

BETWEEN

ANNETTE HUGHES

APPLICANT

AND

IRISH BLOOD TRANSFUSION SERVICE

RESPONDENT

Judgment of Mr. Justice McDermott delivered on the 30th April 2019

1. The applicant was until her dismissal on 20th June, 2017, the Assistant Director of Nursing with the respondent. She was at the time of the initial application 61 years old, with 40 years' experience in the nursing service. The applicant was granted leave to apply for judicial review and seeks orders of *certiorari*, quashing the decision taken by Mr. Paul McKinney on behalf of the respondent to dismiss her on 20th June, 2017 and the decision on appeal dated 21st July, 2017, taken by the respondent's then Chief Executive confirming that dismissal. The applicant also seeks a declaration that the respondent erred in law and acted in breach of fair procedures.

Background

2. On 18th July, 2016, Ms. Mary McArdle, the respondent's Director of Nursing met four of the applicant's subordinates, who were managers within the organisation who had expressed a desire to meet her as a group to raise issues concerning the applicant's behaviour. Ms. McArdle took notes of this meeting in which she recorded various complaints made against the applicant. The complaints varied but central to each was the allegation that the applicant's behaviour had caused huge distress, due to alleged constant negative remarks by the applicant towards the complainants, lack of appropriate consultation, micromanagement and insinuations that she was being spoken about all the time; they also complained that the applicant took an adverse view of comments made by the complainants which were taken out of context. Two of the complainants became extremely stressed and cried during their interviews on the matter. A number of them felt that the applicant's behaviour placed them under huge pressure: all of them emphasised an alleged atmosphere of negativity which had been created in the workplace by the applicant. This was said to have been compounded by inconsistencies in the manner in which various issues were addressed by her and a constant feeling that she was undermining them as managers.

3. On 22nd July, 2016, Ms. McArdle held a meeting with the applicant concerning these complaints. Handwritten notes of this meeting taken by Ms. McArdle were furnished to the court. The applicant was informed that the four complainants had as a group raised a number of concerns including:-

- (1) The way managers were treated, namely that one could be in favour one minute and out of favour the next and treated badly;
- (2) The managers stated they could not continue to work in the current environment;
- (3) They felt like handing in their notices and were very distressed;
- (4) A complaint was made about criticism by the applicant of one member of staff to another in what was said by the applicant to be a confidential meeting or conversation and a sense of staff being caught in the "cross fire" which made the recipients of the criticism of a colleague feel very uncomfortable. Staff members told each other what had been said about the other and complained about being called in by the applicant to "just to sound off about another member of staff";
- (5) They alleged that the applicant was constantly spinning or misrepresenting something said by one staff member to other staff members in an inappropriate way;
- (6) There was no consistency in the applicant's approach;
- (7) The group experienced a lack of trust and confidence;
- (8) The applicant was always pushing for information about others;
- (9) They felt their autonomy was gone and they were being micromanaged and could not use their own initiative;
- (10) They felt that their professionalism was undermined by the applicant;
- (11) The applicant on occasions stated that she had no recollection of conversations which had taken place with the managers, so the complainants were made to feel as if they were lying and stories were changed by the applicant to suit herself;
- (12) There were a number of other different issues peculiar to each of the complainants;
- (13) The complainants emphasised that the behaviour needed to stop;
- (14) They were afraid to have a conversation because of the possible consequences and impact it would have;
- (15) Each of the complainants highlighted the need for a change in the applicant's behaviour and that they had to move forward.

4. Each complainant felt that one of the managers (J. L.) was treated differently and was being actively bullied by the applicant. As a result, she had become disengaged and each of them felt very uncomfortable about how she was spoken to by the applicant.

5. Ms. McArdle then records the following as the course of action directed by her as Director of Nursing and agreed with the applicant at this meeting concerning the complaints:

- (a) The applicant was not to speak to staff individually about the matter as they would not feel comfortable doing so and would only meet in a group. They were afraid of the fallout from the complaints;
- (b) Ms. McArdle recorded "what to do going forward, the need for dignity and respect.

... (3) draw a line in the sand.

(4) working as a team.

(5) need to build up trust again.

(6) what to do if it continues – Stop, I feel uncomfortable about this –

Address it as it occurs.

- We need to address this as staff are going on annual leave, you are to say the following to them:-

"I have been speaking to Mary and she has highlighted your issues and concerns. I apologise, things will change and we will discuss this when you come back from annual leave with a view to moving forward."

6. In a typed note of the interview, Ms. McArdle recorded *inter alia*:-

"I advised Annette that moving forward it was agreed that we would address this at a local level, draw a line in the sand and look at how we would build up trust again and that the behaviour would need to change. There was a need for dignity and respect to be upheld.

Annette was instructed not to speak to the staff individually about this, as they did not feel comfortable, they all stated that they were afraid of the fallout. As all the staff were going on holidays in the next week or two, Annette was instructed to approach them with the following statement:-

'I have been speaking to Mary and she has highlighted your issues and concerns. I apologise, things will change and we will discuss this when you come back from annual leave with a view to moving forward'

Annette agreed this and said she would speak to N. F. and J. L. that day (Fri. July 22nd) as she would be [in] Cork on Monday and Tuesday and they would be on annual leave on her return the following week. She stated that she would talk to E.O.C. on Monday (July 25th) and T. F(r). on Wednesday (27th)."

The last paragraph in that quotation appears to have been added to the typed note and did not appear in the handwritten note.

7. The applicant's note of this meeting and events indicates that Ms. McArdle said that she had been approached by the group. She wanted to draw a line in the sand about the matter and move on. She stated that she had spoken to one of the complainants J. L. regarding the matter and noted:-

"I apologise[d] for any hurt I had caused. J.. didn't want to discuss anything as she felt she [was]'raw'. I said that I didn't want to upset (sic) on holidays and wished her the best. She shook hands and said if there was anything further she should come to me".

She noted that she was not to discuss any aspect of the complaints with the four and was just to acknowledge what had happened and that "we would move on". She also noted in respect of the complainant N. F., that as she was leaving she went into her office to wish her well on her holidays and said that Mary had told her that they had met. She had told her that she wanted to acknowledge that and bear in mind that she wanted to draw a line in the sand and move on. She noted that Ms. F. smiled and then she left.

8. It was later alleged that the applicant failed to comply with the directions given to her by Ms. McArdle which gave rise to the disciplinary action taken against her and ultimately resulted in her dismissal.

The Disciplinary Procedure

9. The IBTS Disciplinary Procedure under which the case was addressed derived from the Disciplinary Procedure for employees of the Health Service Executive and re-drafted in alignment with it. It states that in general, an employee's immediate supervisor will deal with deficiencies in standards of conduct on an informal basis through discussion, appropriate assistance and informal counselling rather than through the formal disciplinary procedure. If, following the informal counselling stage, the employee continues to fail to meet the required standards then the disciplinary procedure should be invoked. The procedure sets out examples of conduct which may lead to disciplinary action including "Bullying harassment or sexual harassment" and "Refusal to obey reasonable instructions". It states that the purpose of the disciplinary hearing is to allow the employee to respond to the complaints before the organisation decides whether disciplinary action is warranted and that the final decision regarding disciplinary action may only be made when the employee has had the opportunity to state his/her case and plead any mitigating circumstances.

10. The procedure provides that in all cases of alleged serious misconduct an investigation into an allegation "may be warranted prior to a disciplinary hearing". Paragraph 3 of sub heading 5 "Stage Four – Dismissal or action short of dismissal" also states that "in all cases of alleged serious misconduct, a full investigation will be carried out." The investigation "will be conducted in addition to a disciplinary hearing and no decision on a disciplinary sanction will be made until a disciplinary hearing has been conducted". Some examples of Serious Misconduct are indicated in the procedure, including "Gross insubordination". Where a full investigation is warranted it will be carried out in accordance with the following principles:

- The investigation will be conducted thoroughly and objectively and with due respect for the rights of the employee to natural justice, including a presumption of innocence.

- The investigation will be governed by clear terms of reference.
- Every effort will be made to carry out the investigation without undue delay and to adhere to agreed timescales. However the timescales may be extended in exceptional circumstances...
- The employee will be advised of the right to be accompanied by a union representative or work colleague throughout the investigation.
- It will be considered a disciplinary offence to intimidate or exert pressure on any person who may be required to attend as a witness."

Following the completion of an investigation, the investigator must submit a written report of his/her findings and recommendations to senior management and the employee. If following an investigation there is a reasonable belief that the employee is guilty of the alleged misconduct a disciplinary hearing may be convened under Stage 4 of the Disciplinary Procedure to determine the appropriate disciplinary sanction. It should be noted that certain offences are said not to be subject to the "progressive stages of the disciplinary procedure" and may result in summary dismissal including "gross insubordination". However, notwithstanding that provision the offence alleged against the applicant was dealt with under Stage 4. Various principles are set out which are applicable to all stages of the Disciplinary Procedure, including:

- "• The employee will be advised in advance of the hearing of the precise nature of the complaint against him/her and will be given copies of any relevant documentation.
- The employee will be afforded the opportunity to state his/her case and challenge any evidence that may be relied upon in reaching a decision."

