

**THE HIGH COURT  
DUBLIN**

**MARY BECKER**

**2006 No. 1239P**

**APPLICANT**

**AND  
THE BOARD OF MANAGEMENT OF ST. DOMINIC'S Respondents  
SECONDARY SCHOOL, CABRA, MARY KEANE,  
DEREK KICKHAM, PATRICIA FITZSIMMONS,  
KATHLEEN CROWLEY, TIM CHADWICK, KEVIN  
BARRY AND MONICA KENNEDY**

**Judgment of Mr. Justice Clarke Delivered on Thursday, 13th April 2006 Judgment delivered by Mr. Justice Clarke as follows**

1. Mr Justice Clarke: In these proceedings the principal contention made by Ms. Becker concerns an allegation that there has been a conspiracy on the part of her employers, the Board of Management of St. Dominic's School, to deprive her of fair procedures in relation to disciplinary proceedings which have been brought against her in relation to her work as a teacher at that school. A number of headings of damages are claimed in the plenary summons together with an injunction which seeks to restrain a disciplinary investigation.

2. The issue that is now before me, and which was the subject of argument last week, is the question of whether an interlocutory injunction in those terms should be granted which would have the effect of restraining any further progress in the disciplinary proceedings which have been commenced.

3. I should note in passing that there has been a significant history of litigation between the parties. That history is too long to recite here save to note that I take no particular view as to the merits or otherwise of any of the other issues which have been brought before the Courts and the result of any of those cases insofar as they have been disposed of has not influenced my decision in this case.

4. I should however note that it is of some materiality to the issues which I have to consider, that the existence and nature of the variety of proceedings which have occurred between the parties shows a significant breakdown in relations between Ms. Becker and the school management, both its Board and the senior staff, which is a factor that has to be taken into account in considering the issues which I have to determine today.

5. Secondly, it is important to note that the issues in these proceedings have to a significant extent moved on from the commencement of the proceedings. At the time when these proceedings were commenced there was under consideration complaints by a Donal Gallagher and a Bridie Gallagher, both of whom are members of the staff of the school and are husband and wife, those complaints having commenced in the early part of 2005. It is suggested in these proceedings that the chairperson of the Board of Management and the head mistress of the school were intent on ensuring an unfavourable outcome to that disciplinary process.

6. A subcommittee consisting of two members of the Board of Management was set up for the purposes of investigating those complaints. At a meeting on 19th January, members of that subcommittee were questioned by counsel on behalf of Ms. Becker. It is suggested that answers given by the members concerned, that is to say the members of the subcommittee, when taken in conjunction with what had previously occurred at a meeting of the Board of Management on 31st August of last year imply a level of disingenuity on the part of the members of the subcommittee. And also that that disingenuity would have been known to the Board who were, of course, present at the meeting of 31st August and also present at the meeting of 19th January. On that basis the original challenge to the disciplinary process involving the complaints made by the Gallaghers' was based on a contention that both the investigating subcommittee and the Board lacked the capacity to act in a fair manner in respect of those disciplinary hearings.

7. In support of the original challenge there were exhibited transcripts of what were apparently tape recordings secretly made, both of conversations which would seem to have occurred in the school between various persons, and also a secret recording of the proceedings of the Board of Management.

8. However, the proceedings have, as I have indicated, moved on since then, in that the Board of Management has given an undertaking not to proceed for the present with the existing complaints and therefore no interlocutory issue arises in respect of those.

9. However, a new complaint has been the subject of the initiation of disciplinary proceedings arising out of the making of the very recordings, the transcripts of which were exhibited in the course of the proceedings.

10. In substance, the school contends that serious disciplinary issues arise out of the fact that Ms. Becker made secret recordings both of meetings of the Board of Management at which she was not present, and it would appear in respect of various other discussions and conversations which occurred within the school, unknown to the other persons who were involved in those conversations. In respect of all of those matters a disciplinary process has been initiated.

11. Therefore, in substance what is now sought to be restrained at this interlocutory stage is the disciplinary process in respect of that new complaint as against Ms. Becker to the effect that she has inappropriately and secretly recorded matters unknown to those who were involved, and in the case of the Board of Management, in circumstances which involved some degree of subterfuge.

12. In approaching the grant or refusal of an interlocutory injunction in a case such as this a number of legal principles, it seems to me, need to be applied. Firstly, it is my view that a Court should only intervene in the course of an uncompleted disciplinary process in a clear case. It does not seem to me to be consistent either with a proper invocation of the Court's jurisdiction or the proper conduct of disciplinary processes in an employment context that the Court should be invited to intervene at a variety of stages in the course of that process.

13. This should not be taken to mean that there may not be circumstances where it is appropriate for the Court to intervene. But I would wish to emphasise that in my view the mere fact that there may be an argument as to whether a particular disciplinary process has taken an appropriate course does not of itself justify the Court in intervening (even where the proposition put forward by the Plaintiff is arguable) to prevent the process moving to its natural conclusion.

14. In general terms it seems to me that the circumstances in which the Court should intervene is where a step, or steps, or an act,

has been taken in the process which cannot be cured and which is manifestly at variance with the entitlement to fair procedures.

