

**THE HIGH COURT**

**JUDICIAL REVIEW**

**[2014 No. 40 J.R.]**

**BETWEEN**

**TOMMY CONROY**

**APPLICANT**

**AND**

**BOARD OF MANAGEMENT OF GOREY COMMUNITY SCHOOL**

**RESPONDENT**

**JUDGMENT of Ms. Justice Baker delivered on the 23rd day of January, 2015**

1. The applicant is a priest ordained in the Roman Catholic Church and some 21 years ago he was nominated by the then Bishop of Ferns to act as chaplain to Gorey Community School. His role evolved over time and although it did involve the applicant in both pastoral and teaching duties in the school, he was contractually a chaplain *simpliciter*. A chaplain in a Roman Catholic school is not required to be an ordained priest, or to have any other ministry of religion.
2. The respondents are the Board of Management of the school established, as are most community schools, under the model deed of trust for community schools made between the Minister for Education and identified persons who act as the Board and others who are trustees of the school. The school buildings themselves are held by the trustees under lease from the Minister, and the State pays some or all of the building costs of the school buildings themselves.
3. Under the model trust the trustees hold the property on trust for the purposes of the school with the declared object of providing a comprehensive system of post primary education open to all children of the community. The model trust deed incorporates a scheme for such education and the trustees covenant to perform and execute the obligations contained in the scheme set out in the two schedules to the deed, the first such schedule being the Instrument of Management and the second schedule being the Articles of Management.
4. Under the Instrument of Management there is established a Board of Management which is responsible for the governance and direction of the school subject to the provisions of the two schedules. The members of the Board are those nominated by the patron, usually a religious body, two parents of children who are pupils in the school, two members who are serving teachers in the school, and the Board in total comprises 10 members as well as the principal of the school.
5. Under the Articles of Management the Board has a power to select and appoint teaching staff, the number of such staff to be subject to the prior approval of the Minister. The Board may also employ part-time teachers and non teaching staff. The contract of employment with teaching staff is to be in the official form supplied by the Minister. The Articles specifically provide for religious instruction to be given at the school and for the attendance of pupils thereat. A whole time or part-time teacher of religion may be appointed for that purpose. A chaplain may be appointed on the nomination of the relevant religious authority.

**These proceedings**

6. By order made on the 20th January, 2014 the applicant was granted leave to seek by way of judicial review an order of *certiorari* quashing a decision made by the Board on the 22nd October, 2013 insofar as the decision purports to:-

- 1) Remove the applicant from his position as chaplain of the school.
- 2) Assert that the applicant is not chaplain of the school.
- 3) Forbid the applicant from having contact with students of the school outside school hours without the consent of the school's principal.
- 4) Forbid the applicant from having a lead role in any school group activity and from participating in any trips with pupils.
- 5) Require the applicant to see his personal counsellor on a regular basis.

The applicant also obtained leave to seek by way of judicial review a declaration that the applicant is and remains chaplain of the school and ancillary injunctive relief prohibiting the respondent from removing the applicant as chaplain.

**Background facts: complaint by former pupil**

7. Sometime in 2011 a former pupil of the school made an allegation against the applicant through her parents that the applicant had had a sexual relationship with her in 2006 and 2007. The applicant was placed on administrative leave while this allegation was investigated by the respondent and, following the mandatory reporting to the HSE, by the HSE. The applicant has always denied and continues to deny all allegations of sexual impropriety, and ultimately the HSE determined that the complainant in question was not one within its remit, as the complainant was not under the relevant age of consent. The HSE, however, did advise the principal of the school that the allegations made by the former pupil were "very serious in nature" and in that context the Board conducted its investigation and inquiry.

8. The Board having determined to conduct its own investigation communicated its disciplinary complaint against the applicant by a letter of the 5th September, 2012 the relevant extract from which states the following:-

*"It is alleged that while in Transition Year you and the Complainant developed a close relationship which became sexual in nature during 5th Year and ultimately broke down in 6th Year. It was further alleged that the sexual encounters occurred in the Oratory in your office and at your house. The Complainant also indicated that whilst on the Transition Year trip to the Gambia, she and another girl slept in your bed but that nothing happened on this occasion. It has also been indicated that while on the Youth Pilgrimage to Cologne, you and the Complainant held hands and one evening you got the Complainant drunk and she woke up next morning in your bed."*

A disciplinary hearing was then convened on the 11th October, 2012 at which the applicant was legally represented. The complainant did not attend. The decision of the disciplinary hearing was communicated to the applicant's solicitor by a letter of the 5th December, 2012 which contained a finding that "on balance the Board believes that there was no sexual impropriety on the part of your client with the Complainant."

