the *Irish Examiner*, nor the pending freedom of information request justified the adjournment of the governing body meeting on 12th April, 2011, or the refusal of the governing body to accept the "*decision*" of the selection board.

67. I am sure that Mr. O'Donoghue has never previously encountered a case in which the recommendation of a selection board was not accepted by the governing body but, with no disrespect, the entitlement of the governing body to have done what it did is a matter of law. Moreover, in the same way that Mr. O'Donoghue never previously encountered a case in which the recommendation of a selection board was not accepted, I am sure that he never previously came across a case in which a member of a selection board who had signed a recommendation, almost immediately said that the governing body should not rely on it.

68. The plaintiff's second witness was Mr. Patrick Downey, who served as Registrar to Waterford Institute of Technology from the time of its establishment in 1992 until his retirement in 2008, and who had served with the predecessor of the defendant from 1977.

69. Mr. Downey pointed in particular to a provision in the Higher Education Authority guidelines (to which I shall return) which provides that the governing body "*shall authorise the appointment*" as requiring that this should be done. Like Mr. O'Donoghue, Mr. Downey had no experience of anything else. Mr. Downey, of course, had retired long before the events the subject of these proceedings but was in court to hear the evidence of those who had been involved. I do not think that it is unfair to say that he cast himself in the role of an advocate for the plaintiff.

70. The plaintiff's third witness, Dr. Venie Martin, acted as Director of Waterford Regional Technical College for a time immediately before the appointment of the plaintiff in 2001. Dr. Martin travelled internationally quite extensively with the plaintiff and thought that it was quite reasonable that he used a hackney to travel between Waterford and Dublin. She had left the defendant at the time of the events the subject of the proceedings and was absolutely appalled to read in the newspaper that things had fallen apart in the way they had.

71. For all that this case occupied the court hearing evidence for six days, it really turns on the law. The witnesses' very considerable experience as to what usually happens is, with no disrespect, not material. The issue is whether the governing body was bound at the end of the selection process to appoint the plaintiff. In practical terms, the issue is whether the governing body was bound to ignore the reservations expressed by the members of the selection board as to the robustness of the recruitment process and was bound to disregard the information as to expenditure and the plaintiff's compliance with the college's procurement and expenses policies.

72. On the pleadings, the plaintiff's challenge is directed to the decision of the governing body on 12th May, 2011 not to "*ratify*" his appointment as President, but the evidence and argument focused on the fact that the plaintiff was not appointed by the governing body at its meeting on 12th April, 2011.

73. The governing body, it was said, had established the Presidential Appointments Committee to oversee the process for the appointment of the new President. This sub-committee, it was said, was *functus officio* once the process had been established. The process which the Presidential Appointments Committee decided upon (or recommended to the governing body) was the public advertisement of the position, followed by a short listing of applicants, followed by a competitive interview by a specialist selection board constituted in accordance with the selection procedure as laid down by the Higher Education Authority. The selection board, it was said, was *functus officio* when it made its recommendation and, in circumstances in which it had recommended only one candidate, the governing body was bound to appoint the plaintiff.

74. Having carefully considered the arguments advanced on behalf of the plaintiff I am afraid that I must reject them.

75. The function of appointing a President of the Waterford Institute of Technology is a function of the governing body. It is a reserved function which must be performed by resolution of the governing body.

76. It is common case that the Presidential Appointments Committee was not established to appoint the new President but only to oversee the process. It is quite clear that the selection board was established under the Higher Education Authority procedures. The selection board was responsible, under the procedures, for screening, shortlisting, interviewing and making a recommendation. It had no power to make an appointment and could not have been conferred with any such power.