11. Stage 4 also provides that:

- "3. In all cases of alleged serious misconduct, a full investigation will be carried out.
- 4. The Human Resources Director or his/her nominee will notify the employee in writing, that they are required to attend a disciplinary hearing.
- 5. The written notification will include the following information;
 - The time and place of hearing
 - The status of the meeting, that it is a formal disciplinary hearing under the IBTS disciplinary procedure
 - The precise nature of the complaint
 - A copy of any documentation that may be relied upon at the hearing e.g. Attendance records
 - The right to be accompanied by a union representative or work colleague
 - The clear terms of reference of the investigation
- 6. The employee will be given sufficient notice of the hearing to enable him/her to arrange for representation and prepare a response
- 7. The employee will be notified of the precise nature of the complaint and the possible outcomes, dismissal or action short of dismissal.
- 8. A written record of the decision will be issued to the employee and kept on the employee's personnel file"

The Commencement of the Process

12. By letter dated 29th September, 2016, Mr. Nesson Rickard, Director of Human Resources, wrote to the applicant in that capacity advising her that the Irish Blood Transfusion Service (IBTS) was obliged to consider an investigation into two matters that concerned her, which were:-

- "(1) Allegations of inappropriate workplace behaviour and/or possibly bullying in breach of our Dignity at Work Policy on the basis of complaints raised by four employees. These matters will require investigation. I enclose a copy of notes taken by the Director of Nursing that set out the basis of these complaints. Having conducted a preliminary review of the issues raised and IBTS's duty of care to all employees, you included, I am of the view that the matters raised cannot be ignored and must be investigated. Further specific details of the complaint will be required and [are] being sought (see below).
- (2) Failure to comply with a reasonable instruction issued to you by a manger, the Director of Nursing, in a manner that could amount to insubordination. This relates to a discussion you had with your Director of Nursing where it is alleged you were instructed to address the above four employees in a specific manner and not to address them individually in respect of the substantive grounds for their concerns. Your line manager is of the view that you directly contravened the clear and unequivocal instructions she gave to you.

In making the decision to pursue the investigation which is provided for in our Dignity at Work Policy, I have taken into account that:

- The informal route offered to you at local level, which had been mediated by your DON, has not been successful,
- Some of the complainants involved stated that they do not want mediation at this point.

While the personnel involved in some facts connected to the above matters may be common, I have decided that the matter should be addressed under separate investigation, (albeit with the one investigator) to respect your entitlements to privacy. For that reason, each of the two issues will have its own Terms of Reference and ultimately, its own report.

I must assure you that no facts have as yet been established or findings reached. The purpose of the investigations will be to determine facts and make relevant findings. I will prepare a draft Terms of Reference in the coming days and send these to the relevant parties for review.

The purpose of the investigations will be to determine facts, make appropriate findings and to produce a report for each matter. The investigations will not be disciplinary hearings. The prospect of disciplinary hearings could only arise for an employee of IBTS if an investigation established facts and findings in respect of which management, having review[ed] the report, formed the view that the initiation of the disciplinary process was warranted. No decisions have been made about this at this time."

13. The letter also informed the applicant that Mr. Michael Stirling of Bridgespan had been appointed as an investigator and attached details of his qualifications. It was proposed that Mr. Stirling would conduct both investigations as a matter of efficiency in that some witnesses or parties were common to both issues. It also stated that the four employees had been requested to provide details in writing in support of their complaint or allegations "respecting your right to fair procedures". The investigator may obtain further and more comprehensive details of complaints that she would be asked to address. It was stated:-

"You will be provided with all such details prior to being required to attend any meeting. This information would be provided to meet fair procedures so that you can fairly reply to the complaints being made. Having regard to the IBTS's duties as employer, I cannot allow these matters to go unaddressed, but I accept that further detail will be required, with reference in our Dignity at Work Policy."

The letter enclosed a copy of the Dignity at Work Policy.

14. The Terms of Reference for the investigation into the alleged failure of the applicant to follow the instruction of Ms. McArdle stated that it would be conducted to determine the facts relating to "a direction issued to Ms Annette Hughes by Ms Mary McArdle in relation to the manner in which Ms. Hughes was to communicate with Ms L, Ms F, Ms Fr., and Ms. O'C., and Ms Hughes' alleged refusal to follow that direction". Specifically, the investigator was required to determine the facts in relation to whether the direction/instruction was given; whether such direction/instruction was adequately clear and unambiguous and whether Ms Hughes refused or failed to follow the instruction, if given. Paragraph 6.2 of the terms of reference was amended on or about the 18th October 2016 to state:

"While the Investigator shall conduct the investigation in accordance with the investigation principles set out in IBTS Disciplinary Procedure, he shall not make any disciplinary finding (e.g. that Ms. Hughes is/is not guilty of insubordination, misconduct etc.) nor shall he make any disciplinary recommendations (e.g. a recommendation that a disciplinary sanction should/should not be imposed in light of the investigation findings). As outlined in 4.8 above, it shall be a matter for IBTS senior management to consider what, if any, actions arise from the Investigation (including whether a disciplinary hearing should be convened)."

This amendment to the Terms of Reference was made following an email sent by the applicant to Mr. Rickard on 18th October enquiring as to the policy under which the investigation into this complaint was to be addressed. The applicant noted in her email that at that stage the terms of reference were "silent in this regard". She states in the email that she is "in agreement with the Terms of Reference as provided (subject to a response to my query)" but reserving the right to raise any additional issues or queries in respect of same. In an email on the same day Mr. Rickard wrote to the applicant:

"In reply to your query on the policy under which the investigation into the complaint made by the Director of Nursing against you is to be conducted, I can confirm that this allegation is to be investigated under the IBTS Disciplinary Procedure. As explained in my original letter, the purpose of this investigation will be to determine facts and make appropriate findings of fact. No disciplinary findings will arise from this investigation and the prospect of a disciplinary hearing could only arise if the investigation established facts in respect of which management, having reviewed the report, formed the view warranted the initiation of the disciplinary process. I have updated paragraph 6.2 of the Terms of Reference to clarify this..."

The applicant responded the following day stating "I confirm that the revised ToR are in order".

15. The court is satisfied that the investigation into the complaint made by the Director of Nursing against the applicant was initiated and conducted under the provisions of the Disciplinary Procedure and that this was made clear to the applicant.

The Investigator's Report

16. The Investigator's Report was completed on 12th April 2017. Mr. Stirling made the following findings in relation to the meeting between Ms. McArdle and Ms. Hughes on 22nd July 2016:-

a) Ms McArdle had taken care to prepare for her meeting with Ms. Hughes. She met Mr. Rickard prior to the meeting seeking his advice on her proposed approach to the meeting. She had also prepared handwritten notes to guide her through the meeting.

b) While Ms. Hughes argues that the notes Ms McArdle used at their meeting were shorter than the typed version and therefore questioned the validity of the typed version, Ms McArdle stated at her first meeting with the investigator that the note of the meeting on 22nd July was 'based on her preparation note' and written up on Monday 25th July. She specified that the note was typed up afterwards.

c) Mr Rickard confirmed that he had advised Ms McArdle to be very specific about any instruction she issued to Ms Hughes. This included instructing Ms Hughes 'not to tackle' any of the four ladies individually. He stated that he understood that Ms McArdle accepted his advice.

d) Ms. McArdle was clear and unambiguous in her instruction to Ms. Hughes that she should apologise to Ms L., Ms. Fr., Ms. O'C., and Ms. F., and that she should not engage with any of them in respect of the subject matter of their complaints about her behaviour towards them.

In reaching these findings, Mr. Stirling noted that Ms. McArdle and Ms. Hughes were in agreement that the applicant was instructed by Ms. McArdle to approach each of the four complainants separately, refer to their meeting with Ms McArdle and make a specific statement to each of them. Ms. McArdle gave evidence to Mr. Stirling that the statement she instructed Ms Hughes to make was written out in advance of the meeting with Ms. Hughes and was part of the preparation for it. Ms. McArdle asserts that the prescribed statement to be made by Ms Hughes was as follows: *"I have been speaking to Mary and she has highlighted your concerns. I apologise, things will change and we will discuss this when you come back from annual leave with a view to moving forward"*. The Stirling report also notes that the applicant gave a different account of the statement she was instructed to make to the complainants. In particular, the applicant insisted that she was specifically asked not to apologise to any of the four complainants. Ms. Hughes states that the instruction given to her was to say words to the effect of *"Mary has spoken to me and she has told me that you have expressed that you have issues with me, I have taken them on board and now I want to move forward and draw a line in the sand"*. The applicant stated however, that she had recorded the words to be used from memory so they might have been slightly different to those used by Ms. McArdle. Ms. Hughes was not furnished with a written copy of the statement she was to make to the complainants by Ms. McArdle. In terms of the applicant's subsequent dealings with the four complainants, Mr. Stirling found that she apologised to Ms. L., on 22nd July 2016. The applicant contended that this apology was not given in the sense described by Ms. McArdle but was in relation to separate matters pertaining to that complainant outside work. Ms. F. on the same day was advised by the applicant that Ms. McArdle had spoken to her and issues would be addressed in the future. No apology was made to Ms. F. The applicant met Ms. Fr., later in the week. She told Mr. Stirling that she had found this meeting difficult as she believed that she was close to Ms. Fr. She told Ms. Fr. that she was surprised that she had been involved in the group meeting with Ms. McArdle on 18th July but that she had then said what she had been told to say and left. No apology was given to Ms. Fr. She met with Ms. O'C, on the 28th July and "used the full statement with Ms O'C, and didn't apologise". Mr. Stirling found that the applicant had "been inconsistent in the manner in which she engaged with each of [the complainants]" and that "Regardless of whether Ms Hughes's or Ms. McArdle's account of the instruction is correct, it is agreed by the parties that a specific instruction was given detailing the message to be communicated. The instruction did not provide for any discretion or latitude in its delivery... I find therefore that Ms Hughes did not comply with the instruction given to her." The report concluded that:

"Ms. Hughes was given the instruction in the manner described by Ms McArdle. In other words, she was to meet each of the four ladies, acknowledge that they had issues and concerns, confirm that things would change and apologise. Furthermore, she was not to engage with any other aspect of their meeting with Ms. McArdle... I therefore conclude that on 22nd July 2016, a clear and unambiguous instruction was given by Ms. McArdle to Ms. Hughes and that Ms. Hughes failed to carry it out".

