

THE HIGH COURT

[2015/8129 P]

BETWEEN

MARY JOYCE

PLAINTIFF

AND

THE BOARD OF MANAGEMENT OF COLÁISTE IOGNÁID

DEFENDANT

JUDGMENT of Mr. Justice Binchy delivered on the 15th day of December, 2015.**Background**

1. In this application, the plaintiff seeks to restrain the defendant, her employer, from continuing a disciplinary procedure against her pending the determination of the proceedings herein.

2. The plaintiff is the principal of Coláiste Iognáid, a Jesuit secondary school in Galway. The defendant is the board of management of that school. The plaintiff was appointed to her position as Principal in January, 2011 and prior to her appointment had no previous involvement with the school. She is a non-teaching principal.

3. At a meeting of the board on 15th April, 2015, the chairperson of the board, Mr. Jack Cleary, presented to the meeting a report which he had been requested to prepare at an earlier board meeting held on 3rd March, 2015, into "*major issues in the school*" i.e. issues of a concern of significant nature in the school ("the April report").

4. According to the minutes of the meeting of 3rd March, the report to be prepared by the chairperson for the April meeting was to focus on the following issues:

- Why the school is not "a happy school;"
- Staff discontent;
- Stress/Morale;
- Student morale;
- Student discipline;
- The ethos and culture of the "Jes" (as the school is known in Galway);
- Respect;
- What kind of school do we have?

5. Although not a member of the board of management herself, the plaintiff acts as secretary to the board and therefore attends board meetings. The plaintiff was in attendance at the meeting on the 3rd March.

6. The chairperson duly prepared the April report which he presented to the board on 15th April, 2015. Although the matters of concern identified at the March meeting made no reference at all to the principal, the April report contained a number of negative references to the principal, in particular in relation to her dealings with the staff; a perceived loss of authority amongst students (resulting in increased student indiscipline); poor relations with parents; and disagreements with the chairperson of the board. In fact, under just about every heading in the report (which did not follow the exact headings set out in the minutes of the meeting of 3rd March) there were comments of a critical nature made about the principal. For example:

(i) Under the heading "*students*" there is a sentence that states: "*Teachers and parents allege that a perceived loss of authority by the principal has contributed to a serious growth in student indiscipline.*" This section concludes with the question: "Can the serious challenges described above be resolved under the leadership of the principal, Mary Joyce?"

(ii) Under the heading "*parents*", it is stated that: "A significant number of parents are very unhappy with developments in the school over the past year". In the same section it is stated that "parents are horrified that some teachers have criticised the principal to their sons and daughters in class."

(iii) Under the heading "*the principal and the chairperson of the board of management*" it is described how the principal sought the views of the chairperson on a number of issues and choose not to act on the advice given by the chairperson in each instance.

(iv) Under the heading "*Disciplinary procedure against a staff member during 2014*" it is stated: "*It has been made very clear to me that the staff have withdrawn cooperation from the principal in the belief that their colleague was treated unjustly. Until this has been comprehensively addressed it seems unlikely that normal, cooperative relations between the staff and the principal and between the staff and the board can be restored.*"

7. Since the April report raised a number of issues concerning the performance by the principal of her duties, the chairperson requested the principal not to attend the board meeting at which this report was to be discussed, which was scheduled to take place

on 16th April, 2015 (but which ultimately took place on 15th April, 2015). The plaintiff agreed not to attend, but under protest.

8. The defendant board then proceeded to meet and to discuss the April report. The minutes of this meeting were exhibited by the chairperson to his affidavit sworn on 27th October, 2015 in opposition to this application. Under the heading *"staff morale and relations"* it is minuted that *"..the morale of the staff is extremely low. The principal was said to be putting a lot of pressure on staff and they were feeling harassed and stressed. Teachers were becoming tetchy with one another as a result."*

9. This section of the minutes goes on to deal with a number of issues and concludes that the school does not have an effective middle management system, but notes *"this has been the case for years."* It then concludes with the statement that *"during Mary's absence the system appeared to work in a more harmonious manner."* The reference to Mary here is to the plaintiff and the reference to her absence is to a period during which she was on sick leave.

10. Under the heading *"student indiscipline"* the minutes record, *"That there is a strong feeling that the discipline in the school has deteriorated significantly. That the disciplining of students by the principal is reported to sometimes be disproportionate and inconsistent."* This section concludes with a question *"Do we have confidence that the Board can look to the principal to effectively deal with the issues of concern?"*

11. Under the heading *"parents"* the minutes record: *"There is a sense that there may have been a general loss of respect for the principal; that much of this stems from the loss of confidence in her judgment and her ability to deal with issues in a proportionate and fair manner"*.

12. On another issue, in the context of an investigation by the principal into the conduct of a member of staff in 2014, it is minuted that an important letter from a parent may have been deliberately withheld from the board and its solicitors.

13. The minutes are very detailed and it is clear that the board had an in depth discussion of the issues raised by the April report many of which concerned the plaintiff. At the end of the meeting, the board resolved to ask the chairperson to draft a report outlining the issues of concern in relation to the principal. The chairperson then distributed to the board the disciplinary procedure for principals and requested board members to read this document with great care. The minutes record that the chairperson said that: *"he would be inviting the board in time to consider if a report might be presented to the principal in the context of the procedure."* He wanted the board to be familiar with the procedures in advance of considering any such report and before making any judgment in the matter.

14. After the April meeting, the chairperson proceeded to prepare a report for the board as directed at that meeting. This report was given to the board for a special meeting of the board that took place on 14th May, 2015. The report was not given to the plaintiff at this time. The report was subsequently appended to the minutes of the meeting of 14th May and deemed to form part of the minutes. The minutes record that *"The chairperson was at pains to remind the board that the report set out a series of matters of concern which related to the principal. It was important that the board be aware that the concerns were set out solely to enable the board to decide whether and how the concerns should be addressed. The board could not discuss the substance of the concerns, given that the principal must be afforded an opportunity to respond."* At the meeting the chairperson was asked to delete a section of the report because the minutes of the May meeting of the board are very short by comparison to other minutes of meetings exhibited and amounts to little more than one page.