9. The letter however stated that the Board did believe "that certain aspects of your client's conduct were inappropriate", although it did not set out details of those matters or how it was suggested they were inappropriate.

10. Following this finding the applicant was requested and did in fact undergo a risk assessment through an assessor, a qualified psychologist, one Kieran McGrath. The process took a number of months and involved an independent consultation process with the applicant following which a report was prepared by Mr McGrath at the end of February 2013. He was asked in particular to assess whether the applicant posed any risk to students at the school and his finding in his written report was that the applicant posed a "low risk", the possibility of there being a "no risk" classification not being open to the assessor as the applicant was not in a sexual relationship because of his vow of celibacy. The assessor went on to recommend that the applicant not engage in counselling pupils in the school, that he refer students seeking pastoral care to the "school chaplain", that he not have any lead role in group activities, and that he not participate in any trips with students.

11. I accept the argument made on his behalf, and this flows indeed from the report of Mr McGrath himself, that in truth the applicant did not pose any risk to students, but having regard to the fact that he had taken a vow of celibacy and was not in a sexual relationship the finding that he was at low risk was the only one open to Mr McGrath, who explained that the vow of celibacy could itself in certain circumstances create a risk.

12. Following the conclusion of the risk assessment process the applicant sought through his solicitors to be restored to his duties at the school. To take up a role as teacher one is required to be registered with the Teaching Council, a statutory body established pursuant to the Teaching Council Acts 1996 to 2001, and the applicant applied and ultimately came to be registered in September 2013, following an appeal. The conditional registration of the applicant as a teacher by the Teaching Council is the subject of other judicial review proceedings not yet determined.

13. Following communication by the applicant to the Board that he had secured registration with the Teaching Council, the Board wrote to him by a letter of the 22nd October, 2013 informing him that he could "return" to the school as a religious education teacher subject to certain conditions and the recommendations contained in Mr McGrath's risk assessment report.

14. The applicant asserts that by this letter the respondent has in effect removed him as chaplain at the school and the first ground of judicial review is that the applicant acted *ultra vires* and in breach of fair procedures in so doing. The second ground of judicial review is that the conditions imposed by the respondent were also not within the competence of the respondent and are harsh, arbitrary, unreasonable and disproportionate.

15. The respondent makes a preliminary objection that the issues arising in the proceedings are not matters of public law. It denies that there was any breach of fair procedure or natural justice and that the imposition of conditions was in excess of jurisdiction. By way of a separate argument the respondent asserts that what the applicant is in truth seeking to do is quash by way of judicial review the decision of the Board made on the 25th October, 2012, and that the applicant is well out of time for seeking such relief. I deal first with this question.

#### **When was the applicant removed as chaplain?**

16. The applicant asserts that the true import of the decision made on the 22nd October, 2013 is to remove him as chaplain and seeks a declaration that such removal is unlawful, for the reasons outlined above. The respondent says that if a decision was made to remove the applicant as chaplain it was done some 11 months earlier following the disciplinary hearing on the 11th October, 2012 and the decision made by the Board following that hearing was communicated on the 5th December, 2012.

17. It has to be said that neither the letter of the 5th December, 2012 nor that of the 22nd October, 2013 expressly removes the applicant as chaplain of the school, but by implication the letter of 22nd October, 2013 which offers the "reinstatement" of the applicant as teacher of religious education has the practical effect that the applicant was offered a return to the school as a teacher but not as chaplain, albeit that he was to be a teacher of religious education.

18. The letter of 22nd October, 2013, was written by the secretary of the Board of Management of the school. The procedures that had occurred leading up to this letter were lengthy and conducted in a formal or relatively formal matter and the applicant had the benefit of legal advice and legal assistance throughout some or all of those procedures. The letter of the 22nd October, 2013 must be seen as a letter written by a lay person albeit, a person with an important role in the school, as a follow up from previous correspondence and events that occurred, and specifically it reports the decision of the Board following a meeting which took place to "consider the risk assessment report prepared by Kieran McGrath" and the fact that the applicant had by then been registered as a teacher by the Teaching Council on the 10th October, 2013.