Disciplinary Proceedings

17. Following the completion of the report, Mr. Rickard wrote to the applicant on 27th April 2017 stating:-

"Having reviewed the report and all of the content of the report it is clear that not only did you fail and refuse to carry out a clear and unequivocal instruction given to you by your manager, which in itself is a gross act of insubordination, but that the manner in which you failed to follow the instruction was deliberately destructive. I am concerned that your line manager instructed you in a clear and unambiguous manner to apologise to each of Ms. L., Ms. Fr., Ms. O'C., and Ms. F., and not to engage with any of them in respect of the substantive subject matter of their complaints about your behaviour towards them. I am further concerned that in a situation that might diffuse[sic] or stop the matter from escalating you decided to undermine that process by making a decision not to carry out the instruction given to you. In fact, in addition to making a decision not to carry out the instruction you received, I believe you took a deliberate decision to behave and engage with the employees in a manner that was contrary to the instruction you received, thereby escalating the situation. In doing so you denied the IBTS the time and opportunity of finding a solution between you and the four employees in question. Also you further eroded the essential trust between you and the 4 employees in question, to a point that is irreparable in my view. Furthermore, your actions damaged the trust these employees have in their Director Of Nursing [sic]. The overall impact has been extremely damaging on the apheresis team as a whole and on the nursing department. It is my view that your behaviour in defying the instruction given to you by your manager and the manner in which you went about mis-implementing it with the individuals in question constitutes gross insubordination on your part and damages irreparably the necessary relationship for trust and confidence that must exist between employer and employee. I have decided to refer the matter to the Director of Operations as a disciplinary case. I have nominated the Director of Operations to manage the matter given my involvement in the matter to date. The Director has had no prior involvement in the investigation. In keeping with the principles of fair procedures, I will excuse myself from making any disciplinary decisions in this process. The Director of Operations will be in contact with you shortly with the details of the necessary disciplinary hearing. I will have no further role in the process (other than as witness if required by the Director of Operations)..."

Mr. Rickard concludes by pointing out to the applicant that the accusation of gross insubordination if borne out could carry a sanction up to and including dismissal.

18. On 28th April 2017, Mr. Rickard wrote to Mr. Paul McKinney, Operations Director of the respondent in relation to advancing disciplinary action against the applicant. Mr. Rickard states:

"I have reviewed Mr. Stirling's report and formed the view, based on his findings of fact, that Ms. Hughes is culpable of insubordination and also that the necessary relationship of trust and confidence which must exist with her as an employee has been irreparably damaged by the manner in which she carried out the insubordination - as described in the report and my letter to her dated 27th April. As Director of HR, it is my opinion that it is appropriate to initiate the disciplinary procedure. However, as I have been involved in commissioning the investigation and also as a witness, it is not appropriate that I have any decision making role in the disciplinary procedure. Accordingly, and in accordance with our disciplinary procedure I have nominated you to convene the necessary disciplinary hearing. I am leaving the matter to you to consider and to convene as you see fit in accordance with the disciplinary procedure. I remain available to you as a witness within that process should you think that appropriate but otherwise I should not be consulted in respect of your deliberations or any decision you feel appropriate to reach in due course."

Enclosed with this letter was a copy of the letter of 27th April 2017, a copy of the Stirling Report and a copy of the Disciplinary Procedure.

19. On 15th May 2017 Mr. McKinney wrote to the applicant explaining his role in relation to the allegation of gross insubordination against her and informing her of his decision to invoke the disciplinary procedure. The letter states:

"In his letter to me, while expressing his view that the investigation findings warrant the invocation of the Disciplinary Procedure, Mr. Rickard has made it clear that it is for me to decide whether I think it appropriate to invoke the Disciplinary Procedure. Having carefully considered the contents of the investigation report and related appendices, I have decided that the matters set out therein are of sufficient concern to require you to attend a disciplinary hearing under Stage 4 of the Disciplinary Procedure to address an allegation of gross insubordination (in respect of the conduct described in the investigation report). A copy of the Disciplinary Procedure is enclosed... I have decided to invite Mr. Rickard to attend the disciplinary hearing to formally present the findings of the investigation report, which he commissioned, and to afford him an opportunity to explain why he considers that your conduct amounted to gross insubordination, as set out in his letter to you of 27 April. You will of course be afforded an opportunity to respond to the investigation findings and indeed Mr. Rickard's evidence at the disciplinary hearing. You will also be afforded an opportunity to outline any mitigating factors you consider relevant. Furthermore, notwithstanding Mr. Rickard's stated view, I can assure you that I have not reached any decision in respect of this matter and the decision as to whether you have committed an act of gross insubordination is one for me alone to make having considered all relevant evidence as part of the disciplinary process..."

The disciplinary hearing

20. A disciplinary hearing took place on 23rd May 2017 during which the applicant made a statement and Mr. Rickard gave evidence. The applicant was accompanied by Mr. Jim Shanahan, an employee of the respondent. The applicant was not furnished in advance of the hearing with any memo of the proposed evidence of Mr. Rickard nor was Ms. Hughes or her representative present when Mr. Rickard was giving his evidence. However, this was a result of the decision by the applicant not to question Mr. Rickard in person but rather to be furnished with notes of his evidence during a break in the hearing and respond to his evidence. Mr. Rickard gave evidence of the findings of the Stirling report which he stated were very serious. He stated that the overall finding of the investigation was that the applicant failed to carry out a clear and unambiguous instruction given to her by the Director of Nursing to acknowledge the employees' concerns, confirm that things would change, apologise to the employees in question and not engage with them regarding the matter. It was, he stated, important to note that Ms. Hughes had not been asked for an admission of liability. He stated that he believed the applicant knew when she failed to act in accordance with this instruction from the Director of Nursing that the instruction was supported by him and that the failure to carry out the instruction had to be viewed in the context in which it was issued. Mr. Rickard stated that it was his assessment that the failure by the applicant to carry out the instruction of her Director of Nursing and the way she failed to implement it by confronting people and getting into substantive issues when told not to do so, was in the prevailing circumstances a gross act of insubordination by a senior manager in the organisation. He believed that her actions were intentional and added to the destabilisation of the team which she was responsible for managing.

21. Mr. Rickard then gave an account of factors which he viewed as "compounding factors", stating that he believed that the applicant had not been truthful in her account of the instruction given to her by Ms. McArdle or the actions she took to undermine that instruction. In his view the applicant not only failed to carry out the instruction but deliberately acted contrary to that instruction insofar as she did not apologise as instructed and it was reported that she confronted the employees about their complaints in one to one meetings over a number of days. He states that in his view the situation brought about by the applicant "has irrevocably damaged the essential trust and confidence management must have in a [Assistant Director of Nursing]" and the "findings of the report and impact of the ADON's gross insubordination (as set out in the report and contextualised in this document) have irrevocably damaged the essential trust and confidence between employee and employer". He further noted that throughout the investigation the applicant had failed to acknowledge any wrongdoing. Following his evidence Mr. McKinney asked Mr. Rickard various questions based on a discussion with the applicant from an earlier phase of the hearing. The applicant was given a handwritten note of Mr. Rickard's evidence and allowed to review same with her representative and then make representations. Mr. Rickard agreed to this facility but wanted the same facility given to him, namely that he would be given a right to reply to any comments made by Ms. Hughes. This was agreed by Mr. McKinney.

22. During the course of the hearing Mr. Rickard declined to answer a number of questions concerning issues which the applicant claimed to be relevant to the decision under consideration.

Mr. McKinney's decision

23. On 20th June 2017, Mr. McKinney wrote to Ms. Hughes rendering his decision following the disciplinary hearing. He stated that in reaching this decision he had taken account of Mr. Stirling's report, Mr. Rickard's letters of 27th April 2017 to the applicant and 28th April 2017 to himself, Mr. Rickard's evidence and her evidence at the hearing. Under the heading "PART 2 THE MAIN ALLEGATION" Mr. McKinney concluded:-

"In his investigation report, Mr. Stirling specifically concluded that '*A clear and unambiguous instruction was given by Ms McArdle to [you] and [you] failed to carry it out.*' In his letter to you of 27th April, Mr. Rickard accused you of not only failing and refusing to carry out '*a clear and unequivocal instruction given to you by your manager, which in itself is a gross act of insubordination but the manner in which you failed to follow the instruction was deliberately destructive*'".

The letter goes on to state the following:

"PART 4 MULTIPLE ALLEGATIONS

Mr. Rickard made it very clear to me in:

- (1) the letter that he sent to you on 27th of April 2017,
- (2) the letter that he sent to me on the 28th of April 2017,
- (3) his evidence at the disciplinary hearing,

That (in his opinion)

- (1) [You are] culpable of insubordination and also that the necessary relationship of trust and confidence that must exist with [you] as an employee has been irreparably damaged by the manner in which [you] carried out the insubordination.
- (2) that [your] failure to carry out the instruction of [your] DON and the way [you] failed to carry out the instruction of [your] DON and the way [you] failed to implement it (i.e. confronting people/ getting into the substantive issues when told not to). That [your] actions were intentional and added to the destabilisation of the team [you were] responsible for managing.

(3) that [you have] not been truthful in this process regarding [your] account of the instruction [you were] given by [your] DON or the actions [you] took to undermine that instruction.

(4) that [you have] presented a version of events that is inconsistent with the fact that a clear and unambiguous instruction was issued to [you] by [your] DON. This was not a situation where [you] failed to carry out an instruction, it is a situation where [you], in [his] view, deliberately acted contrary to the instruction. [You] did not apologise as instructed and it is reported that [you] confronted the employees about their complaints in one to one meetings over a number of days. This was entirely inappropriate given what [you were] told to do in a clear and unambiguous instruction. [Your] actions escalated a situation where the approach was to de-escalate.

(5) That throughout this investigation [you] had failed to acknowledge any wrong doing on [your] part.