15. In coming to a view as to whether that stage has been reached, it is important to note that the Court should not assume that unfairness will occur in the future, nor should it make assumptions about the likely future course of the process. The Court should intervene only where it has been demonstrated that the process has already been so tainted with an absence of fair procedures that it cannot be allowed to continue.

16. Also I should emphasise that that the above approach does not mean that at the end of the day the process may not be the subject of an appropriate intervention by the Court, if, at a full hearing, it can be demonstrated that the process failed to vindicate the legal entitlements of the person involved. The precise remedies that may be available in those circumstances are, of course, a matter of some debate. But it seems to me that very different considerations apply where it is sought to prevent a process being continued with on the one hand, and where the process has been completed and the Court is in a full position at trial to take a view as to whether it was properly conducted on the other hand.

17. In addition, I also have to take into account the legal principles in relation to the remedies that maybe available in the event of it being established that an unfair process was conducted. While obviously at this stage all that is being sought is an interlocutory injunction which is designed to preserve matters pending trial, and while it does not necessarily follow that an interlocutory injunction cannot be granted where a substantive injunction could not be granted in respect of the same matter at trial, nonetheless, the Court has to have regard in the granting or refusal of an interlocutory injunction, to the nature of the relief that might ultimately be obtained at the end of the day, should the plaintiff succeed.

18. Having reviewed many of the relevant authorities in the case of *Carroll -v- Bus Atha Cliath* I came to the view, for the reasons which I set out in that judgment, that while declaratory relief might be appropriate and also pecuniary damages might be awarded, the preponderance of authority suggests that the traditional principle by which the Court will not intervene in a manner which would amount to specific performance of a contract of employment remains the law and I remain of that view.

19. Therefore, it seems to me that even if the Plaintiff succeeds, subject to clearly the entitlement of the Plaintiff to attempt to persuade the trial Judge otherwise, I am of the view that the height of the entitlement which the Plaintiff is likely to obtain is declaratory relief as to the process or damages. But it would not seem to me on the preponderance of the authorities that it would be open to the Plaintiff to obtain an order which would require her to continue in active work, most particularly in circumstances where there has been a loss of confidence between the parties and irrespective of the cause of that lack of confidence.

20. Insofar as there are a number of authorities in which the Court appears to have given effect to what might loosely be called 'the enforcement of a contract of employment', same appear to be cases where the differences between the parties were not such as gave rise to a lack of confidence, but were perhaps more technical rather than substantive.

21. Against the background of those legal principles, I have come to the following views: Firstly, there is evidence from which a Court at trial might infer *mala fide* on the part of the Board of Management and the head mistress. However, the assessment of that evidence depends to a very large extent on context. It depends on a careful analysis and an assessment of the creditability of witnesses as to what happened at a variety of meetings. It is not in my view therefore possible at this stage to conclude that the apparent contradiction between what was seemingly said at the meeting in August 2005, and what was said at the meeting in January 2006, will necessarily lead to that inference. However, it is clear that there is evidence which might well persuade a Court to draw that inference, but not necessarily so.

22. Secondly, the fact that secret or surreptitious recordings were made is undoubtedly highly unusual. There must be little doubt that the making of such recordings could in principle amount to a serious disciplinary matter. But it is equally true that an assessment of that matter requires an assessment of context. If, as Ms. Becker asserts, the recordings were made essentially as a defensive measure in circumstances where there was, in fact, a conspiracy to deprive her of fair procedures then such proceedings might well be seen in an entirely different light to circumstances where there either was not such conspiracy, or where there was no reasonable basis for believing that a conspiracy such as might warrant the extraordinary measures taken was there.

23. Equally, it is clear that the disciplinary charges now brought against Ms. Becker relate not just to the recording of a single meeting, but a whole series of lengthy recordings which it would appear were taken. It is certainly possible that a view might ultimately be taken that while some of those recordings might be justified in the event that the Court was persuaded that there were reasonable grounds for believing that unfairness was likely to attend the disciplinary process, nonetheless there might be questions as to the extent.

24. Thirdly, I have to take into account the proposed process which the school intends, unless restrained, from going ahead with, which is in accordance with the agreement entered into between the ASTI and the JMB. Stage 2 of that process, which is the stage which has now been reached, involves the establishment in accordance with Clause 2.2 of the agreement, of an Independent Investigating Committee, which in accordance with the terms of the agreement cannot contain members of the Board of Management. The notes to the agreement suggest that the two members of the Independent Investigating Committee should be a teacher and a member of a Board of Management, both selected from outside of the school.

25. While of course no selection has yet been made, for the reasons which I indicated earlier, I should not assume that the persons selected to conduct any such investigation would not be entirely independent and would not carry out their role in accordance with fair and agreed procedures and come to reasonable conclusions on the basis of the evidence before them. Those persons are entitled to make findings and to report those findings to the parties in accordance with Clause 2.4 of the agreement.

26. Before going onto Stage 3, I should also touch upon an issue which arose in the course of the hearing before me concerning the exclusions from the disciplinary process set out in the agreement between the ASTI and JMB, which excludes from the consideration of that process disputes which are referred to law. The relevant exclusion arises under the heading on the first substantive page of the agreement under the title "Scope of this Procedure". Under Item C (iii):

"Amongst the matters excluded are complaints in which either party has recourse to law or to another more appropriate standard procedure".