19. The letter identifies the decision of the Board as follows:-

*"After careful consideration of Mr McGrath's report, and having considered the views expressed by the HSE and the Board's responsibility and the views expressed by the HSE that the Board's responsibility is to ensure its pupils are safe at all times, the Board has decided to allow you to return as a Religious Education teacher in the school, subject to your written acceptance of and adherence of the following conditions:*

- 1) You will not counsel any student of the school without the consent of the Board of management;*
- 2) You will have no contact with the students outside of school without the consent of the principal;*
- 3) You will confirm in writing to me that you are familiar with and will abide by all current child protection policies,*

*protocols, school policies and directives. I enclose a copy of the Child Protection Procedures for Primary and Post Primary Schools."*

20. In addition the letter required the applicant to accept and adhere to the recommendations made by Mr McGrath in his report.

21. Nowhere in the letter is the applicant's role as chaplain mentioned, but the letter undoubtedly expresses an offer by the school to "allow" the applicant to return to the school as a teacher of religious education. The use of the expression "return as a teacher of religious education" imports some degree of substitution of roles, and I accept that the letter by implication identifies a decision by the Board that the applicant would not be permitted to return as a chaplain.

22. To understand this letter it is important to understand the earlier engagement between the parties and the disciplinary process concluded by the Board on the 25th October, 2012. The disciplinary process resulted in the letter of the 5th December, 2012 where the findings of "inappropriate" conduct were identified. As a result of the decision of the Board communicated by that letter the applicant was required to attend the risk assessment process conducted by Mr McGrath. It was expressly stated in that letter that the applicant undergo a risk assessment and the following important statement is then made:-

*"Subject to the outcome of the risk assessment and its report, the Board of Management will further consider your client's position in Gorey Community School having also liaised with the HSE and the Teaching Council. The Board will consider your client's possible return to the school as a Religious Education Teacher but this is dependent on the result of the risk assessment."*

23. Certain recommendations are then referred to as being likely to apply should the applicant be "reinstated" in the school and these are exactly the same conditions as were imposed on the applicant by the letter of 22nd October, 2013.

24. I consider that on any reasonable interpretation the letter of the 5th December 2012, itself also contained an implicit dismissal of the applicant from his role as chaplain of the school. Indeed while it can be fairly said that there is no express removal of the applicant from that role, it is clear that the purpose of the risk assessment was not to restore the applicant as chaplain, but rather to consider whether he might "possibly" return to the school in a different capacity, namely as religious education teacher. It was with that possible return to the school on that basis and with that exact role in mind that the risk assessment was conducted.

25. Thus it seems to me that the applicant was dismissed as chaplain by the letter of 5th December 2012, and he is out of time to seek review of that decision. No reason has been advanced to support an extension of time and indeed as the applicant engaged fully with the process commenced after the letter of the 2nd December 2012, I regard that he has approbated the process to the extent that would disentitle him to seek an extension of time.

26. If I am incorrect in this conclusion, I also consider that the decision to remove the applicant is not amenable to judicial review for the reasons I now set out.

#### **Is the decision amenable to judicial review?**

27. A relationship between a school and its staff members is complicated by the fact that some schools have historically been run by or through religious congregations, and by the direct role in the appointment of certain school staff that is taken by the churches, primarily the Church of Ireland and the Roman Catholic Church. The relationship is particularly complex in the case of a person employed as chaplain to a school and it might appear, having regard to the fact that the initial appointment of the applicant to the school as chaplain was made by the Bishop of Ferns, that the relationship was one governed by private law, or perhaps even by canon law, and that the role was entirely pastoral.