PART 5 My Decision

...I have reflected on the allegations made by Mr Rickard, which I accept are very serious, and in particular the allegation that by your actions you committed an act of gross insubordination. Having carefully considered the evidence, I am satisfied that this allegation should be upheld. It is clear to me that Mr. Rickard and the DON, once they became aware of concerns raised by your colleagues, had agreed an approach that was designed to ensure a 'holding pattern' so that the serious HR and operational issues that arose in light of these concerns being raised could be parked until such time as everyone had returned from annual leave and the issues raised could then be pro-actively addressed. By not following this instruction and instead taking upon yourself to address the staff who had raised concerns in your own way, you jeopardised the holding pattern and compounded the situation. I am of the view that it is reasonable to conclude that you did so deliberately as you were annoyed/upset/frustrated at the fact your colleagues had escalated their concerns to your manager. Given it has been concluded that you were asked to apologise to your colleagues but ultimately concluded that you only apologised to one of them, I am satisfied that you deliberately decided not to apologise to the remainder... While at the hearing you stated that you did not accept that your actions in any way adversely impacted your colleagues or the working environment, I do not believe that to be correct. While it is true to say that the Department has continued its work of collecting apheresis platelets from donors, it has done so in a particularly challenging working environment, largely driven by inter-personal difficulties between colleagues. This is far from ideal and while I accept that you cannot be held solely responsible for the poor working relations between you and your colleagues, I believe your actions in not following the DON's instruction in the immediate aftermath of it being given served to further worsen relationships that were under strain at the time and, as a consequence, contributed to the evident effective breakdown in normal working relations with your colleagues..."

The letter went on to state:

"Having found that you committed an act of gross insubordination by your actions, I have had to carefully reflect on the disciplinary sanction warranted in your case. Under the IBTS Disciplinary Procedure a finding of gross insubordination constitutes a finding of Serious Misconduct, for which the sanction of dismissal without notice can be imposed, even in circumstances where an employee has no prior disciplinary record. I regret to inform you that I have decided your dismissal is warranted in the following circumstances:

1. I believe that you deliberately disobeyed a clear and unambiguous instruction given to you by the DON. I am satisfied this instruction was given to create a holding position to allow the DON and the HR department to take action to resolve serious issues within Apheresis departments in both Cork and Dublin. You did not have an issue with this instruction at the time it was given. It is my belief that instead of following the instruction given to you, you decided to take things into your own hands and challenge your colleagues in an unprofessional and provocative manner. Instead of calming the situation, I believe your actions served only to worsen the situation.

2. Your relationship with your direct reports has been fatally compromised as a consequence of your actions. This is best evidenced by the fact you cannot now meet with one of your colleagues without somebody else being in attendance. I believe that you have shown by your actions that you cannot be trusted to follow a manager's instruction. This makes the running of the Apheresis department extremely challenging. A DON cannot be expected to check that their instruction has been carried out at all times. There must be an understanding that all managerial instructions will be carried out effectively and efficiently. Without that, a DON is effectively being undermined in their role.

3. I do not see you being able to change your behaviour. You have shown no remorse for your actions in this matter. Quite astonishingly, you have failed to acknowledge that your actions further deteriorated the already strained relationships between you and your colleagues."

The letter concluded by notifying Ms. Hughes of her right to appeal against this decision to the Chief Executive within 7 days.

The Appeal

24. By letter dated 27th June 2017, Ms. Hughes wrote to Mr. Andrew Kelly, the respondent's Chief Executive, appealing against Mr. McKinney's decision dismissing her from her employment setting out seven grounds of appeal. They relate to the nature of the instruction given by Ms. McArdle; the applicant's relationship with Ms. McArdle and other employees; Ms McArdle's role and conduct in relation to the complaints by the four complainants; and Mr. Rickard's role in the disciplinary process. Other grounds of appeal were advanced based upon the applicant's work record which indicated that there were no complaints made against her in the seven years of her employment with the respondent or in her previous positions. The applicant also emphasised the fact that prior to 22nd of June the applicant was not made aware that her behaviour was causing any difficulty and that she considered that her relationship with two of the four complainants was very good. The appeal hearing was held on 7th July 2017 during which Mr. Kelly heard oral evidence from the applicant.

25. The appeal procedure is set out in the Disciplinary Procedure which states:

"The appeal hearing is not intended to repeat the investigation process but to address specific issues which the employee feels have received insufficient consideration such as:

- Mitigating circumstances
- Procedural deficiencies

- Severity of the sanction imposed”

26. On 21st July 2017, Mr. Kelly wrote to Ms. Hughes informing her of his decision to dismiss her appeal and affirm Mr. McKinney’s decision to dismiss her immediately from her position. He wrote “I stated from the outset that I was not re-opening the report of Mr. Michael Stirling or the outcome of the disciplinary hearing and the decision of Mr. Paul McKinney, the Operations Director but rather, in line with the Disciplinary procedure, the purpose of the hearing was to listen to the evidence you would provide under each ground of appeal.” In reaching his decision Mr. Kelly considered the Stirling Report, including the appendices containing the interview notes with Ms. McArdle and the applicant and the statements of the four complainants. He stated that he read the letter from Mr McKinney setting out the rationale for his decision to dismiss her. He also considered the information which the applicant adduced on appeal and mitigating circumstances. Mr. Kelly set out his reasons as follows:

- “There is no disagreement that an instruction was given to you by the Director of Nursing to meet the four staff members involved. The instruction was not to deal with the complaints but to acknowledge that you were aware there were issues, a line was being drawn in the sand and that you would build better relationships in the future. The only issues that are not agreed is that there was an exact form of words to be used and whether you were to apologise or not. You apologised to J. L. but not to the other three. It is reasonable to expect that when acknowledging your behaviour that this would be accompanied with some form of apology. The wording to be used is secondary to the instruction and its intent. You failed to carry out the instruction which was clear in its intent by dealing with the complaints and refusing to apologise to the four staff members in question. If you do not agree with the instruction that was given to you by the Director of Nursing then you could have raised your concerns with her. You did not do this at the time.
- You stated that you wanted to do the right thing. It is agreed by all that you were not to engage with the four complainants on their complaints. Yet on your own admission you acted contrary to this instruction by seeking to address the issues with staff members individually and confronting them in one to one meetings. By your own admission you probed too far with T.Fr., and you also had a discussion with O’C. You are a manager of many years of experience and should have known not to probe because that would not have been the right thing in these set of circumstances and could only serve to make the situation worse.
- You believe that you have a good relationship with two of the staff involved, one you expected no less from the other one had a performance issue which you were dealing with in conjunction with HR. The statements from all four would not support your contention.
- I believe that, at this stage, it would be extremely difficult, if not impossible, to build better relations with the three remaining staff of which two continue to report directly to you. If you were to build better relations with the staff concerned this would have to start with an acceptance by you that there are difficulties between you and the staff concerned and that your actions following the meeting with Ms McArdle on 22 July 2016 contributed to the deterioration of relations between you and the staff concerned. You would also have to accept that you did not follow the reasonable instruction of Ms McArdle and that not following that instruction contributed in a negative way to the situation with your colleagues.
- As noted above, it appears to me that you continue to refuse to accept responsibility for the harm you have done to the working relations between you and other staff members. You continue to refuse to admit any wrongdoing. Consequently, I do not believe that you have the capacity to build better relations with these staff and foster a positive working environment. This would have serious implications for the Apheresis section and the wider Nursing Department.
- While I have taken all mitigating factors into account, and considered lesser sanctions, I am of the view that the only appropriate sanction in this case is dismissal and I uphold the decision of Mr. McKinney.”

Other developments

27. In the meantime while the disciplinary proceedings in respect of the failure to carry out an instruction were underway, Mr. Stirling was investigating the Dignity at Work complaints raised against the applicant. This investigation had not concluded by the time Mr. McKinney made the decision to dismiss the applicant from her employment; however, it emerged following her dismissal that a report in respect of the complaint made by Ms. Fr. was completed by the 7th July 2017, the day of the applicant’s appeal hearing in front of Mr. Kelly: Mr. Stirling found that the complaint made by Ms. Fr. against the applicant was unfounded. This report was not made available to the applicant or Mr. Kelly until some weeks after the decision was made to affirm the decision dismissing the applicant from her employment.

28. The applicant states in her first affidavit sworn on 11th September 2017 that on 17th July 2017 that a magazine article was published in the respondent’s quarterly magazine bidding her a “fond farewell” prior to Mr. Kelly’s decision confirming her dismissal. The respondent subsequently wrote to all staff via email stating that this was a mistake. The applicant avers that she never received this email but that she became aware of it having been sent a copy of the email by a former colleague.

29. I do not consider that these developments provide grounds for granting the relief claimed.

Grounds for Relief

30. Paragraphs E(3) – (36) of the Statement of Grounds relate to the investigation by Mr. Stirling of the applicant’s failure to follow Ms McArdle’s instruction, the ensuing disciplinary proceedings and Mr. McKinney’s decision. It is said that in arriving at the decision to dismiss the applicant, Mr. McKinney:

- Failed to observe the Disciplinary Procedure of the Respondent in a material way.
- Proceeded to a disciplinary hearing without a full investigation having taken place following allegations of serious misconduct having been made (for the first time) to the Applicant by letter of the 27th of April 2017.
- Permitted the impermissible conflation of roles by Nesson Rickard who at various times in the process acted as the person directing an investigation, a witness in that investigation, as a person making the allegation of serious misconduct and as a witness at the hearing on the 23rd of July 2017.
- Acted disproportionately in that the sanction of dismissal in the circumstances was ravelly disproportionate to the facts

established.

31. Grounds of relief are then raised in respect of the limited appeal to the Chief Executive. The applicant argues that Mr. Kelly's decision upholding the applicant's dismissal was irrational, contrary to fair procedures and contrary to the respondent's disciplinary procedures because he relied upon the applicant's decision to appeal Mr. McKinney's decision as evidence of her inability to accept any wrongdoing and found that there had been an irrevocable breakdown in trust notwithstanding the fact that the applicant worked productively for over a year after the incident the subject of the investigations.

32. It is also argued generally that the manner in which the respondent conducted the process leading to the applicant's dismissal and in particular, the reliance placed upon Mr. Rickard's views in the disciplinary and appeal hearings would lead a disinterested but informed observer to the conclusion that justice had not been seen to be done.