15. It is minuted that the board concluded that the remaining matters outlined in the chairperson's report set out a *prima facie* case that required the concerns therein to be put to the principal and her response sought. Two possible avenues to achieve this were considered; one was to put the matters to the principal informally, outside of any formal procedure; the second was to proceed under the revised procedures for suspension and dismissal of principals section 24(3) of the Education Act 1998.

16. The board did not reach a decision on how to proceed and agreed to meet again on 4 June, 2015 to consider that matter further. The minutes recorded that *"The chairperson reminded the board of the need for absolute confidentiality."*

17. The board then met again on the 4th June, 2015 to consider the matter further. The minutes of this meeting record that the chairperson reminded the board that *"the issue here was not to adjudicate on the allegations being made but to establish if there was a prima facie case to be answered by the principal and then to decide (if that was judged to be the case) how best to manage this."*

18. These minutes record that the chairperson stated that in his view the issues presented fell into two categories:

(i). *"The perception amongst staff that there was a serious injustice done to a member of staff in relation to the principal's handling of a disciplinary procedure"; and*

(ii). *"Other and more general matters of concern relating to the principal's management of the school."*

19. In relation to the first issue, the minutes record the need to get the response of the principal to a number of issues arising in relation to that issue. The minutes further record that *"It was stressed that the principal had not yet had an opportunity to respond to the concerns identified and that the board must not prejudge any aspect of the matter."*

20. In relation to the second more general set of issues, it was decided to omit one further matter from the report of the chairperson to the board. The minutes conclude by saying that it was agreed that the principal's response to the concerns should be sought under stage 4 of the procedure.

21. From all of the above, it is apparent that the board had considered, in some detail, allegations made against the principal at its meetings (from which the principal herself was excluded) on April 15th, May 14th and June 4th. While the meeting in April was to consider the April report into matters of concern in the school generally, there can be no doubt but that there was a lot of discussion at that meeting in relation to the conduct of the principal, indeed it was for that reason she was requested not to attend the meeting.

22. The April meeting then gave rise to the report dealing specifically with the conduct of the principal which, as a result of discussion at the May and June meetings, was amended by the deletion of two paragraphs relating to matters which the board did not consider it necessary to pursue or investigate any further.

23. The chairperson did not interview the principal at any stage for the purposes of the preparation of his report. Although it is not entirely clear, it seems as though he did interview other personnel (for example there is annexed to his report a progress report prepared by another member of staff into the implementation of a memorandum of understanding prepared by the principal in

conjunction with the teaching staff).

24. Ultimately, the chairperson finalised his report on 17th July, 2015 and sent it, together with a letter dated 4th August, 2015, to the plaintiff who received it on 13th August, 2014. The plaintiff complains that the report furnished to her purports to make findings and draw conclusions in relation to the performance of her duties, and that many of the findings are deeply prejudicial and shocking to her; that they are very damaging to her personal and professional reputation; that they are unfair and unwarranted and that she will not be able to challenge the findings of the report as the findings have already been made. In short, she fears that there is no prospect that she will have a fair hearing from the board in view of what she describes as its findings to date (which have been made without the benefit of any input of the plaintiff). The plaintiff fears that her employment will be terminated without her having been afforded the opportunity to be heard in her own defence "within an objective forum free from any actual or perceived bias".

Report of 17th July 2015

25. The report of the chairperson dated 17th July, 2015 ("the July report") was prepared by reference to a number of headings which overlapped to a significant extent with the April report, into matters of concern generally in the school. It is not necessary for the purpose of this judgment to get into the detailed facts of these matters, instead I will set out the remarks to which the plaintiff takes exception using a short summary of the issue concerned, or where the chairperson does so in the July report, using headings. In the July report the chairperson addresses:

1. An allegation that the principal misled the board of management, deliberately, in the course of an investigation into the conduct of a teacher in the school. This section of the report concludes with the following sentence:

"The principal's conduct, outlined above, raises very serious concern around the trustworthiness of the principal in her interaction with the teacher involved, and with the board itself.

This comment is preceded by almost two pages of the chairperson's summary of the facts in this matter (without of course, any comment by the plaintiff herself).

2. Concerns regarding the loss of parents' and students' personal data during 2014. This is contained in a short paragraph.

3. Concerns regarding the investigation into the conduct of the teacher referred to at paragraph 1 above dealing with a report given by the plaintiff to the teacher concerned in March 2014 and which the chairperson described as containing "*statements, allegations and innuendo which were incompatible with her duty of care to the teacher and with her duty to the board of management.*"

This is also a short section of the report and concludes with the question:

"The board is asked to judge whether this statement is laden with baseless innuendo, as alleged by the teacher in his submission to the disciplinary hearing of 30th June 2014."

4. Concerns relating to the relationship between the plaintiff and the board of management and implementation by the plaintiff of board of management decisions. There are a number of comments made in this section that the plaintiff complains are clearly of a conclusive or judgmental nature. These include:

- *"It is unacceptable that the principal would not support a decision of the board. To link that decision to an allegation of serious misconduct by students, misconduct which turned out not to include criminal damage, is wholly unacceptable."*
- *"Other examples of actions by the principal which did not meet professional standards include..."*
- *"Such conduct undermined the board. It also undermines the trust and confidence of the board in the principal, including the essential trust and confidence that the principal would support and execute decisions of the board, and be seen to do so."*
- *"The board was of the view that the principal had not adhered to the board's direction in this matter."*
- *"Her actions call into question Ms. Joyce's professional judgment. Her ethical standards were also questionable"*
- *"This unnecessarily hasty decision exposed the school to the possibility of having an unsuitable person work with students in a very sensitive area."*
- *"Another example of the principal's judgment causing upset relates to ..."*
- *"By her conduct, I believe that essential trust, support and cooperation of staff has been seriously undermined."*

26. Under the heading of "staff morale", the chairperson concludes by asking the board "to decide if it believes that Ms. Joyce can regain the trust, support and cooperation of the staff."