28. However matters are not so simple and two primary factors are relevant to understand the contractual nature of the relationship between the school and the applicant. The first arises from the deed of trust contained in the demise of the school lands by which the school chaplain is designated as a member of staff of the school notwithstanding that the initial nomination of him as chaplain may have come through the religious authorities. It may be doubted whether the Board of Management of the school has a power to appoint as chaplain someone other than the person nominated by the competent religious authority, but it cannot be doubted that the chaplain is appointed by the Board and is employed following his appointment as a full-time member of staff, by which must be meant that he is employed by the school. Some assistance is also to be gleaned from an analysis of s. 24 (1) of the Education Act 1998 which provides that a board of a school may appoint persons both as teachers and "other staff", and that such teachers and "other staff" so appointed are to be paid from monies provided by the Oireachtas but may be suspended or dismissed only in accordance with the provisions of s.24 (3) which I recite in full:-

*"A board shall appoint teachers and other staff, who are to be paid from monies provided by the Oireachtas, and may suspend or dismiss such teachers and staff, in accordance with procedures agreed from time to time between the Minister, the patron, recognised school management organisations and any recognised trade union and staff association representing teachers or other staff as appropriate."*

29. A chaplain must in that context be seen as a member of staff, properly characterised as "other staff of a school" and under s. 24 (3) suspension and dismissal of him by the Board must be done in accordance with the procedures set out or agreed from time to time by the Minister, if such have been agreed.

30. That this can in certain circumstances import a statutory and public law element to the relationship is clear from the very comprehensive analysis of the law in this area contained in the judgment of O'Malley J. in *Kelly v. Board of Management of St. Joseph's National School* [2013] IEHC 392. That case involved a principal of a school and certain mandated provisions relating to the removal or disciplining of a principal, but her judgment is of wider application. She identified in particular what she described as the "statutory source for procedures within the sector", and held that the decision to dismiss or demote a principal as well as the decision to appoint a principal are "decisions which manifestly have a public element."

31. I adopt the analysis of O'Malley J. in *Kelly v. Board of Management of St. Joseph's National School* and in particular note that the combination of the provisions in the trust deed and the statutory provision has the effect, as she described it, of incorporating the procedures from the Act into any disciplinary process engaged in by the school. As O'Malley J. said at para. 134:-

*"Every aspect of the procedure which must be followed derives its authority from statute rather than from contract."*

32. The judgement of Kearns J. in *Tobin v. Minister for Education* [2000] 3 JIC 2105 also involved a case where the relationship between the teacher and the school was founded in the deed of trust common to community schools, in broadly similar if not identical

terms to the one which operated in the respondent school. That decision was also to the effect that the requisite public law element was present having regard to the fact that the Minister controlled school expenditure, had a supervisory role over the curriculum and had "a legal responsibility to ensure that the school is conducted in accordance with the trust." Even without the Act, the deed of trust itself imported an element of State involvement sufficient to engage a public law question.

33. Costello P. in *Campaign to Separate Church and State in Ireland & Ors v. Minister for Education & Ors* [1998] 3 IR 321 considered that no constitutional issue arose with regard to State financial aid to education. The Supreme Court agreed and held that the system for the payment of salaries of chaplains in community schools was a manifestation under modern conditions of principles recognised and approved under Article 42 and Article 44 of the Constitution. Keane J held that the payment by the State of the salaries of chaplains in such schools did not "constitute an endowment of the particular religion concerned", but that even if there were an endowment it was constitutionally sanctioned.

34. Certain judgements of the High Court regarding wholly private schools have been referred to me, the judgement of Dunne J. in *Catholic University School v. Dooley* (Unreported, 20th July 2010) and the judgment of Hedigan J in *Blackrock College v. Mary Browne* [2013] IEHC 602. Each of those schools was a wholly private school and it was the school Board that determined the terms and conditions of certain teachers who were paid by the school and not by the Department. I can glean no assistance from these decisions as the respondent school is not wholly private.

35. O'Malley J in *Kelly v. Board of Management of St. Joseph's National School* took the view that the public law element arose from the interconnection between the Minister in a public role and the mandatory nature of the statutory disciplinary procedures for teaching staff following the publication of Ministerial Circular 60/2009. Kearns P found a public law element arose from the role of the Minister in the trust deed. Equally Quirke J found in *Brown v The Board of Management of Rathfarnham Parish National School* [2008] 1 I.R. 70, that the selection process for the appointment of a school principal had a statutory genesis. With this in mind I turn to consider the provisions of the trust and the purpose of the involvement of the Minister.