The Investigation Process and the Invocation of Stage 4 of the Disciplinary Procedure

33. Numerous complaints are made in respect of the investigation process and the respondent's subsequent reliance on the investigation report as a basis for initiating the stage 4 disciplinary procedure. It is submitted by the applicant that the investigations undertaken by Mr. Stirling did not amount to the initiation of a disciplinary process and therefore prior to the disciplinary hearing that occurred on 23rd May 2017 in relation to the allegation of gross insubordination, a full investigation into the allegation of gross insubordination which first arose in Mr. Rickard's letter of 27th April 2017, ought to have been carried out in accordance with paragraph 5.3 of the disciplinary procedure. The applicant in her first affidavit of 11th September 2017 states that Mr. Rickard's letter of 29th September 2016 made reference only to "failure to comply with a reasonable instruction issued to you by your manager... in a manner that could amount to insubordination". She states that while the letter suggests that she disobeyed a direction of her line manager, there is no suggestion that this amounts to misconduct, or more importantly, serious misconduct or gross insubordination. She notes that the letter states that the investigations "will not be disciplinary hearings" and therefore claims that Mr. Stirling had no authority to conduct an investigation contemplated by the Disciplinary Procedure or Stage 4 thereof. Rather, it is contended that the two investigations undertaken by Mr. Stirling were to be carried out in accordance with the respondent's Dignity at Work Policy, and therefore could not constitute the full investigation into serious misconduct mandated in the Disciplinary Procedure. The applicant relies upon the fact that the Dignity at Work policy was attached to the letter of 29th September and to a statement in the same letter that the only reason given for initiating two separate investigations was to "protect the applicant's privacy". It did not state that the Stirling investigations were initiated or to be conducted in accordance with the disciplinary procedures: this only emerged in Mr. Rickard's e-mail of 18th October in response to the applicant's request for clarification of the matter.

34. Attention is drawn in the applicant's affidavit to the fact that if the investigation was conducted under the disciplinary procedure, the investigator would have been obliged to have permitted her to challenge any evidence relied on by the investigator. She states that:-

"it is clear that paragraph 6.2 of the terms of reference states: 'The investigator shall not consider IBTS's disciplinary procedure and/or make any recommendations of same' in other words the investigator under the Dignity at Work policy was not permitted to consider the safeguards provided for in the disciplinary procedure and... was specifically prevented from paying any regard to the fact that an employee is entitled to challenge any evidence that may be relied upon in the type of full investigation provided for in the Disciplinary Procedure".

It is clear, however, that paragraph 6.2 of the terms of reference of the investigation were subsequently amended to state that the investigator should conduct the investigation in accordance with the investigation principles stipulated in the disciplinary procedure, quoted above at para. 10 of the judgment. It was also made clear to the applicant that the investigation was to be carried out under the IBTS Disciplinary Procedure following which she agreed to the terms of reference for the investigation. I am not satisfied that there is any substance in this point.

35. At grounds E(7) and E(27) it is claimed that even if Mr. Stirling's investigation was carried out in accordance with the Disciplinary Procedure, the procedure adopted by him in compiling his report did not comply with fair procedures because the applicant was not accorded a right to cross-examine persons who gave evidence to him about Ms McArdle's complaint. However, in his affidavit of 1st December, 2017, Mr. Stirling states that it is his practice to allow cross-examination of witnesses in the course of an investigation. At para. 14 of that affidavit he avers that his "standard introduction to all witnesses specifically advises of this possibility at their first meeting" and that he uses "prompt notes for myself for each meeting with parties or witnesses to complaint hearings. These notes include alerting all witnesses to the fact that they may be cross-examined". He avers that the applicant made no request or attempt to cross-examine any witnesses during the investigation. The respondent submits therefore that the applicant can have no complaint in this regard. In addition, the respondent submits that no relief by way of *certiorari* is sought in respect of Mr. Stirling's investigation, his report or the findings of fact contained therein and any such claim is now out of time. I accept the respondent's submissions on these issues and I am not satisfied that the applicant is entitled to relief on this basis.

36. Mr. Rickard made a decision based on Mr. Stirling's report as detailed in the letter of 27th April to proceed under the Stage 4 Disciplinary Procedure. It is also clear that Mr. McKinney relied upon the report in deciding to convene a Stage 4 Disciplinary Hearing. It is argued by the applicant that reliance should not have been placed on this report other than to provide material which might have enabled an appropriate employee of the respondent to determine that the Disciplinary Procedure should be invoked under Stage 4 with a full investigation thereafter to be carried out. The report should not have been treated as the end product of an investigation mandated by the disciplinary procedure. I am not satisfied that this is so since the investigation carried out was clearly carried out under the IBTS Disciplinary Procedure and in contemplation of and in accordance with the procedural sequence set out therein.

Notice of the allegation

37. Counsel for the applicant submits that as a matter of fair procedures the employer had a duty to furnish the applicant with notice of the precise allegation made against her under the respondent's disciplinary procedure. It is submitted that although the allegation against the applicant originated, and indeed was investigated as a "failure to comply" with an "unambiguous instruction" the respondent subsequently engaged in reformulating and/or "retro-fitting" the allegation into an allegation of gross insubordination and gross misconduct in the form of a breach of trust and confidence. It is submitted that fair procedures require that the applicant ought to have been informed in advance of the Stirling investigation as to the seriousness of the allegations made against her and that if established, they might result in her dismissal. This requirement, it is said, enables an employee to answer the charges in a fair investigative process and to know what conduct is a potentially dismissible offence. The applicant relies on *Mooney v. An Post* [1998] 4 IR 288, *Frizelle v. New Ross Credit Union Ltd* [1997] IEHC 137 and *O'Leary v. An Post* [2016] IEHC 237 in this regard. It is further contended that the process leading to the applicant's dismissal was fundamentally different to that initiated in the letter of 29th September. It is submitted that the description of the second issue to be investigated in this letter does not contain the words "serious misconduct" or "gross insubordination": nor is there an allegation at this stage that the applicant "refused" to follow an unambiguous instruction from Ms. McArdle. In this regard it is contended that the allegation originally made against the applicant and

investigated by Mr. Stirling was impermissibly allowed to morph into significantly more serious disciplinary matters when the report was received by Mr. Rickard (*Condon v. Law Society* [2012] IEHC 173).

38. The respondent submits that it was at all times clear from the Terms of Reference that the Stirling report would be considered by Senior Management. It is submitted that it was appropriate for Mr. Rickard who commissioned the report in his capacity as Human Resources Director to consider its conclusions and categorise the findings made in the report as gross insubordination warranting a disciplinary hearing. It is submitted that the allegation of gross insubordination is not a new allegation levelled against the applicant following the investigation but rather a categorisation of the findings of fact made on the balance of probabilities by Mr. Stirling at the conclusion of the investigation. Mr. Stirling in accordance with the terms of reference was precluded from making any disciplinary findings. Therefore it is submitted that this is not a case in which any "morphing" of allegations has occurred; the core complaint made against the applicant was that she had done what she was instructed not to do and had caused distress to everyone involved. In supplemental legal submissions the respondent adds that the applicant was not asked to apologise for being a bully but rather that she was told to acknowledge the complainants' "issues and concerns", that things would have to change and she would take some responsibility for her part in interpersonal difficulties. In Mr. Stirling's notes of the investigation Mr. Rickard stated that "he couldn't say that Ms. Hughes had been asked to apologise, however, he would have expected some acknowledgment that there was an issue with her management style. Perhaps recognition that she was sorry that the complainants felt there was a problem – that would have been the context". Mr. Stirling's note of his meeting with the applicant on 30th January 2017 records that "Ms. Hughes stated that Ms. McArdle told her that there was no need to apologise but to acknowledge there were issues". The evidence on these matters was considered in Mr. Mc Kinney's decision quoted above. It is submitted that what led to the applicant's dismissal was not the wording of an apology; rather the concern that the situation should be defused; however, rather than defusing it, the applicant breached Ms. McArdle's clear instruction by engaging with the four complainants on the substance of the issues. It is submitted that the argument that the allegation has morphed into something more serious than that originally laid is neither sustainable on an examination of the relevant facts or the procedure applied: the plain finding was that the applicant refused to obey an instruction.

39. In his affidavit Mr. Stirling avers that he was "never asked and never investigated an allegation of 'insubordination'" and that the terms of reference "do not contain the term 'insubordination'". He states that he was not "asked nor required to 'label' Ms. Hughes' or Ms. McArdle's actions," in determining the facts of the case. The respondent also submits that it was clear at all times, at least from the email correspondence in or around 18th October 2016 that Mr. Stirling was operating under the terms of the Disciplinary Procedure rather than the Dignity at Work policy. The respondent relies on para.10 of Mr. Stirling's first affidavit in which he states:

"I say that at no time did I believe the McArdle/Hughes investigation was being conducted under the Dignity at Work Policy. Ms McArdle's 'complaint' was that the Applicant had failed to follow her instructions. This is not a 'Dignity at Work' issue"

Mr. Stirling states that in contrast to his emails sent in respect of this investigation, his introductory emails to the applicant and four complainants in the Dignity at Work complaints, each contained a copy of the IBTS Dignity at Work policy for reference.

40. It is also submitted that the respondent acted contrary to paras. 5.3 and 5.7 of the disciplinary procedure in failing to ensure that any allegation of serious misconduct was put to the applicant in advance and thereafter fully investigated. Counsel for the applicant emphasised that while the Stirling report found that "on the 22nd of July 2016, a clear and unambiguous instruction was given by Ms McArdle to Ms Hughes and that Ms Hughes failed to carry it out", the allegation of gross insubordination arose for the first time in Mr. Rickard's letter of the 27th April 2017. Furthermore, it is said that the reasons given at various times for the decision to invoke the Stage 4 Disciplinary Hearing and dismiss the applicant included findings that she had:

- "added to the destabilisation of the team you were responsible for managing";
- "worsen[ed] relationships that were under strain at the time and... contributed to the evident effective breakdown in normal working relations with colleagues" and that it would be "extremely difficult if not impossible to build better relationships with the three remaining staff"; and
- continued to refuse to accept responsibility for harm she had caused in the workplace.

which were never subject to a formal independent investigation and therefore the Stage 4 hearing was invalidly invoked: *Doherty and Carroll v. Health Service Executive* [2009] E.L.R 131, in which Laffoy J. held that "If there was no finding of serious misconduct... in relation to the plaintiffs, the defendant had no entitlement to proceed to a disciplinary hearing".