27. Again, without reaching a concluded view on the matter, it seems to me that the most likely interpretation of that Clause is that it excludes from the scope of the procedure matters where the appropriate way of dealing with the issue concerned is through Courts, such as for example where someone has a claim for damages for breach of contract, or claim for damages for tort.

28. It would seem to me that it would make a nonsense of the agreement if the mere fact that someone chose to institute legal proceedings had the effect of excluding any entitlement to go ahead with the process set out in the agreement. Therefore, I am not currently persuaded that on a proper construction of the terms of the agreement between the ASTI and the JMB it has the effect of excluding matters simply because someone has chosen to institute litigation in respect of those matters.

29. As I indicated earlier, I should not at this stage make any assumptions as to what the outcome of any further part of the process should be. We do not know what view the Independent Investigating Committee will come to. It does, of course, need to be noted that if it does come to a view significantly unfavourable to Ms. Becker, then the next stage of the process is Stage 3 where the matter goes back before the Board of Management. But equally it is not clear at this stage as to the basis, if any, upon which the matter would go back before the Board of Management.

30. In summary, there are a variety of matters which I should not assume at this stage. I should not assume that the Investigation Committee will be anything other than independent, anything other than impartial, and that it will not conduct its enquiries properly. I should not assume that the decision of the Investigation Committee as reported in accordance with Clause 2.4 will be adverse to Ms. Becker. I should not therefore assume that the matter will go to the Board at all.

31. Equally if the matter does go to the Board, I should not make any assumptions as to the issues which will be before the Board and whether any members of the Board, or indeed possibly all of the members of the Board, would be unable to deal with the matter by virtue of the nature of the issues which were before the Board. They are matters which may or may not arise depending on the course of the disciplinary process.

32. In all of those circumstances, I am not satisfied that this is the sort of clear case in which it is appropriate to intervene at this stage. It does not necessarily follow that the process will be unfair. In respect of this particular complaint no steps in substance have been taken in relation to it. Effectively to conclude that it would necessarily have to be unfair would require me to conclude that there is no way in which it could be completed in a proper way. For the reasons which I have indicated that does not seem to me to be the case.

33. However, it may be that that situation will change. It could be that steps were taken which would be irrevocable, which could not be cured, and which would evince a level of a lack of fair procedures that would entitle the Court to intervene at some subsequent stage. But it does not seem to me that that stage has now been reached in respect of the issues which are the only ongoing issues in the disciplinary process against Ms. Becker.

34. The only other basis upon which I could conclude that there was a clear case which would justify intervention at this stage would be if I were persuaded that there were no circumstances in which an adverse finding to Ms. Becker could be made.

35. Obviously on her case she was justified in making the recordings concerned because of the fact that there were inappropriate actions being taken on the part of her employers, designed to bring about a result of an adverse finding against her. But equally that may not turn out to be the case. It will be necessary for the Investigating Committee to consider all elements of the case.

36. The fact of the making of the recordings appears not to be controversial. Ms. Becker not only accepts, but fully accepts that they were made. She will doubtless seek to justify them. As I indicated earlier, it seems to me that whether or not the making of those recordings amounts to a disciplinary matter depends entirely on a range of factors which place the making of those recordings in context. It might be appropriate to conclude at the end of the day that she was justified in making them, it may not.

37. One cannot assume what the proper outcome of such a disciplinary process should be. In those circumstances it does not seem to me that I can hold that there are no circumstance in which a fair, proper, and impartial disciplinary process might not conclude that Ms. Becker was guilty of either minor or significant disciplinary breaches as a result of the making of those recordings.

38. In all of those circumstances it seems to me that for the moment it is appropriate to allow the disciplinary process to proceed in accordance with the agreement reached between the ASTI and the JMB. In those circumstances I would propose refusing the interlocutory relief. However, for the reasons which I have indicated it does seem to me to be possibly the case that that situation might change depending on how the process continues.

39. In those circumstances I would wish to make it clear that nothing in this judgment should be taken as a barrier to a renewal of the application in the event that there was a change in circumstances, which in the view of Ms. Becker or her advisors' might justify the Court in taking a different attitude.

40. Finally, while it is not part of the formal determination of this issue, it seems to me that the core issue in the proceedings as to whether there is *mala fide* on the part of the Board of Management and the head mistress, is a matter which should be determined as a question of the greatest possible urgency.

41. If the parties wish, I would be happy to put in place arrangements to ensure that these proceedings are ready for hearing at the earliest possible date. Given that that issue in the proceedings. It is bound to have a significant effect in any event on the running of the school, it seems to me that it is a matter that should be aired and resolved as quickly as possible.

42. Indeed, should the hearing of this case be capable of being achieved within a relatively short period of time, the possible necessity for further applications of an interlocutory variety to the Court might well be obviated. But so far as my formal determination is concerned I would propose refusing the interlocutory injunction sought, but giving liberty to apply for the reasons which I have indicated.