### **The purpose of the Minister's involvement**

36. The Minister for Education is a party to the lease for the community school, and the lease, described as a "model lease", is common to all community schools. The lease recites the purpose of the demise as being "to facilitate the establishment of the school" and more importantly recites the public purpose or trust upon which the school is established namely:-

*"With the object of providing a comprehensive system of post primary education open to all the children of the community, combining instruction and academic and practical subjects and ongoing education for persons living at or near aforesaid and generally for the purpose of contributing a spiritual, moral, mental and physical well-being and development of the said community."*

37. There is a provision that should it come to be considered at any time that it is impracticable to continue the school as a community school that the lease will be surrendered.

38. The Articles of Management bind the Board to these objects which are repeated in clause 2 and the provisions of the lease are recited almost in identical form, save that the establishment of the school is recited as being for the education of persons living in or near an identified town land in the relevant county, making the recitals in the Articles location specific. The Minister's involvement with the school is quite extensive: estimates for expenditure must be submitted to her every year; she maintains and establishes a school fund; she pays the salaries of teachers; she is responsible for the erection of the buildings and development of school premises and the provision of equipment, furniture, books etc. The number and classification of the teaching staff is subject to the prior approval of the Minister, and more importantly the qualifications for appointment of staff are stipulated from time to time by the Minister, who has a residual discretion to determine whether the validity of the qualifications of a candidate for appointment are within her requirements. She plays a role in the appointment of individual teachers, as the selection committee for the filling of a vacant post must at all times include an inspector of the Department nominated by the Minister. The organisation and curriculum also involve the Minister, and although the Board has what is described as the "general direction" of the conduct and curriculum of the school, this power is subject to the "provisions" of the Minister as protector of the general educational character of the school and its place in the educational system, as provided in clause 10(i).

39. This particular clause shows the extent to which the Minister has a role, and the purpose of that role not merely in providing the buildings and funding for the school, but also in ensuring the establishment and continuation of the general educational character of the school and its place in the education system and in the community. The Minister's role is as protector of the common and public good in the education system itself. The Board has entered into covenants with the Minister as covenantee, and the role of the Minister is a public one, and recited as such in both the lease and covenants contained in the Articles.

40. Clause 10(ix) provides that recognition as temporary full-time or part-time teachers of religion may be accorded to priests or to any other suitably qualified person and the Board is authorised to appoint such teachers of religion with the formal approval of the Minister on the nomination of the appropriate religious authority. While the Board is also authorised to terminate this appointment if and when necessary and in accordance with the wishes of that religious authority, the Minister plays a role as protector of the public interest.

### **Does the Minister have involvement with the role of chaplain?**

41. The appointment of a chaplain is different however, and clause 10(x) provides that the Board will appoint a chaplain nominated by the competent religious authority who is to be employed outside the normal quota of the school. The chaplain is a full time member of staff and is paid a salary equivalent to that of a teacher in the school, but is not characterised as a teacher.

42. There is a specific provision with regard to teachers of religious instruction, and the appointment of such a teacher is subject to the formal approval of the Minister. There is however no such provision with regard to the appointment of the chaplain, and the Board of Management has power to appoint a chaplain subject only to the fact that the chaplain must be nominated by the relevant competent religious authority. The Minister has no role in the selection criteria, appointment or dismissal. The appointment of a chaplain is one which the Board can exercise without the approval of the Minister, albeit the chaplain is a full-time member of staff and is to be paid by the Minister a salary equivalent to that of the teacher in the school.

43. The Minister thus has no role in the appointment of the chaplain nor does the Board covenant with the Minister to, for example, seek the Minister's approval for the appointment of a chaplain, such as is found in regard to the appointment of a teacher, and in particular the chaplain is not appointed following a decision by a selection committee which I have noted includes an inspector of the Department nominated by the Minister. The appointment of the chaplain is outside that framework and the nomination of the chaplain is done by the relevant religious authority. The qualifications for the role of chaplain are not fixed by the Minister, unlike in the case of

the qualifications for appointment of the teacher.

44. I note also that the Minister has a general role to oversee the general organisation and curriculum of the school and that the advisory committee which assists the Board in the running of the school consists of the principal, the vice principal and not more than five representatives of the teaching staff. The chaplain plays no role in this.