41. I am not satisfied to accept the applicant's submissions on this issue. The agreed Terms of Reference set out the parameters of the investigation. Mr. Stirling carried out his investigation independently, interviewed various witnesses and provided an opportunity to the applicant to cross-examine any witness: he made findings of fact which he duly submitted in his report to Mr. Rickard. It was not his function to formulate disciplinary charges: that was a course of action to be determined following a consideration of the report by management. The matter proceeded to the next stage under the Stage 4 procedure: a precise allegation was formulated of which notice was given to the applicant and a hearing was convened. That process was in my view fair and in accordance with the Disciplinary Procedure.

Role of Mr. Rickard

42. Ground E(24) states that in communicating his views to Mr. McKinney, the person tasked with determining whether disciplinary procedures should be invoked, Mr. Rickard contaminated the process and prejudiced the independent decision making capability of Mr. McKinney by forwarding detailed findings of fact made by him rather than merely allegations requiring investigation.

43. The applicant avers that in his letter of the 27th April when the applicant was first informed that she was being accused of gross insubordination, Mr. Rickard added significantly to the findings of Mr. Stirling. In addition to finding that she had failed to follow the instruction of Ms. McArdle he found that "the manner in which [she] failed to follow the instruction was deliberately destructive". Accordingly it is argued by the applicant that while the investigation found that the applicant had failed to carry out the instruction of her manager, Mr. Rickard went outside the ambit of the investigation by finding that she had made the decision to deliberately defy the instruction intending to cause damage. Without any allegation ever having been put to her of gross insubordination, Mr. Rickard then made the finding that she was guilty of gross insubordination. He then went on to state that she had escalated the situation and denied the respondent of the opportunity of finding a solution to the issues with the four complainants. In Mr. Rickard's view the applicant's conduct "eroded the essential trust between [her] and the four employees in question to a point that is irreparable". Further he found that the applicant had damaged irreparably the necessary relationship of trust that must exist between employer and employee, the apheresis team as a whole, and the nursing department. It is submitted that no assessment of this alleged damage to trust and confidence was ever undertaken by the respondent. I am not satisfied that this is a correct representation of what

happened.

44. It is submitted by the respondent that Mr. Rickard was the appropriate person, as a member of senior management, to review the Stirling report and to consider whether the disciplinary procedure should be invoked. He was not the complainant, and contrary to what is asserted by the applicant, did not have any role other than to request Mr McKinney to consider the matter: thereafter Mr. McKinney had to determine the appropriate course to take subject to the provisions of the disciplinary procedure and principles of fair procedures. It is contended that the respondent's disciplinary procedure required a further investigation prior to the disciplinary hearing. The gross misconduct alleged in the present case is gross insubordination arising from the applicant acting in direct contravention of a clear and unequivocal instruction. Such an investigation occurred, namely Mr. Stirling's investigation. On considering the findings in the report it was determined that the insubordination fell at the more severe end of the scale and that a disciplinary hearing should be convened. Reference in this regard is made to the *dicta* of Smyth J. in *Harrington v. Irish Life and Permanent Plc.* (Unreported, High Court, 18th June 2003, Smyth J.) which was approved by the Supreme Court in *Berber v. Dunnes Stores* [2009] IESC 10:-

"The following basic principles are applicable -

1. The employee[e] impliedly contracts to obey the lawful and reasonable orders of his employer (or his employer's delegate) within the scope of the employment he contracted to undertake... and
2. It has long been part of our law that a person [repudiates] the contract of service if he wilfully disobeys the lawful and reasonable orders of his Master. Such a refusal fully justifies an employer in dismissing him summarily."

45. It is submitted that the allegation of serious misconduct/gross insubordination was made explicitly prior to the disciplinary hearing and the facts giving rise to that allegation had already been investigated. Counsel for the respondent submit that the respondent was entitled to treat the applicant's failure to comply as a repudiation of the contract of employment and only did so following a thorough investigation and disciplinary hearing.

46. I am satisfied that an investigation under the Disciplinary Procedure was conducted and conclusions of fact were reached by Mr. Stirling. They were then considered by Mr. Rickard who had commissioned the investigation under the Disciplinary Procedure pursuant to the Terms of Reference agreed with the applicant. I am satisfied that Mr Rickard was entitled to consider Mr Stirling's report and draw certain inferences for the limited purpose of determining whether there was a basis upon which to proceed to a disciplinary hearing under the procedure: he had a duty to consider whether and if so what, alleged wrongdoing ought to be the subject of action under the Disciplinary Procedure. In doing so he assessed and characterised the seriousness of the conclusions reached in respect of the applicant's behaviour, its consequence for the organisation, other staff and the applicant as he was entitled to do and initiated the disciplinary procedure. He did so in the knowledge that the Disciplinary Procedure designates certain types of conduct as breaches of contract or discipline which is properly subject to the procedure and may be the subject of a serious sanction up to dismissal. He knew that the applicant had to be given clear notice of any allegation of wrongdoing which she could then address. He then notified the applicant that he intended to refer the matter to the Director of Operations, Mr. Mc Kinney as a disciplinary case on 27th April 2017 clearly setting out the nature and seriousness of the allegations of wrongful behaviour which he considered arose from the report and justified the consideration of a hearing. This was not a finding of fact on the allegation made nor was it an addition to the conclusion drawn by Mr. Stirling. Mr. Rickard's view clearly did not bind Mr. McKinney in any way. I am satisfied that Mr. Rickard acted correctly, fairly and in accordance with the Disciplinary Procedure in so doing. I am also satisfied that notwithstanding Mr. Rickard's views, the case was referred to Mr. Mc Kinney for an independent decision and he, in turn, informed the applicant that he would approach the case independently and reach his own determination.

47. Grounds E(28)-E(33) seek relief on the basis of Mr. Rickard's role and conduct in the Disciplinary Hearings both at first instance and on appeal. In her first affidavit, the applicant avers that there was a conflation of roles by Mr. Rickard and that he exercised influence over Mr. McKinney in order to secure the applicant's dismissal. In particular the applicant averred that:

"Mr. Rickard made a number of very disturbing claims which concern me without any factual basis and when it was not his function to do so. He made these allegations in the course of testimony to Mr. McKinney during the disciplinary process at first instance and also to Mr. Kelly in the course of my appeal against Mr. McKinney's decision to dismiss me... this was in circumstances where Mr. Rickard instigated and drafted the terms of reference for the *Dignity at Work* investigation, was a witness to Mr. Stirling's investigation, made the allegations of misconduct on 27th April, presented Mr. Stirling's report (for what it's worth) on the 23rd May 2017 and actually then gave evidence of new 'contextualising' allegations on the 23rd May 2017."

Mr. Rickard gave evidence during the investigation of "one or two situations" where he was not happy with the way the applicant managed a situation and that he had concern "about the approach based on his knowledge of and previous experiences with Ms. Hughes and of her working style which is very controlling". He referred to seeking legal advice in respect of some incidents relating to the applicant and to an ongoing pattern of behaviour of the applicant as "hot or cold". He also stated that while Ms. McArdle was "an excellent people manager, consistent in her approach, straight and honest in her dealing with people" this had not been his experience with the applicant and that she was unreliable and inconsistent at times. The applicant states that these allegations of inconsistencies, controlling behaviour and bad management were not investigated and bore no relevance to Mr. Rickard's role as witness in the investigation: nevertheless, they were received and formed part of the evidence upon which Mr. McKinney and Mr. Kelly decided to dismiss her. The applicant also states that Mr. Rickard made these fresh allegations which were beyond the terms of reference and findings of the Stirling Report for the first time at the disciplinary hearing. She states that:

"[Mr. Rickard's] role might certainly have been, legitimately, to present the report of a (lawful and proper) investigation had it taken place under the Disciplinary Procedure. But he did more than present someone else's report. Rather he had a mixed role with the role of witness and indeed fact finder and formulator of the charge. I say that even if such a mixed role were to have been permissible it is clear that Mr. Rickard's proposed evidence should have been provided to me well in advance of the disciplinary hearing. To provide the notes to me after Mr. Rickard had given his evidence was a direct breach of paragraphs 5.6 and 5.7 of the disciplinary procedures and also of the safeguards contained earlier in the disciplinary procedures document. I say that it was also unfair to simply allow Mr. Rickard, without adverse inference to refuse to answer what appear to have been very pertinent questions."

48. The applicant notes that at no stage prior to the findings made by Mr. Rickard and Mr. McKinney was the proposition that trust between her and the respondent and/or other employees of the respondent had broken down put to her or investigated properly. She states that Mr. McKinney devoted an entire section of his dismissal letter to Mr. Rickard's position on the matter and clearly relied very heavily on what Mr. Rickard gave in evidence. In his letter dismissing the applicant of 20th June 2017 Mr. McKinney clearly states

that he has taken Mr. Rickard's evidence into account and acknowledges that the purpose of Mr. Rickard's attendance at the hearing was "to elaborate on the contents of the letter he sent to [him] in April 2017, in which he accused [her] of having committed an act of gross insubordination".

49. Ms. Hughes further avers that Mr. McKinney was demonstrably taking direction from Mr. Rickard during the disciplinary hearing and that Mr. Rickard was permitted to set the parameters of the hearing. In particular, the applicant refers to Mr. Rickard's refusal to answer various questions put to him by Mr. McKinney, such as whether the complaints by the four complainants were orchestrated and whether he had actually seen the form of words of the instruction from Ms. McArdle. She complains that no adverse inferences were drawn in relation to this refusal to answer questions.