27. Under the heading of "student discipline" it is stated:

"This, in the view of the board, shows poor judgment and an insufficient understanding of the stress experienced by students facing into Leaving and Junior Certificate exams. In the view of the board, the principal's actions were unnecessary, excessive and can only have added to the anxiety and stress levels of some students. The board is asked whether Ms. Joyce has the trust and confidence of students."

28. Under the heading of "Jesuit ethos", the report states that the board perceives that the Jesuit ethos which has characterised "the Jes over many years, is being eroded by the conduct of the principal." In this section of the report the chairperson asks the board to judge whether the principal shares the traditional values for the school, as well as the vision for the school into the future and whether she can lead the school back to its traditional ethos.

Applicable Disciplinary Procedures

29. There is no dispute between the parties as to the procedures that apply where disciplinary issues arise in connection with the performance by school principals of their duties. These procedures are set out in a document prepared by the Department of Education pursuant to section 24(3) of the Education Act, 1998 entitled "Towards 2016, Revised Procedures for Suspension and

Dismissal of Principals". This procedure is set out in a Departmental Circular No. 60/2009. At the beginning of the circular it is stated that the procedures are intended to comply with the principles of natural justice and provide, inter alia:

- "that there will be a presumption of innocence. No decision regarding disciplinary action can be made until a formal disciplinary meeting has been convened and the employee has been afforded the opportunity to respond to the allegations raised;
- that the employee will be advised in writing in advance of a disciplinary meeting of the precise nature of the matters concerned and will be given copies of all relevant documentation. In the case of a complaint, this detail will include the source and text of the complaint as received. A complaint should be in writing;
- that details of the allegations, complaints or issues of professional competence be put to the Principal concerned;
- That the principal concerned be given the opportunity to respond fully to any such allegations, complaints or issues of professional competence;
- That the principal concerned has the right to examine and challenge all evidence available and to call witnesses or persons providing such evidence for questioning;
- That the principal concerned has the right to a fair and impartial examination of the issues being investigated, taking into account the allegations or complaints themselves, the response of the Principal concerned to them, any representations made by or on behalf of the Principal concerned and any other relevant or appropriate evidence, factors or circumstances.

30. The procedure itself is broken down into four stages but allows for the possibility that the board of management of a school may proceed directly to stage 4 in given circumstances. The opening paragraph of stage 4 states:

"If it is perceived that the poor work or conduct has continued after the final written warning has issued or [emphasis added] the work or conduct issue is of a serious nature a comprehensive report on the facts of the case will be prepared by the Chairperson and forwarded to the board of management. A copy will be given to the Principal"

31. The process then continues as follows:

"The board of management will consider the matter and will seek the views of the Principal in writing on the report prepared by the Chairperson. The board of management shall afford the Principal an opportunity to make a formal presentation of his/her case. The Principal should be given at least ten school days' written notice of the meeting. The notice should state the purpose of the meeting and the specific nature of the complaint and any supporting documentation will be furnished to the Principal. The Principal concerned may be accompanied at any such meeting by his/her trade union representative/s or a colleague/s subjected to a maximum of two. The principal will be given an opportunity to respond and state his/her case fully and to challenge any evidence that is being relied upon for a decision and be given an opportunity to respond. Having considered the response the board of management will decide on the appropriate action to be taken. Where it is decided that no action is warranted the Principal will be so informed in writing within five school days. Where following the hearing it is decided that further disciplinary action is warranted the board of management may avail of the following options;"

The process then sets out the possible sanctions in the event of a finding of misconduct. These include the deferral of an increment, demotion, other disciplinary actions short of suspension or dismissal, suspension with pay, suspension without pay and ultimately, dismissal.

32. As might be expected, the procedures provide for an appeal and this is set out in appendix A to the Circular. For present purposes, paragraphs 1-3 are the most relevant:

"Disciplinary Appeal Panel

1. The board of management shall appoint a Disciplinary Appeal Panel which shall comprise;

- An independent Chairperson from a panel nominated by the Minister for Education and Science
- A representative of the recognised management body
- A nominee of the relevant teacher union

2. No member shall be appointed to the Panel to consider a case referred to the Panel who has had any prior interest in or dealings with that particular case.

Appeal Process

3. A Principal may seek a review of disciplinary proceedings by the Panel on one or more of the following grounds:

- i. the provisions of the agreed procedures were not adhered to
- ii. all the relevant facts were not ascertained
- iii. all the relevant facts were not considered or not considered in a reasonable manner
- iv. the Principal concerned was not afforded a reasonable opportunity to answer the allegation
- v. the Principal concerned could not be reasonably be [sic] expected to have understood that the behaviour alleged would attract disciplinary action
- vi. the sanction recommended is disproportionate to the underperformance or misconduct alleged

Grounding Affidavit of Plaintiff

33. In her grounding affidavit, the plaintiff complains specifically about the text in the July report referred to at paragraphs 25-28 above, and about other matters. She complains that the board has already considered the July report and made findings prior to the disciplinary hearing, that is meant to follow the delivery of the chairperson's report. She claims that at this stage, it will not be possible for her to challenge the findings made in the report as those findings have already been made, and that they have been made without her input or involvement. She claims that she was entitled to participate in the investigation process and that this is necessarily required as part of the fair and impartial examination of the issues envisaged by Circular 60/2009. Accordingly, she seeks orders requiring the July report to be set aside and the discontinuation of the current disciplinary process.