45. The Board, in clause 11, covenants with the Minister to ensure that there is religious worship and religious instruction for pupils, save where the parents of those pupils request that the pupils be withdrawn from religious worship or religious instruction and the Minister has a role in the provision of teachers of religious instruction who are appointed by a selection committee and whose appointment is subject to formal approval by the Minister. That role can be seen in the context of the recital of the spiritual purpose and trust to which one of the recited purposes for which the school is established and of which the Minister is protector.

46. No such provisions are contained with regard to the appointment of a chaplain and the chaplain is not for the purposes of his or her role as chaplain, deemed to be a teacher of religious education. The appointment of the chaplain, the role of the chaplain in the school, the selection of the chaplain, the position of the chaplain in the curriculum while they each have Board involvement, do not have any Ministerial involvement. The role of chaplain, then, is not subject to any covenant with the Minister and is not identified in the context of the community and education purpose. The role of chaplain can to that extent be seen as residual and religious rather than a community role. There is accordingly no public law element in the appointment and dismissal of a chaplain.

47. I do not consider that the fact that the State pays the salary of a chaplain as importing a sufficient public law element and this is clear from the judgements noted above where the schools were wholly private, and from the judgment of Peart J in *Becker v The Board of Management St. Dominick's Secondary School Cabra* [2005] 4 JIC 1405 where he held that the grievance procedures were wholly contractual and did not arise from statute or mandatory regulation.

48. I have already held that the decision of the respondent to remove the applicant as chaplain occurred in October 2012 and that the applicant is out of time to bring an application for judicial review. Even if I am wrong in that I also hold that the applicant may not avail of the remedy of judicial review with regard to the removal of him as chaplain as that removal arose from the wholly private contract between the parties and does not arise from any covenant of the Board with the Minister, nor from any statutory provisions or public law purpose by which the Minister performed a role of protector of the community or public interests.

#### **The decision to offer a new position**

49. The letter of the 22nd October 2013 proposes a return by the applicant to the school as a teacher of religious education subject to his written acceptance of and adherence to the conditions which I have outlined above. The applicant also seeks an order of *certiorari* quashing the decision to impose these conditions, as having been imposed in breach of fair procedures, or outside the powers of the Board.

50. On one reading of the letter, and looking at it purely from the point of view of contract, what the Board did was offer the applicant the position of teacher of religion in lieu of his role as chaplain and the offer contained these conditions. I have already noted that the Board's communications are not, nor could one expect them to be, couched in legal language, and while to some extent the letter has the appearance of being an offer I cannot read it as being such in substance. This is primarily because what the letter does is identify a decision of the Board to "allow" the applicant to return to the school as a religious education teacher. It was a substitution of role, not the offer to the applicant of a new position, but permitting the applicant to continue to be employed at the school.

51. I have already explained the import of Article 10 in the Articles of Management as characterising a chaplain in a school as being a member of staff of the school and there was never any question throughout the correspondence, the decision making process of the Board over the relevant period, nor through the disciplinary procedures, that the applicant was to be or was ever dismissed from his position as a member of staff. What was proposed was he would take a different role and that he would thereby become a teacher subject to the somewhat different regime that prevailed with regard to teachers. If he is to be characterised as a teacher then he is entitled to the benefit of the new mandatory scheme "Towards 2016 Revised Procedures for Suspension and Dismissal of Teachers" and there was no suggestion in the Board's decision that the applicant was to continue in his role as a member of staff in any probationary capacity.

52. I consider that the agreed procedures in the "Towards 2016" document apply. That document provides a very extensive mandatory scheme and provides a formula for procedures to deal with various types of disciplinary issues and in particular for the purpose of the argument of the applicant identifies a range of penalties that can be imposed and the penalty identified includes the deferral of an increment, withdrawal of an increment, demotion, suspension with or without pay or "other disciplinary action short of suspension or dismissal". There is a specific provision that:-

*"The nature of the disciplinary action should be proportionate to the nature of the issue of work or conduct issue that is resulted in the sanction being imposed"*

53. I am of the view that the decision of the Board is amenable to judicial review as it has to be seen to have been made within the context of "Towards 2016", as in my view it was made in the context of the employment, reemployment or repositioning of the applicant as a teacher within the school to which the requirements of the circular apply and which imports an element of public law. In that I follow the judgment of O'Malley J. in *Kelly v. Board of Management of St. Josephs National School*.