50. Counsel for the applicant submits that Mr. Rickard acted as accuser, witness, investigator and adjudicator during the investigatory and disciplinary procedures resulting in the applicant's dismissal: his alleged bias and the unfairness of the role adopted by him in the disciplinary process is the subject of ground E(43). From the outset of the investigation commencing with the letter of 29th September it is said that Mr. Rickard knew that Ms. McArdle had already made a finding in respect of the allegation of bullying insofar as she claims to have instructed the applicant to apologise. He went on to conclude that this was a matter that "could not be ignored". It is submitted that already there were two adverse findings made in respect of the applicant. It is said that despite the appointment of an independent investigator to investigate the two allegations, Mr. Rickard at all times exercised control over the process in stating that if there were any objections to the external investigator he would consider them. Attention is drawn to the statement of Mr. Rickard in his letter of 28th April 2017 to Mr. McKinney where, despite the fact that "gross insubordination" is not referenced, he states "I have nominated you to *convene* the *necessary* disciplinary hearing". At paragraph 6 of Mr. Rickard's affidavit of 21st February 2018 he states that he personally hand-delivered the Stirling Report on the McArdle allegation to Mr. McKinney. It is submitted that in light of the comments made by Mr. Rickard about the applicant during the disciplinary process, he should never have been involved in the process whether at its inception or its conclusion and that his participation in the disciplinary hearing was calculated to damage the applicant's character on the basis of his own personal assessment, rather than the evidence available in the form of the Stirling report. Reliance is placed on *Heneghan v. The Western Regional Fisheries Board* [1986] ILRM 225 in which Carroll J. held that it was highly objectionable for a manager who had a separate dispute with the plaintiff to be the defendant's principal representative in the procedures leading to the plaintiff's dismissal. The learned judge found that a main reason for the dismissal was an "element of professional antagonism" which existed between the parties and consequently the manager ought to have disqualified himself from dismissing the plaintiff as he had been "witness, prosecutor, judge, jury and appeal court". I am not satisfied that the applicant has established that Mr. Rickard's participation in this process was of that nature or that there is evidence of bias or behaviour that a reasonable person might perceive as bias in his actions and decisions. I am satisfied that Mr. Rickard exercised his role under the Disciplinary Procedure in accordance with his duty and function in the managerial hierarchy and the disciplinary process. However, evidence received from Mr. Rickard and considered by Mr. McKinney during the course of the hearing concerning other alleged wrongdoing will be addressed separately.

The Disciplinary Hearing

51. The applicant also raises other complaints in respect of the disciplinary hearing conducted by Mr. McKinney. In particular it is averred that far from finding that the precise nature of the allegation had not been properly formulated or put to the applicant and then investigated, Mr. McKinney permitted an expansion of the allegation and the introduction of fresh allegations which were neither put to the applicant or investigated. She states that in his letter dismissing her on 20th June 2017, Mr. McKinney found that she had taken matters into her own hands and acted in an unprofessional and provocative manner. He found that the working relationship she had with the respondent was "fatally compromised". It was also alleged that the applicant could not meet with her colleagues without someone else being present and that she could not be trusted to follow a manager's instruction and undermined the Director of Nursing in her role. Mr. McKinney found that she failed to acknowledge that her actions further damaged a strained relationship between her and other staff and that she would be unable to change her behaviour. The applicant states that it is clear at page 6 of the decision letter that in large measure the findings and sanction were based upon Mr. Rickard's evidence given on 23rd May 2017. She states that although some matters had been flagged to her in advance in the letter of 27th April 2017, additional matters were clearly given in evidence before Mr. McKinney. In this regard the applicant submits that she was not given advance notice of the allegations made against her during the hearing.

52. Complaint is also made by the applicant in relation to the lack of proper opportunity for her to cross-examine Mr. Rickard on his evidence at the hearing. Particular complaint is made of Mr. Rickard's failure to provide to the applicant a prepared note of his evidence in advance of the disciplinary hearing and the fact that the applicant had no advance notice of the extent of his criticisms of her. The applicant relies on *In re Haughey* [1971] IR 217, *EE v The Child and Family agency* [2016] IEHC 777 and *Lyons v Longford Westmeath Education and Training Board* [2017] IEHC 272 in this regard.

53. Counsel for the applicant submit that the applicant was not made aware of numerous matters in a manner which would have allowed her to make proper and effective representations or cross-examine, namely,

- a. Discussions with the four complainants concerning mediation and the fact that some of the complainants did not object to proceeding to mediation.
- b. The conversation between Mr. Rickard and Mr. McKinney when the letter of the 28th April 2017 was personally delivered to Mr. McKinney.
- c. The letter handed to Mr. McKinney on 28th April 2017.
- d. Email exchanges with Mary McArdle containing her opinions as to how the allegation should be formulated.
- e. Forewarning that Mr. Kelly would be relying on the bullying complaints of the four complainants to come to his conclusions regarding trust and confidence.
- f. Forewarning in relation to the bases upon which Mr. McKinney would make his findings in relation to trust and confidence.
- g. the farewell message in the respondent's magazine.
- i. the fact that Mr. Kelly had not considered the outcome of the Fr. complaint investigation.

It is submitted that the applicant was not fully on notice of the full content of many of the exchanges between the respondent's officers. I am not satisfied that these matters provide a basis upon which to grant relief. However, the court must also consider

whether the decision to dismiss the applicant was taken based upon or inextricably bound up with, information and opinions which were never made available in a timely manner to the applicant for scrutiny and challenge or ought to have been the subject of the investigation required under Stage 4. Two cases were relied upon by the applicant. In *Georgopoulos v. Beaumont Hospital Board* [1998] 3 IR 132 the Supreme Court held that fair procedures were breached "when a decision-maker acts on the basis of information which has been obtained outside of the hearing and which is not disclosed to the party adversely affected". In *Delaney v. Central Bank of Ireland* [2012] ELR 117 Laffoy J. held that the actions of the respondent employer in withholding documentation informing the opinion of a doctor in relation to the plaintiff's fitness to work was a breach of fair procedures as it deprived the plaintiff of the ability to test the contents of the documentation.

54. I am not satisfied that the decisions reached in this case were subject to the infirmities identified in the those cases. The central allegation was the subject of the investigation conducted by Mr. Stirling. All materials relevant to that investigation were set out in the appendices to the report. The applicant was given full notice of the allegation of serious misconduct that arose out of the conclusions of fact reached by Mr. Stirling and accorded an oral hearing at which she could challenge any evidence adduced and cross-examine any witness including Mr. Rickard, which she declined to do. The potential sanction of dismissal was also known by the applicant. It would be most unusual, unrealistic and indeed unfair if the consideration of the appropriate sanction did not involve a consideration of any mitigating or other factors relevant to the carrying out of her functions and the nature, status and importance of her relationship with her subordinates and superiors. These factors and all submissions made in that regard were considered by Mr. McKinney and Mr. Kelly. It is in that context that the exchanges about her prior history and staff relationships were explored and considered. I am not satisfied that there was any want of notice to the applicant or that this material ought to have been the subject of a further investigation under the Stage 4 process.

The Limited Appeal

55. A number of complaints are made regarding the conduct of the appeal as set out in grounds E(37) to (43). An appeal hearing was held by Mr. Andrew Kelly, the respondent's chief executive. As stated in Mr. Kelly's seven page and detailed letter to the applicant dated 21st July. 2017, the hearing was not a re-investigation but was, in accordance with the Disciplinary Procedure, confined to specific issues which the employee felt may not have received sufficient consideration such as mitigating circumstances, procedural deficiencies and the severity of the sanction imposed.

56. The applicant states that it is clear that Mr. Kelly did not consider it open to him to reopen the findings of fact made by Mr. Stirling during his investigation, or indeed the additional findings made by Mr. McKinney based on the Stirling report and the evidence of Mr. Rickard. It is said that Mr. Kelly reviewed mitigation only despite the applicant raising points of appeal based on further findings of fact being made against her that were not the subject of investigation in the Stirling Report.

57. The applicant also claims that Mr. Kelly's decision is irrational insofar as he states that the words that she was directed to use by Ms. McArdle were not central to the issue of gross insubordination. This is said to be irrational in light of the importance attached to the exact words she was instructed to say in the investigation and the disciplinary hearing. It is said that Mr. Kelly found the applicant guilty of matters that were raised by the four complainants on 18th July 2016 despite never giving an opportunity to the applicant to refute them. It is also claimed that he made incorrect findings of fact that she could not explain why the staff took the actions that they did, demonstrating that she did not really accept that she had to change her behaviour and that she did not have the capacity to develop positive working relationships with the staff members in question. These grounds in my view seek to attribute findings to Mr. McKinney and Mr. Kelly that were not made in respect of the four complainants in the Dignity at Work investigation. It is also claimed that Mr. Kelly's decision to affirm her dismissal was based partly on a criticism that she had pursued her right to appeal thereby refusing to accept Mr. McKinney's findings. I am not satisfied that this is so having considered in particular the operative part of the decision setting out the reasons for Mr. Kelly's conclusions in Part C of his letter. In addition. I am satisfied that in raising these grounds the applicant seeks to re-open the case on the merits on this application which is not the function of the court on this application.

58. I am satisfied that Mr. Kelly gave full and careful consideration to each of the grounds relied upon by the applicant in her appeal. It is clear that the applicant disagrees with his conclusion but the appeal was not a re-hearing: it was to provide an opportunity to the applicant to submit material or evidence in respect of each ground of appeal. This was provided and Mr. Kelly addressed each point raised on the appeal in his decision.

Alternative remedy, acquiescence and delay

59. It is submitted that the applicant had a more suitable remedy under the Unfair Dismissals Acts 1977-2015. In *O'Donnell v. Tipperary (South Riding) County Council* [2005] 2 IR 483 the applicant having being dismissed from his employment lodged a claim for unfair dismissal before the Employment Appeals Tribunal (EAT). Prior to the decision of the EAT, the applicant initiated Judicial Review proceedings seeking a declaration that the respondent was not entitled to terminate his employment in the absence of a proper system of inquiry and appeal. The Supreme Court held that the respondent's decision to dismiss the applicant was amenable to judicial review but nonetheless dismissed the appeal on the ground that an appeal to the EAT was the more appropriate remedy. Denham J. stated:

"The common law relating to the discretion to be exercised by a court, where there is an alternative remedy, is well settled. In a High Court judgment in *McGoldrick v. An Bord Pleanala* [1997] 1 IR 497 at p. 509, Barron J. held:-

'The real question to be determined where an appeal lies is the relative merits of an appeal as against granting relief by way of judicial review. It is not just a question whether an alternative remedy exists or whether the applicant has taken such steps to pursue such a remedy. The true question is which is the more appropriate remedy considered in the context of common sense, the ability to deal with the questions raised and principles of fairness; provided, of course, that an applicant has not gone too far down the road to be estopped from changing his or her mind. Analysis of the authorities shows that this is in effect the real consideration.'