Replying Affidavit of Mr. Cleary

34. In his replying affidavit, Mr. Cleary, the chairperson of the board denies that any findings have been made. He states in his affidavit, that by the time of the board meeting of 14th May, 2015 *"your deponent had formed certain views and had prepared a report which reflected those views. The views recounted therein were my own. Insofar as the report refers to the views of the board such references are to views arrived at before April 2015 and which were discussed in the presence of the plaintiff over time."* He exhibits to his affidavit the minutes of the meetings of 3rd March, 2015, 15th April, 2015, 14th May, 2015 and 4th June, 2015. Mr. Cleary places great emphasis on those parts of the minutes that stress that the board could not discuss the substance of the concerns in the report presented to the board and that the principal must be afforded an opportunity to respond. He avers that the only amendments to the report as originally presented to the board comprised the deletion of two sections of the report, in respect of which the board did not think it appropriate to proceed to stage 4 of the disciplinary process. Mr. Cleary avers that when the board finished its deliberations at the meeting on 4th June, 2015 it was agreed that there was a case to be answered and that this should be done through the formal disciplinary procedure. Mr. Cleary denies that there has been any predetermination of matters. He further denies that the plaintiff has any entitlement to participate in the preparation of the report and that this is not a requirement of Circular 60/2009; nor in his view, is it a requirement of fair procedures that the plaintiff should be entitled to participate in the preparation of the report. He claims that if the plaintiff was correct in her contention that she has an entitlement to participate during the phase when the report is being prepared, that this would have impossible practical implications that would require the person compiling the report to mediate between versions of events and even find facts, when that is clearly the responsibility of the board.

35. As regard to the balance of convenience, Mr. Cleary argues that there is a process underway whereby all relevant matters can be resolved and which fully protects the rights of the plaintiff and that accordingly it is premature for the plaintiff to seek injunctive relief.

36. Mr. Cleary also stated that he himself will have no further role in any future disciplinary hearings, save to present the report. While this is not a requirement of Circular 60/2009, Mr. Cleary avers that this is consistent with the relevant procedures. Moreover, the defendant has agreed that at any disciplinary hearing, the plaintiff may have the assistance of legal representation, although that is not envisaged by the circular either. However, the defendant is prepared to accommodate the plaintiff in this regard because she is not a member of a union and will not therefore have the benefit of union representation.

Affidavit of Mr. Brian Flannery

37. An affidavit opposing the plaintiff's application was also sworn by Mr. Brian Flannery. Mr. Flannery is a member of the board in his capacity as delegate for Education and Youth in the Irish province of the Jesuits. Apart from having previous experience as a teacher, Mr. Flannery also has extensive experience in the educational sector generally and has served as a trustee nominee on the boards of management on a number of schools under the trusteeship of the Society of Jesus. He is currently also a member of the board of management of Crescent College Comprehensive in Limerick, as well as advising the Jesuit provincial on matters of trusteeship and governance of the Jesuit schools and colleges in Ireland.

38. Mr. Flannery states that he is familiar with the terms of Circular 60/2009 and is very conscious of the importance of adhering to the principles of fairness in the implementation of disciplinary procedures. He avers that at no point during the meetings of March, April, May and June 2015 did he, or any other member of the board, make or express any determinations or findings of fact adverse to the plaintiff. He said the board was very careful not to do this, being aware of the importance of adhering to the necessary procedures. He confirmed that the chairperson carefully outlined to the meetings not just the terms of the circular, but also the need to be fair to any affected party. He states that staff morale at the school is low and that concerns regarding the Jesuit ethos of the school have been the subject of long and concerned debate at various board meetings in which the plaintiff took a full part. He says that these issues having been before the board for some time, are issues of which the board has knowledge. However, he states that this does not mean in any sense that the board has *"found facts as against the plaintiff at the board meetings between 15th April and 4th June, 2015 as claimed by the plaintiff."* He avers that should the Court decline to grant the plaintiff the relief she seeks, the procedures provided for by the circular will be implemented by the board in a fair and considered way.

Second Affidavit of the Plaintiff

39. The plaintiff swore a second affidavit on 6th November, 2015. Her principle complaint in this affidavit is that the exhibits to Mr. Cleary's affidavit of 27th October, 2015 demonstrate the involvement of the board *"at all stages of the 'purported' investigation and completion of the Cleary report which is now used as a basis to commence proceedings against me"*. Moreover, the plaintiff asserts that: *"what is envisaged and expected by the Circular is that a final report which is the conclusions (sic) of the investigator taking account of the explanations of the Principal is presented to the defendant and on the basis of that report, a decision is taken by the Board whether to proceed to a disciplinary procedure."* The plaintiff goes on to say that: *"it is outside of the provisions of the Circular, and indeed the role of the defendant under the Circular, to consider various drafts of the report prior to it being finalised. Given that the defendant considered at least three versions of the report prior to it being finalised, it is clear that the defendant had a considerable opportunity to influence the report and the findings contained therein (including its own findings), had an effect over the direction of the report, all without having heard any explanations from your deponent"*.

40. Insofar as the chairperson had in his affidavit explained those parts of his report where he had expressed views of the board, and had explained that as referring to matters previously discussed by the board (before the onset of disciplinary proceedings against the plaintiff) the plaintiff makes the point that the mere fact that a particular issue, for example that of staff morale being low, is known to the board is very different to linking that issue to the performance of the plaintiff in her duties. The plaintiff avers that she was unaware of such criticism of her previously and claims that she had an entitlement to respond to any such allegation.