54. I consider that the conditions imposed on the return to work were disciplinary sanctions because the Board cannot have it both ways. It cannot employ the applicant as a teacher of religious education de novo, and for the Board to do that it would have to engage in the recruitment process provided under its Articles of Management and under the legislation. It changed the terms of conditions of the applicant's role as an employee of the school and the only way that I can characterise some of the conditions imposed on the applicant in that changed role is to characterise them as disciplinary.

55. The applicant argues that the conditions contained in the letter of 22nd October, 2013, was made in breach of fair procedures, and I now turn to this question.

#### **Fair procedures**

56. The letter of the 5th December, 2012, suggested that the Board would consider a possible return to the school dependent first on risk assessment, but also that the Board had recommended certain conditions would apply to any such appointment.

57. The decision followed a disciplinary hearing in which certain allegations were considered by way of disciplinary process. The

applicant makes the argument that the allegations the subject of that process were allegations of sexual impropriety but that the Board, following the hearing, and having found that there was no sexual impropriety, came to a conclusion that there had been "inappropriate behaviour". He makes the point that the Board was not competent to make a finding of "inappropriate behaviour" because that was not a matter before it, and more especially that it was not a matter in respect of which he understood he had a case to answer. The letter of complaint while it identified what one might call in general a sexual impropriety between the applicant and the former pupil of the school, in that it is asserted that a sexual relationship had begun and continued for a while between them, also made allegations with regard to certain other behaviour which, while it might have had a connotation of sexual interaction, was not sexual in its nature.

58. I believe that the applicant knew, and indeed that any person reading the letter would have known, that the allegation made by the former pupil was twofold: it was an allegation of sexual impropriety in that a sexual relationship is alleged to have occurred, but it is also a suggestion that certain behaviour of the applicant in the presence of, or in interaction with, the pupil was inappropriate in a more general way. While undoubtedly the behaviour alleged had a certain innuendo of sexuality or perhaps of behaviour of a flirtatious nature, the distinction can, it seems to me, be drawn from the letter that what was alleged, and what was to be considered by the disciplinary body, was whether there had either been a sexual relationship between the applicant and the former student, or whether the appropriate boundaries between the teacher and pupil had not been respected or had become blurred.

59. I have considered the transcript of the disciplinary hearing from which it appears that various matters were canvassed and put to the applicant in the course of that hearing, his responses were presented on his behalf in a robust way by his solicitor and he was given an opportunity to address the various allegations made. The Board was, it seems to me, competent to make a finding that expressed its concern that a degree of impropriety or inappropriate behaviour had occurred, and in simple terms the finding that there had been inappropriate behaviour was a finding with regard to the second part of the complaint, namely that certain behaviours of the applicant had failed to respect the relative positions of the applicant and the complainant, and that their respective personal boundaries had become blurred. It is not so much that the finding of impropriety was a subset of, or capable of being considered as a subset of, a lesser finding than a finding of full sexual impropriety, but rather that the complaint was made out initially as a complaint of various happenings along a spectrum of behaviour, the most serious of which was the alleged sexual relationship, and the least serious which was identified in the case as "boundary issues".

60. Further, following the determination by the Board that there had been a degree of inappropriate behaviour, the Board requested that the applicant undergo risk assessment, which he did and with which he engaged fully, knowing, as he must full well have known, that this risk assessment was for the purpose of assessing the extent to which the so-called "boundary issues" might impact upon his relationship with students in the school, and might constitute a risk to them. There is no sense in which the risk assessment was carried out in the light of the allegations of sexual impropriety, which had been by then held to be unfounded, and indeed the applicant was unlikely to have engaged with the risk assessment process if he had genuinely believed that that process was mandated by the Board to deal with the alleged sexual impropriety claim, as this had already been disposed of. He knew and must have known, and in my view most certainly did know, that the process engaged in by him in early 2013 through the interviews with Mr McGrath was a process to deal with and assess the extent to which he as a person posed a risk to students. Therefore I find no lack of fair procedure in the determination and take the view that the applicant knew, and was given full opportunity to address, the nature of the complaint.