...

In assessing the relative merits of the appeal to the Employment Appeals Tribunal as against judicial review, the true question is as to which is the more appropriate in the context of common sense, the ability to deal with the questions raised and the principles of fairness. I am satisfied on each of these grounds that the appropriate remedy is that of the appeal to the Employment Appeals Tribunal. It has the ability to deal with the questions raised and the principles of fairness."

On the issues of fair procedures Denham J. stated:

"The High Court was satisfied that this procedure, largely in relation to and by way of documentation, afforded the opportunity to the applicant to respond. I find a relevant factor also that the applicant had legal representation during the procedure. A judicial review considers the procedure adopted. It appears to me that the appropriate remedy here is, rather than to assess the procedure, to have a full hearing of the facts."

60. The respondent submits that the crux of the applicant's case is that there had been no investigation into serious misconduct/gross insubordination within the meaning of stage 4 of the disciplinary procedure and that the facts did not justify that finding; the fact that Mr. Rickard classified Mr. Stirling's findings as gross insubordination in or about April 2017 and communicated those views to Mr. McKinney thus contaminating the process; and Mr. McKinney's decision, notified to the applicant by way of letter dated 15th May 2017 to convene a disciplinary hearing regarding the allegation of gross insubordination which the applicant contends were never investigated. I am satisfied that under these principles the appropriate forum for the determination of these matters of fact was the Employment Appeals Tribunal under the Unfair Dismissals statutory code.

61. It is submitted that the applicant acquiesced to the procedures adopted by the respondent at all stages and that the court should have regard to same in considering whether to exercise its discretion to grant the relief sought. The respondents refer to *State (Byrne) v. Frawley* [1978] IR 326 in which the applicant was tried and convicted in the Circuit Court by a jury which had been selected under the Juries Act 1927, of which certain provisions were subsequently found unconstitutional by the Supreme Court in *de Burca v. Attorney General* [1976] IR 38. The judgment in *de Burca* was delivered during the course of the applicant's trial and one of the applicant's counsel was directly involved in the *de Burca* case. The applicant brought an application seeking his release from prison under Article 40 of the Constitution on the basis that the jury in his trial had been selected under the Juries Act 1927. The Supreme Court refused relief because the applicant had accepted the jury sworn at his trial and had made no complaint about its composition at the hearing of his appeal. Henchy J. held:

"Because the prisoner freely and knowingly elected at this trial to accept the empanelled jury as competent to try him, I consider that he is now precluded by that election from claiming that the jury lacked constitutionality... [t]he prisoner's approbation of the jury was affirmed by his failure to question its validity when he formulated grounds of appeal against his conviction and sentence, and when his application for leave to appeal was argued in the Court of Criminal Appeal."

62. It is submitted by the respondent that the issues now raised in these proceedings were not the subject of objection taken at the time and that in effect the applicant acquiesced in the procedures adopted without objection. This applies to her failure to object to the alleged deficiency in the right to cross-examine Mr. Rickard, the opportunity for which she declined; the applicant confined herself to commenting on his evidence at her request having being furnished with a note of it and having declined to be present when it was given. Furthermore, no objection was taken at the time to the fact that Mr. Rickard declined to answer certain questions posed during the hearing by Mr. McKinney though issue was taken on appeal. In addition the applicant availed of her right to appeal the decision under para. 9 of the procedure.

63. I am satisfied that the applicant acquiesced in the core procedures adopted and applied during the disciplinary process to an extent that disentitles her to the relief claimed in these proceedings in the exercise of the court's discretion.

64. The respondent submits that this application is made out of time. A number of decisions were made during the investigation and following the delivery of Mr. Stirling's report which led to the decision to convene the disciplinary hearing and the consideration of the allegation of 'gross insubordination' on the basis that an adverse finding could lead to dismissal by the 15th May 2017 and ultimately the dismissal decision of the 20th June 2017. It is said that leave to apply for judicial review was not brought within three months of the date upon which the grounds for relief first arose. The respondent relies on *Sloan v. An Bord Pleanála* [2003] 2 ILRM 61 in this regard. It is submitted that Order 84 rule 21(3) provides a mandatory requirement that the court shall only extend time if it is satisfied of specific matters.

65. It is submitted that no proper reasons have been offered on affidavit by the applicant such as to satisfy the court that there should be an extension of time and that the application should be dismissed. Reliance is placed on *Shell E&P Ireland Limited v. McGrath and Ors.* [2013] 1 IR 247.

66. I am not satisfied that this submission is correct. The decision to dismiss the applicant was communicated to her by letter dated 20th June 2017 and I am satisfied that the application for leave was made within three months thereof: the suggestion that it might have been made earlier is in my view unrealistic having regard to the matters complained of in the grounds which are said to have led to and underpin the decision to dismiss the applicant.

Proportionality

67. It is contended on behalf of the applicant that her dismissal was manifestly disproportionate in the circumstances. In *McSorely v. Minister for Education and Skills and County Kilkenny VEC* [2012] IEHC 201 Hedigan J quashed the decision of the respondent dismissing the applicant from her post on the basis that the decision was disproportionate. Having had regard to the principles set down by the Supreme Court in *Meadows v. Minister for Justice Equality and Law Reform* [2010] IESC 3, the learned judge stated:

"7.7 Clearly the circumstances under which the Court can intervene with a decision maker involved in an administrative function such as herein are limited. However as stated above the Court must have regard to the implied constitutional limitation of jurisdiction in all decision-making which affects rights. Any effect on rights should be within constitutional limitations and should be proportionate to the objective to be achieved. If the effect is disproportionate this justifies the court setting aside the decision. Clearly the Ministers decision has a profound effect upon the applicant's rights. Thus the Court must ask was the decision reached in this case disproportionate?...It seems to me that bearing in mind the inordinate length of time since the events in question and balancing that with her apparently very satisfactory performance of her duties as principal in the time between, there is in the decision to now remove her from her post, a manifest disproportionality that requires the Court to intervene. There must be an order to quash the decision of the Minister to dismiss the applicant from her post..."

68. The respondent submits that any assessment of the proportionality of the respondent's decision to dismiss the applicant must be made in accordance with the test for irrationality and unreasonableness set down in *O'Keefe v. An Bord Pleanála* [1993] 1 IR 39 and *The State (Keegan) v. Stardust Compensation Tribunal* [1986] IR 642. It is said that the principles set down by the Supreme Court in *Meadows* do not alter the standard of review set down in *O'Keefe and Keegan*. In this regard the respondent refers to *Donegan v. Dublin City Council* [2012] 3 IR 600 in which the Supreme Court stated addressing the submission that *Meadows* had significantly altered the scope of judicial review the court stated at para. 136: "In light of the comments already made as to the adequacy of judicial review, I would not find that *Meadows v. Minister for Justice* [2010] IESC 3, [2010] 2 IR 701 has substantially altered that position in this regard". In coming to this conclusion the court had regard to the decision of Murray CJ in *Meadows* at p. 723:-

"[57] In examining whether a decision properly flows from the premises on which it is based and whether it might be considered at variance with reason and common sense I see no reason why the court should not have recourse to the principle of proportionality in determining those issues...

[58] ... Application of the principle of proportionality is in my view a means of examining whether the decision meets the test of reasonableness. I do not find anything in the dicta of the court in *The State (Keegan) v. Stardust Compensation Tribunal* [1986] IR 642 or *O'Keefe v. An Bord Pleanala* [1993] 1 IR 39 which would exclude the court from applying the principle of proportionality in cases where it could be considered to be relevant."

and the dicta of Fennelly J., stating:-

"[422] Two fundamental principles must, therefore, be respected in the rules for judicial review of administrative decisions. The first is that the decision is that of the administrative body and not of the court. The latter may not substitute its own view for that of the former. The second is that the system of judicial review requires that fundamental rights be respected. Thus although some consideration of fundamental rights may be entered into in judicial review, this in no way affects the traditional position that such remedy cannot be used as a rehearing or otherwise to determine conflicts of fact."

It is therefore contended that although some extension of judicial review for reasonableness is envisaged so as to take account of the proportionality of the action, it is to be done on the basis of *O'Keefe* and *Keegan* rather than as an entirely novel criterion.

69. I am not satisfied that the decision to dismiss the applicant was in all the circumstances of the case unreasonable, irrational or disproportionate. The decision-maker gave a carefully considered reasoned ruling that the applicant committed an act of gross insubordination and that finding was upheld on appeal. The sanction of dismissal was the most severe available. However, that has to be viewed in the context of the serious nature of the issues confronting the employer which gave rise to the direction given to the employee. The consequences for the management and disruption of the smooth administration of an important service because of the applicant's behaviour were considered. Her record and employment history were taken into account.

70. I do not accept the proposition that the applicant was dismissed for unascertained wrongdoing or that the consequences of her behaviour were matters which could not be taken into account in respect of a person in a senior management position. These were matters which the decision makers were in a position to evaluate when considering the appropriate sanction.

71. Furthermore, I do not accept the submission that Mr. Kelly was wrong to consider that the applicant had not accepted the findings made against her when considering the penalty: this is not a situation in which the appeal was dismissed because she appealed the first instance decision. Mr Kelly carefully considered her appeal and addressed each of the points raised by her. However, a continuing failure to accept the underlying difficulty caused by her behaviour was one of the relevant factors when he came to consider the sanction to be applied. This was clearly set out Part C of the letter of 21st July 2017. The consideration of penalty follows a finding of fact was made that the applicant committed an act of serious misconduct amounting to gross insubordination. I am satisfied that, following that finding, her inability as a senior manager to accept that her misconduct caused difficulties in the workplace was a matter which a reasonable employer could take into account in considering whether dismissal was the appropriate sanction.

Decision

72. For all of the above reasons this application is refused.