41. The plaintiff further claims that as a result of what she describes as the highly damaging comments made by the chairperson about her at the meeting of 15th April, coupled with the findings of the board contained in the final report of Mr. Cleary of 17th July, in her absence, that the board cannot determine allegations against her impartially at a disciplinary hearing. She says:

"They cannot but be tainted by Mr. Cleary's negative view of me as recounted in that meeting. The clear lack of demarcation between the investigation and disciplinary procedure, including the role of the defendant in both, means that the entire process is flawed and invalid."

42. The plaintiff goes on to say that the facts contained in the report of the chairperson are clearly established both on his part, and on the part of the board, and are established or found against the plaintiff without any input on her part. She claims that this is evident from the absolute language in the report, such as *"it is the view of the board that I have shown poor judgment."*

43. The plaintiff also made a complaint about a meeting that the chairperson had with members of staff, and what he said at that meeting, on 12th October, 2015. This was following upon the application by the plaintiff for ex parte relief. I do not think that anything turns on this issue and do not propose to address it any further.

Second Affidavit of Mr. Cleary

44. Mr. Cleary delivered a replying affidavit dated 12th November, 2015 in which he stresses that there is no question of the board having formed any views of its own and that to the extent that such phraseology appears in his report, it is clear that it is in his report from the very outset, prior to the board being furnished with the report at all. He again states that the only effect the board had on the content of his report was to request that two matters should not be included in the final version i.e. that two complaints should not proceed.

Submissions of Counsel for the Plaintiff

45. Firstly, it should be observed that there is no dispute between the parties that Circular 60/2009 is applicable to the plaintiff's employment with the defendant. The principle differences between the parties in this regard are: firstly, as to the exact requirements of Circular 60/2009 and secondly, whether or not there has been compliance with the procedures set out therein.

46. Ms. Bolger S.C. on behalf of the plaintiff submits that the terms of the circular clearly provide the right on the part of the plaintiff to participate in any investigation and for her views to be taken account of in the fair and impartial examination of the complaints themselves during the investigation. She submits that this requirement was breached by the defendant in view of the fact that the July report was formulated and finalised in the absence of any input on the part of the plaintiff.

47. Counsel relied upon a range of authorities including the case of *Minnock v. Irish Casing Company Ltd.* [2007] 18 E.L.R. 229 in which Clarke J. said:

"Firstly, while it is asserted on the part of the defendant's that Mr. Stewart is conducting a investigation, it seems to me that that is only partly true. As has been pointed out in some of the authorities, the range of preliminary enquiries that can be conducted may flow from one end of the scale where there is a pure investigation where no findings of any sort are made on behalf of the enquirer other than to determine whether there is sufficient evidence or materials to warrant a formal disciplinary process, and it seems clear on all the authorities that that type of pure investigation which does not involve any findings is not a matter to which the rules of natural justice apply and is not a matter therefore which the courts should interfere with At the other extreme there are inquiries which can make formal findings which may, for example, be part of a statutory process or the like in respect of which it does appear on the balance of authorities to be settled that the rules of natural justice do apply, and it may well be that in those circumstances the court would need to consider whether it is appropriate to intervene by making an interlocutory order where a case has been established that there has been a significant flaw in the process."

48. It is submitted on behalf of the plaintiff that in this instance, the report of Mr. Cleary was manifestly more than a mere evidence gathering exercise; that there are more than mere allegations in the report, there are findings both of the chairperson and of the defendant. Accordingly, it is submitted that the plaintiff was entitled as a matter of fair procedures, to have an input into the preparation of the chairperson's report.

49. It is further submitted on behalf of the plaintiff that both the chairperson and the defendant have made specific findings of fact in respect of the performance of the plaintiff in her position as principal and that these findings were collated entirely in the absence of fair procedures and natural justice, and that they are findings of fact that have been made prior to the disciplinary hearing taking place.

50. It is further submitted on behalf of the plaintiff that the defendant departed from the procedures set out in Circular 60/2009, which requires the chairperson to prepare a report on the facts of the case and to forward it to the board and the plaintiff. In this instance, the report was considered at the meetings of May and June 2015, and issues giving rise to the report had been considered at the meeting of April 2015. The plaintiff submits that in considering drafts of the report, including allegations against the plaintiff, and in making findings of fact against the plaintiff, both the chairperson and the defendant have acted in contravention of Circular 60/2009.

51. The plaintiff submits that it is clear from the authorities that the Courts will intervene to restrain a breach of a disciplinary procedure and refers in particular to the decision of Laffoy J. in *Giblin v. Irish Life and Permanent Plc.* [2010] IEHC 36.

52. It is further submitted that the defendant cannot but have prejudged all of the findings against the plaintiff (including those where it has made specific findings of fact), given its consideration of the various drafts of the chairperson's report and the meeting of 15th April, 2015 where serious views of the plaintiff as principal were expressed by the chairperson which then formed part of his findings. Moreover, it is submitted, the use of the language of findings is also evidence of prejudgment.

53. The plaintiff also relies on the decision of Laffoy J. in *McLoughlin v. Setanta Insurance Services Ltd.* [2011] IEHC 410. In that case, Laffoy J. found that the person charged with conducting the investigation had gone further than merely conducting an investigation and that she had made findings of fact. Laffoy J. noted that comments in the affidavit of the investigator bore "more of the hallmark of a reasoned determination against the plaintiff than merely an outline of why the invocation of the disciplinary process against the plaintiff was necessary". Laffoy J. considered that this suggested prejudgment on the part of the person conducting the investigation and the Court therefore restrained the investigation from proceeding further.

54. The plaintiff submits that the test for objective bias or prejudgment is set out in the decision of the Supreme Court in *O'Neill v. Beaumont Hospital* [1990] I.L.R.M. 419 where Finlay C.J. stated:

"The test is an objective test as to whether a person in the position of the plaintiff who is a reasonable man might reasonably fear that prejudgment expressed ... would prevent a completely fair and independent hearing of the issues

which arise”.