61. I reject then the argument that the applicant was not fully informed before the disciplinary hearing of the matters in issue at that hearing, and that the finding that there had been a degree of inappropriate behaviour was not one in respect of which he had an opportunity to respond. Thus the offer to him of the new role as teacher of religious was not a decision made without giving him an opportunity to respond and was made within acceptable procedures.

#### **The conditions of return to the school**

62. The applicant further argues that the conditions are arbitrary, disproportionate and irrational and should be struck down for this reason.

63. I note the requirement in "Towards 2016" that a sanction be proportionate to "the conduct/behaviour/performance that has resulted in the sanction being imposed". While there is considerable vagueness in the matter, it seems to me that the only reasonable way to read the letter of the 22nd October, 2013 is that, were the applicant to come out of administrative leave and return to the school, certain conditions would be imposed upon him, and these conditions have the substance, if not exactly the form, of sanctions.

64. Some of the conditions sought to be imposed do not give rise to any difficulty. There are a number of provisions that restrain the applicant from acting as a counsellor, and as he is not a qualified counsellor it seems to me not unreasonable to impose such a condition, it would flow from the nature of his newly defined position in the school, and indeed such a condition would flow from the mere fact that the applicant has no counselling qualification as such would be required for a counselling activity in the school. Equally the requirement that the applicant confirm that he is familiar with current child protection policies is not objectionable and such familiarity is one that all teachers are required to have, and is perfectly reasonable and not in any sense either discriminatory or irrational. The requirement that any students seeking pastoral care be referred to the chaplain is also apposite, as is the one that the applicant refers any students who seek help with personal problems to the guidance counsellor. Neither of these functions could be regarded as the function of the teacher of religious education and the requirement that the applicant not engage in either counselling activities or seek to help pupils with personal problems is also one of the indices of his new role as teacher of religious education. There can also be no objection as a matter of law to the requirement of Garda vetting and this was a requirement which the Board had to impose as a matter of law and in accordance with circular 63/2010.

65. However certain conditions do give rise to comment and I identify the following:-

- a) That the applicant would have no contact with students outside of school without the consent of the principal.
- b) That he would not engage with pupils outside working hours in any way except with the express permission of the principal.
- c) That he continue to see his personal counsellor on a regular basis.

66. It is argued by the applicant that these conditions are harsh, arbitrary, unreasonable and disproportionate. I reject this argument and do so because it seems to me that the condition arose directly from the conduct of the applicant that led to the findings of inappropriate behaviour, all of which related to conduct during school trips abroad and contact with the complainant outside of school hours. The alteration of his position was done in a way that imposed upon him conditions which related to this behaviour outside of school.

67. Further, the applicant was granted a limited registration with the Teaching Council as a teacher and his registration contains stipulations which mirror those contained in the requirements of the Board in their letter of the 22nd October 2013. The Board could not have reinstated or redeployed the applicant as a teacher and ignored the conditional nature of his registration. Thus I conclude that the sanctions or conditions were not arbitrary or irrational, or unduly harsh.

68. Finally, it is argued by the respondent that some of these conditions were imposed by the decision of the 5th December 2012, namely those conditions which were recommended by Mr McGrath and by the Board at its meeting on the 22nd October 2012, and that the applicant is out of time to challenge them. That letter of the 5th December 2012 contained no more than a recital of recommendations made by the Board and did not constitute a decision of the Board that those conditions would be imposed, nor that those recommended by Mr McGrath following the risk assessment which took place after the letter of the 5th December 2012 was completed. I do not consider that the Board decided to impose those conditions in October or December 2012, but decided to do so following the registration of the applicant with the Teachers Council and at or around the time of the letter of the 22nd October, 2013.

### **Conclusion**

69. The decision to remove the applicant as chaplain is not one amenable to judicial review, but the decision to employ the applicant as teacher of religion in the school is one with a sufficient public law element to attract review. I reject the argument that the applicant was denied fair procedure in the way in which certain conditions were imposed upon him. He was well aware of the possible inclusion of these conditions either as a result of Mr McGrath's findings or as a result of the recommendations made by the Board. He cooperated with the risk assessment. There was no denial of his rights to fair procedure or constitutional justice in the process. I also find that the conditions imposed upon him were not harsh, arbitrary, disproportionate or irrational and are not ultra vires the Board.

70. I refuse the relief sought.