77. The selection board and each of its members were entitled to decline to recommend any of the candidates it saw and/or to convey to the governing body any misgivings or reservations there may have been in relation to the recruitment process. It was less than ideal that Ms. Gray, having subscribed to an unqualified recommendation on 31st March, effectively disowned it on the following day but if Ms. Gray, on reflection, thought that she had made a mistake, I think that she was entitled, if not bound, to say so. I do not believe that it is realistic to suggest that when Ms. Gray's email was brought to the attention of Dr. Ormonde he was bound to ignore it and not bring it to the attention of the governing body, or that the governing body was bound to ignore it because the selection board was *functus officio* when it was written.

78. The provision of the Higher Education Authority Selection Procedures to which Mr. Downey in his evidence, and counsel, in argument, referred was section 5.7. this provides that:-

"The professional recruitment organisation shall examine and verify the documentary evidence of qualifications, references and other necessary criteria on the recommended candidate and present a report to the Governing Body on the process and on the extent to which the candidate recommended by the Selection Board meets the requirements for appointment. The Governing Body shall authorise the appointment subject to satisfactory certification from a medical practitioner nominated by the Institute in relation to the candidate's health and subject also to vetting and certification of his/her qualifications."

79. It was argued that this provision means that the governing body is bound to authorise the appointment, subject only to medical certification and verification of qualifications. I do not accept that. In my view it means that any authorisation (if any) must be made subject to such certification and vetting. Even if it did mean what the plaintiff submits it means, it would be an invalid fetter upon the statutory power to make an appointment, which is vested in the governing body.

80. The plaintiff's case was that the governing body was not entitled to have any regard to the pending freedom of information request or and information that might have come to light as a result of that request. I cannot accept that. The plaintiff himself recognised that the pending freedom of information request had the potential to cause reputational damage. The plaintiff's evidence was that his immediate and principal concern was that the publication of the information which had been sought might damage the reputation of the college. That may have been so, but as witness the press reports following its release, the information had the potential to damage the plaintiff's prospects of reappointment, also. In his evidence the plaintiff did not really contest the findings of Deloitte that he had failed to strictly adhere to procurement, travel, and hospitality policies but concentrated on justifying his expenses as having been incurred solely for the purposes of his office and as having been good value for money. If the plaintiff believed that the defendant's rules were overly bureaucratic or that they ought not to have been so strictly applied to him, I am not prepared to say that the governing body was not entitled to take into account the findings of Deloitte in its deliberations as to whether he should be reappointed.

81. The core case made on behalf of the plaintiff was that he was entitled, as a matter of law, to be re-appointed for five years. For the reasons given, that must fail.

82. In the alternative, it is contended that the plaintiff had a legitimate expectation that he would be re-appointed. The court was referred generally to the decision of the Supreme Court in *Webb v. Ireland* [1988] I.R. 353 but counsel for the plaintiff did not attempt to identify the principles of law laid down by that judgment or to link them to the evidence. As I understood the case made it is more

or less that the plaintiff had a legitimate expectation that he would be reappointed because, by reference to the work he had previously done as President and the important contribution he had made to the development of the Waterford Institute of Technology, he deserved it.

83. The Supreme Court in *Webb v. Ireland* dealt with a number of issues of common law and constitutional law upon which there was a divergence of views, but the court was unanimous as to what the outcome should be and the basis for it. At p. 384 of the report, Finlay C.J. said:-

"It would appear that the doctrine of 'legitimate expectation' sometimes described as 'reasonable expectation', has not in those terms been the subject matter of any decision of our courts. However, the doctrine connoted by such expressions is but an aspect of the well-recognised concept of promissory estoppel (which has been frequently applied in our courts), whereby a promise or representation as to intention may in certain circumstances be held binding on the representor or promisor. The nature and extent of that doctrine in circumstances such as those of this case has been expressed as follows by Lord Denning M.R. in Amalgamated Property Co. v. Texas Bank [1982] Q.B.84, 122:-

"When the parties to a transaction proceed on the basis of an underlying assumption – either of fact or of law – whether due to misrepresentation or mistake makes no difference – on which they have conducted the dealings between them – neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands."