55. Furthermore, the plaintiff submits that where there is any doubt the plaintiff is entitled to the more favourable interpretation.

56. The plaintiff accepts that she is, in effect seeking a mandatory injunction and that accordingly she must establish a strong case that she will succeed at the trial of the action per *Maha Lingham v Health Services Executive* [2006] 17 E.L.R. 137 That said, the plaintiff places reliance from the decision of Hogan J. in *Wallace v Irish Aviation Authority* [2012] 23 E.L.R 177 in which Hogan J. suggested that the *Campus Oil* principles may require refinement in appropriate cases and that they are designed to be flexible and to be capable of adaptation to the specific circumstances of the case at hand. While noting that in that case the “plaintiff’s case appears particularly strong” he also noted that “it is only just and equitable that she be granted the interlocutory relief which she seeks, not least where (as here) the point is a net one of construction, not dependent on oral evidence or elaborate argument, and where damages would be an inadequate remedy”.

57. It is submitted on behalf of the plaintiff that she has a particularly strong case by reason of the following:

- i The plaintiff has a contractual entitlement to the application of fair procedures including the right to participate in the investigation conducted by the chairperson;
- ii The investigation of the chairperson was more than a mere evidence gathering exercise;
- iii There were no fair procedures or natural justice or contractual entitlements applied to the plaintiff prior to the chairperson’s report issuing;
- iv There have been findings of fact and prejudgment of the issues made by the defendant and the chairperson;
- v The plaintiff will not obtain a fair and impartial determination of the allegations against her due to the involvement of the defendant and the chairperson in the investigation;
- vi The plaintiff is at risk of dismissal and;
- vii There have being findings of fact made by the defendant, the same entity charged with conducting the disciplinary hearing.

58. Finally, the plaintiff submits that damages could not be an adequate remedy having regard to the damage to her reputation that she will sustain in the event of her dismissal. As to the balance of convenience, the plaintiff relies on the decision of Clarke J. in *O’Sullivan v Mercy Hospital Cork Limited* [2005] IEHC 170 in which he held:

“The fact that there may be difficulties for the hospital in dealing with the legitimate interests of all of the parties involved which difficulties are significantly compounded by the fact that this process would appear to have gotten off to a most inauspicious start does not alter the fact that the plaintiff is entitled to have her rights and her reputation dealt with in accordance with law. Where she has, as I have found, made out an arguable case that what is intended will be in breach of those entitlements I am satisfied that the balance of convenience would favour the granting of an interlocutory injunction unless some particular and exceptional countervailing injustice that will occur by reason of a delay could be pointed to. I am not satisfied that any such countervailing factor has been established and in particular I am not so satisfied provided that the full hearing of this action can, as I intend it will, be made ready for hearing in a relatively short period of time.”

59. The plaintiff submits that any inconvenience caused to the defendant by the granting of the relief sought will be short term and is alleviated by the willingness of the plaintiff to cooperate both in relation to the earliest possible trial date, and to participate in an investigation process which confirmed to her rights to fair procedures and natural justice.

Submissions on behalf of Defendant

60. The defendant submits that the plaintiff’s case centres around two points:

- (i) A claim that the plaintiff was entitled to participate at the report stage of the stage 4 disciplinary process i.e. that the chairperson should have sought out the views of the plaintiff in relation to the matters addressed in his report, and incorporated those views into the report and
- (ii) That the board (as distinct from the chairperson) has demonstrated bias or prejudgment that is fatal to the whole process.

61. In relation to the first point, the defence submits that the authorities are quite clear that an employee does not enjoy any entitlement to participate in the preparation of the report of the chairperson prior to the presentation of the same to the board. It is submitted that the procedure set out in Circular 60/2009 is a procedure that was the product of protracted negotiations (over a period of years) involving teacher’s unions, school patrons, management organisations and the Department of Education and Skills. It is submitted that had it been agreed that a teacher or principal should participate in the preparation of the chairperson’s report, it would have been reflected in the circular. In short, the fact that there is no such provision in the circular is not an oversight and such a significant provision should not be implied.

62. Counsel also relied on the authorities of *Morgan v. Trinity College* [2003] 3 I.R. 157, *O’Brien v. AON Insurance Managers (Dublin) Ltd.* [2005] IEHC 3 and *Minnock v. Irish Casing Co. Ltd. & Stewart (supra)*, all as authority for the proposition that the rules of natural justice do not apply to preliminary enquiries that are in their nature investigatory, and where no findings of any sort are made on behalf of the inquirer other than to determine whether or not there is a *prima facie* case to warrant a formal disciplinary process.

63. It is submitted on behalf of the defendant that there was no question of the chairperson or the board making findings in the preparation of the report and that all of the evidence makes it clear that the chairperson was at pains to emphasise to the defendant that the purpose of the report was to determine whether or not there was a *prima facie* case, and not to make any findings against the plaintiff. It is submitted that there is no finding in the July report which have an impact on the subsequent procedures; that everything remains to be determined with the full input of the plaintiff.

64. As to the plaintiff’s contention that the defendant i.e. the board (as distinct from the chairperson) has demonstrated

prejudgment, it is submitted that this is not supported by the evidence. Firstly, it is submitted that insofar as the plaintiff places reliance upon text in the July report that refers to views of the board or concerns of the board, this text has its origins in the April report i.e. prior to consideration by the board of the report prepared by the chairperson in relation to the principal which was presented for the first time to the May meeting of the board.