84. I cannot see how the plaintiff's case could come within the principles so formulated. I have no doubt that between 31st March, 2011 and 11th April, 2011 the plaintiff expected that he would be appointed but conceptually the plaintiff cannot have legitimately expected that he would be appointed otherwise than by a resolution of the governing body.

85. That apart, no one ever told the plaintiff that he would be re-appointed. The height of the plaintiff's evidence is that he was told, first by Dr. Ormonde and soon after by the Public Appointments Service, that he had been selected by the selection board. It seems to me that the plaintiff cannot have legitimately believed that either Dr. Ormonde or the Public Appointments Service was entitled to speak for the governing body. I am satisfied on the plaintiff's own evidence that he well understood at all times that his selection was subject to the approval of the governing body. If he had not, he could not have clearly appreciated the necessity for discretion as to what he ought to say and to whom about the outcome of the selection board.

86. Even if the plaintiff mistakenly assumed that he would be re-appointed, there is no evidence that the governing body proceeded on the same mistaken assumption. Moreover, the evidence does not establish that either the plaintiff or the defendant conducted themselves on the basis of any underlying assumption. It may very well have been that what the plaintiff said to Counsellor Roche on the afternoon of 1st April, 2011 was based on an assumption (and if he could hold off the freedom of information request it may very well have been a reasonable assumption) that the governing body would accept the recommendation of the selection board, but any such assumption was short of an expectation or assumption that his name would not have to go before the governing body, or that the governing body was bound to appoint him.

87. Nor is there any evidence that the plaintiff did or did not do anything in reliance on anything said or not said, or done or not done, by or on behalf of the defendant or, indeed, by anyone else. It seems to me that no matter what happened along the way the plaintiff would always have been disappointed if he was not reappointed. In circumstances in which it had come to be expected that he would be re-appointed, the plaintiff's disappointment was greatly compounded by embarrassment. But if whatever was said by the plaintiff to Counsellor Roche gave Counsellor Roche to believe that his re-appointment was guaranteed, I do not believe that the defendant or the Public Appointments Service was responsible.

88. On 13th May, 2011 the plaintiff had a letter from the human resources manager formally advising him of the expiration, that day, of his ten-year term of office as President and enclosing details of the arrangements applicable on the expiration of ten year contracts for Presidents of Institutes of Technology. The enclosure outlined options to retire or take up a senior pensionable position. The letter asked for a response at the earliest possible opportunity and by no later than the following Friday, 20th May. The deadline of a week was not terribly reasonable but it was not insisted upon. In the following three months the plaintiff wrapped up his work and on 12th July, 2011 wrote to the acting President giving notice of his resignation/retirement with immediate effect. During those last months the plaintiff was paid the salary equivalent to the senior positions he had been offered.

89. The plaintiff gave evidence that he thought that he was bullied and intimidated out of Waterford Institute of Technology but not that anything was said or done that might have led him to that view, apart, perhaps, from the fact that he had not been re-appointed. His evidence was that the governing body had forfeited his respect and that he could not have stayed. The plaintiff pointed to the fact that the option offered to him of a new position was subject to governing body approval and said that he was not confident that such approval would be forthcoming. In fact, the letter of 13th May, 2011 stated that governing body approval was required for any of the options.

90. It seems to me that the plaintiff's case that there might have been difficulty in securing governing body approval for an alternative position is unsupported by any evidence and is inconsistent with the fact that he was effectively given such a position immediately upon the expiry of his term as President. The plaintiff admitted that he had not discussed any such concerns with anyone before he decided to resign. I accept the evidence of Dr. Ormonde that there would have been no difficulty in getting any sanction necessary to formalise the plaintiff's continued employment, if that was what the plaintiff opted for.

91. In any event, the case pleaded was that the plaintiff was entitled to be appointed as President of Waterford Institute of Technology, and not that he was deprived of any other option, opportunity, or office.

92. For these reasons, I have come to the conclusion that the plaintiff has not made out his case and that it must be dismissed.