65. Secondly, the defendant places great emphasis upon the fact that from the very outset i.e. from the time that the board determined that the chairperson should prepare a report outlining issues of concern in relation to the principal, the board was reminded by the chairperson of the need to be familiar with the disciplinary procedure in advance of considering the chairperson's report and before making any judgment in the matter. Reliance is also placed upon subsequent board minutes that record the reminders given by the chairperson to the board, following the delivery of the chairperson's report to the effect that the principal must be afforded the opportunity to respond to the report and that there was not to be adjudication on allegations in the report, but instead a determination as to whether or not there was a *prima facie* case to be answered.

66. Counsel for the defendant argues that the plaintiff has misinterpreted those parts of the report which she alleges constitute findings of fact or conclusions in relation to the performance of her duties. He further argues that it is clear from a proper reading of the July report that the chairperson, in regard to these matters, is either making allegations and/or expressing his own view on the issues complained of but that in no sense does the report purport to express findings of fact of the board. In some cases counsel argues that where views of the board are expressed, they relate to matters previously discussed by the board i.e. prior to this investigation about which the views of the board would have been well known to the plaintiff. Accordingly, counsel submits that the matters complained of by the plaintiff do not constitute any evidence of the making of findings or the formation of conclusions by the board.

67. In response to other points it is submitted that the chairperson was doing no more than formulating an allegation and/or expressing his view on the issue.

68. The defendant responds to a number of other points on the basis that the issues raised refer back to historic events and that insofar as any views are expressed to be views of the board e.g. that staff morale is low, this could not be considered to be a finding of fact arrived at by the board between the months of April and July 2015 i.e. the report may reflect views of the board that predated this investigation and it is submitted that this does not constitute any findings of fact on the part of the board in relation to the conduct of the plaintiff. It is further submitted that the board can hardly be expected not to know matters that are notorious in the school and which have been the subject of much discussion by the board itself previously.

69. It is further submitted that the test of whether or not the disciplinary process is contaminated by bias or prejudice is an objective test i.e. would a reasonable person believe that the decision maker will bring an impartial mind to the matters it has to decide? Reliance is placed in this regard on the decisions of Denham J. (as she then was) in *Bula Ltd. v. Tara Mines Ltd. (no. 6)* [2000] 4 I.R. 412 and *O'Callaghan v. Mahon* [2008] 2 I.R. 514 in which Fennelly J. said that the test was one of a hypothetical observer, neither oversensitive nor careless of his own position.

70. Finally, the defendant submits that even if there has been any defect in the processes to date, there are significant and important safeguards provided for in Circular 60/2009. These include:

- The principal will have an opportunity to provide a written response to the July report;
- There will be an oral hearing at which she may be legally represented;
- The plaintiff will have an opportunity to call evidence and cross-examine witnesses at the oral hearing;
- The chairperson will have no further involvement in the process;
- The plaintiff has a right of appeal to an independent body, if she is dissatisfied with the decision of the board; and
- In the event of her dismissal, the plaintiff still has the remedies afforded to her by the unfair dismissal acts or she may challenge the outcome by way of judicial review.

71. The defendant submits that the balance of convenience does not favour the plaintiff in the light of the safeguards afforded to the plaintiff and in view of the alternative remedies available to the plaintiff.

Decision

Compliance with Procedures

72. The first question to be addressed in considering this application is whether or not there has been compliance by the chairperson with the procedures prescribed by Circular 60/2009. Counsel for the defendant has submitted that in construing these procedures, the Court should not do so as though the circular was a statute and should look at the procedures in a flexible and purposive way and I agree with this submission. To apply standards of statutory interpretation to such circulars might well make them unworkable.

73. The first step in stage 4 of the circular requires the chairperson to prepare a "comprehensive report on the facts of the case". Clearly the word "facts" in this context must be treated with some circumspection as to present a report that is solely confined to incontrovertible fact may well result in a report that contains so little information as to serve no useful purpose. That the procedure does not envisage the chairperson himself making findings is clear from the requirement of the board of the management, following receipt of the report, to seek the views of the principal in writing on the report.

74. It is quite clear that it is at that stage in the process that the principal is entitled participate and make her submissions, and not at the stage when the chairperson is preparing his report, although it must be said that there would be nothing to prevent the chairperson seeking out the views of the principal on the matters under investigation in the course of preparing the report. However, he is not obliged to do so on the basis of the procedures in their current format.

75. Moreover, this is consistent with the jurisprudence in the area, to which the Court has been referred. It is quite clear that the principles of fair procedures and natural justice do not apply to the investigator stage provided that, in the words of Clarke J. in *Minnock* "no findings of any sort are made on behalf of the inquirer other than to determine whether there is sufficient evidence or materials to warrant a formal disciplinary process."

76. Before considering this question i.e. whether or not the report contains findings, it should be observed that counsel for the plaintiff is correct in saying that the procedure envisaged by Circular 60/2009 was not exactly followed when the report was first available. The chairperson first brought his report on the principal to the May meeting of the board. Strictly speaking, in accordance with the procedures, he should at the same time have given a copy of that report to the principal. At that meeting, the board, having decided that there was a *prima facie* case, were unable to decide on how best to proceed and adjourned the matter for further consideration to its meeting on the 4th June, when it then decided to continue the stage 4 procedure and to seek the principal's views on the report. Firstly however, the chairperson had to amend the report further to reflect the direction of the board to omit one heading of complaint (having already omitted an other following the May meeting). The chairperson did not get around to attending to this until July and did not send the report to the principal until mid-August.

77. It is submitted on behalf of the plaintiff that, by the time the report was finalised, the board had effectively discussed and considered the content of the report on three occasions, the first being at the April meeting when a number of the same issues referred to in the July report were discussed in the context of the April report (into matters of concern in the school generally) and then again at the May and June board meetings. By reason of this, it is submitted, the board must by the time the July report was finalised, have reached conclusions adverse to the plaintiff (which it is further submitted are reflected in the July report) without having afforded the plaintiff the right to be heard.

78. There is no doubt that strict compliance with the procedures set out in Circular 60/2009 requires the chairperson to send his report to the principal at the same time that he sends it to the board. However, counsel for the defendant has submitted that it is necessary for the board to consider the report in the first instance in order to decide whether or not there is a *prima facie* case that merits proceeding any further with the matter. I do not think however that this is correct. There is no ambiguity about the procedure in this respect – it clearly envisages the chairperson delivering, simultaneously, his report to each of the board and the principal. As counsel for the defendant submitted in another context, these procedures were the subject of exhaustive negotiations and if it was intended that the board should be given the report in advance of the principal, then the procedures would have been worded accordingly. Even if a board determines that it does not wish to advance an investigation any further, after receiving a report from the principal, it seems to me that a principal would in any event be entitled to receive a copy and would most likely want to receive to a copy of the chairperson's report in case there are any adverse inaccuracies that a principal would not wish to see left uncorrected or in any way on the principals' record.

79. Furthermore, the detailed consideration and discussion of the report at meetings of the board (in this case on two occasions, disregarding the April meeting), in the absence of any response from the principal must inevitably lead to the possibility that by the time the board eventually receives the response of the principal, the board, or individual members of the board, will already have begun to reach conclusions, (based on the July report or its earlier drafts) notwithstanding whatever warnings may have been given to the board that it should not rush to judgment.

80. The July report itself contains a number of remarks or comments (set out in paragraphs 25-28) which by any standards could only be regarded as highly prejudicial to the plaintiff. A number of them are most definitely in the nature of conclusions and some are in the nature of rhetorical questions, begging only of an answer adverse to the plaintiff. A considerable amount of time at the hearing was taken up in discussing whether or not those parts of the July report that referred to "the views of the board" in fact represented the views of the board. However, I am not altogether sure that this really matters; it is clear from the authorities that where the investigator goes beyond the mere gathering of facts in order to determine whether or not there is a case to answer to warrant a formal disciplinary proceedings and makes findings or draws conclusions, the enquiry can not any longer be characterised as one which Clarke J. described in *Minnock* of a "pure evidence – gathering type" to which the rules of natural justice do not apply. In that case, Clarke J. held that the second defendant, who was conducting an investigation on behalf of the first defendant employer had purported to make what he described as findings and for that reason he granted an order restraining the continuation of the investigation pending the full trial of the action.

81. In the *McLoughlin* case, the human resources manager of the defendant was conducting an investigation on behalf of her employer. The board of the defendant had passed a resolution delegating the adjudicative function in any disciplinary hearing to an independent third party, and the human resources manager was to be responsible for assembling the relevant evidence and formulating allegations, if any, against the plaintiff. The resolution delegating the adjudicative function also recorded that the defendant had resolved to observe principles of fair procedures and natural justice at all times. However, Laffoy J. granted an order restraining the defendant from carrying out the investigation in the manner proposed because, inter alia, the affidavit evidence of the human resources manager indicated that she had made a "*judgment that the conduct of the plaintiff warrants her dismissal, presumably, because she considers it serious misconduct.*" Laffoy J. also referred to other comments of the human resources manager, which she did not quote but, which in the view of Laffoy J. pointed to a pre judgment on the part of the human resources manager in relation to the conduct of the plaintiff.

82. In this case, and as is referred to in para. 34 (supra) Mr. Cleary states on affidavit that he had formed certain views and had prepared a report which reflected those views. Counsel for the defendant submits that this is permissible and that if the chairperson's words are to be construed as a determination on his part that there is a case to answer, this is entirely consistent with the case law relied upon by the defendant. The chairperson's views are those referred to in paras. 25-28 (supra) which quite clearly reflect very negatively on the plaintiff in the performance of her duties and there must be a strong case that they go far beyond the gathering of evidence or the formulation of allegations based upon the evidence. Moreover, the circumstances of this case as a whole do not seem to me to be materially different to those that gave rise to interlocutory relief in the *Minnock* and *McLoughlin* cases.

83. In my view the plaintiff has established a strong case that at the full trial of the action, she will, notwithstanding the cautions given by the chairperson to the board when considering the drafts of the report at the May and June meetings of the board, succeed in establishing:-

1. That the chairperson and the board did not proceed with the investigation in accordance with Circular 60/2009, in that the chairperson did not distribute copies of his report to the plaintiff and the board simultaneously and the board proceeded to discuss the report at two meetings in advance of giving the same to the plaintiff, to the likely detriment of the plaintiff and/or;
2. That the July report contains not just a statement of the facts, but also findings and conclusions which have been made without affording the plaintiff any opportunity to respond, thereby depriving the plaintiff of fair procedures and natural justice, and/or;
3. If Circular 60/2009 envisages the making of findings as part of the preparation of a comprehensive statement of the facts, then it is clear that the plaintiff would be entitled to fair procedures and natural justice at that stage in the

process i.e. when the report is being prepared by the chairperson.

84. It is well established that in a matter such as this, damages will not be an adequate remedy for a person such as the plaintiff in the event that the investigation proceeds and she is dismissed from her employment, by reason of the reputational damage that the plaintiff would suffer consequent upon her dismissal.

85. As to the balance of convenience, while it is clear that an investigation of this kind is very disruptive to the orderly running of the school and therefore requires urgent resolution from the point of view of the defendant, nonetheless I am satisfied that the balance of convenience lies in favour of granting an injunction limited to restraining the defendant from continuing its investigation pending the full trial of the matter. Clearly an early trial date is desirable and I will address that by making appropriate orders as to delivery of pleadings.

Counsel for the plaintiff: Marguerite Bolger SC and Claire Bruton BL, instructed by Purdy Fitzgerald Solicitors.

Counsel for the defendant: Feichin McDonagh SC and Brian Foley BL, instructed by Mason Hayes & Curran.