

**THE HIGH COURT
JUDICIAL REVIEW**

Record No. 2013/279 JR

BETWEEN/

NORA KELLY

Applicant

-and-

THE BOARD OF MANAGEMENT OF ST. JOSEPH'S NATIONAL SCHOOL, VALLEYMOUNT, COUNTY WICKLOW

Respondent

Judgment of Ms. Justice Iseult O'Malley delivered the 6th August, 2013.

Introduction

1. The applicant is currently the principal of St. Joseph's National School in Vallemount, Co. Wicklow. The respondent Board of Management ("the Board") decided on the 22nd November, 2012 to demote her from that position to the grade of "mainstream", or ordinary, teacher. This decision was made on the basis that the applicant was guilty of "serious misconduct". An appeal to a Disciplinary Appeal Panel was, from the point of view of the applicant, largely successful in that it recommended that the disciplinary process should recommence at the informal stage of the disciplinary procedure; should warn the applicant as to her conduct and should ask her for an apology for her behaviour. The Board did not accept the recommendation and confirmed its original decision on the 12th March, 2013.

2. Leave to seek judicial review was granted on the 18th April, 2013, with a stay on implementation of the demotion. An early hearing date was fixed with the intention that the matter should be resolved before the start of the next school year. For that reason this judgment is being delivered in the first week of the long vacation. It will not delve into the factual history of the case, or the minutiae of rules pertaining to the different types of teaching contracts, to the extent argued over the course of the eight days the matter was at hearing. This is, in part, due to the need to give a decision in early course but mainly because the concern of the court in a matter of this nature is the propriety of the process, rather than the correctness of a particular view of an issue considered in that process.

3. The applicant seeks orders of certiorari in relation to the two decisions of the Board. She also seeks declarations that the decision of the 19th March, 2013 was reached in breach of Department of Education and Skills Circular 60/2009 entitled "Revised Procedures for Dismissal and Suspension of Principals section 24(3) of the Education Act 1998"; that the disciplinary procedure conducted by the Board was carried out in breach of the applicant's rights to natural justice, fair procedures and other Constitutionally guaranteed rights; that the discretion of the Board under the provisions of the Circular not to accept the recommendation of the Disciplinary Appeal Panel was not exercised in a fair and impartial manner and that the sanction sought to be imposed on the applicant is disproportionate in all the circumstances. There is also a claim for injunctive relief and for damages.

4. The Statement of Opposition asserts that the issues between the parties arise from a contract of employment not amenable to the public law remedy of judicial review. Without prejudice to that plea, there is an allegation that the applicant's grounding affidavit was "wanting in candour" on a key aspect to the extent that relief should be denied. The question of delay in relation to the decision of November, 2012 is raised. Without prejudice to any of these contentions it is pleaded in robust terms that the applicant was indeed guilty of serious misconduct warranting the sanction imposed upon her; that the disciplinary procedures were implemented fairly and properly and that the sanction imposed was proportionate.

Background

5. The applicant has been teaching in St. Joseph's for 32 years and was appointed principal in 2007. The school is a small one, with just under one hundred pupils in the current year. The complement of teachers is accordingly small but the exact description and ranking of the teaching staff at the material times is a matter of controversy.

6. The school itself, despite the difficulties between the Board and the applicant, appears to be an excellent one. It was the subject of a very positive Whole School Evaluation in 2012, which included a survey of the satisfaction levels of the parents of school pupils.

7. What has on occasion been described as "the major issue" between the parties arose from the presence on the staff list of a teacher, sometimes referred to as Teacher X. This man, who had a teaching qualification from an English university, was first appointed to a post in the school in 2001. The difficulty was that, despite giving a commitment so to do, he never acquired the necessary qualification to teach Irish and could not, therefore, be assigned to mainstream class duties in the normal course of events. Because of this he did not have "full recognition" as a teacher. Notwithstanding this fact, he was eventually deemed to be permanent. In June, 2009 the Board determined seniority rankings for the teaching staff and this teacher was placed on the list. This decision seems to have been heavily influenced by advice from the Catholic Primary School Management Association, whose view it was that he would have a legal cause of action against members of the Board personally if they acted otherwise.

8. The applicant has never accepted that the Board made the decision correctly and in this she is supported by the rest of the teaching staff. She has persistently raised the issue with the Board and at one stage appears to have sought Counsel's opinion on the matter.

9. The problem about allocating duties to the teacher was surmounted for some time by assigning him to a particular scheme called "Principals Release Day." In December, 2009 he took sick leave and never returned thereafter. During his absence, the school assigned him to the PRD and was then able to hire a substitute teacher to carry out that and ordinary classroom duties.

10. There is no question but that the Board acted in good faith in its dealings with this teacher. It sought advice from a number of quarters including the Education Secretariat of its patron the Archbishop, the Department of Education and the Catholic Primary Schools Managers Association. It also took legal advice. Having seen the responses, one has to have some sympathy with the Board in that what one might have thought were clear-cut concepts- qualifications and seniority did not seem, on the information the board was given, to have a single authoritative definition.

11. Equally, there is no doubt but that this situation caused a good deal of unhappiness on the part of the other teachers in the school, due to the knock-on effects on the entitlements and job security of the more junior staff members. This was an aspect with which the principal of the school was, of course, obliged to concern herself. The Board does not contend otherwise, but it came at a certain stage to the view that the applicant was simply refusing to accept the Board's position on the matter.

12. In 2011 the teaching staff wrote formally to the board to "appeal" the seniority rankings as determined in 2009. The Board decided that it would not change them at that time, despite the fact that the list by now contained the name of a teacher who had retired.

13. In April 2012, the school was informed that it was to lose a post because of a change to a particular scheme in which it had been participating. In subsequent weeks, the Department confirmed that the allocation of teachers to the school was: one principal, three teachers and one fixed term post (relating to the Principals Release Days scheme). The latter post was deemed to be allocated to the teacher with the least seniority, a Ms. O'Neill. This was the scheme to which Teacher X had been notionally assigned since before going on sick leave. He was therefore now notionally occupying a mainstream classroom post.

14. Thereafter, communications between the applicant and the Chairperson of the Board, Mr. John Horan, became increasingly fraught. The Chairperson was seeking a way to ensure that the school had a fifth teacher (not counting Teacher X) for the new school year, while the applicant was maintaining that she could not allocate duties to the staff until she had a full complement of qualified teachers (in which category she did not include Teacher X). She further maintained that, although she had undertaken the bulk of the work in solving the problem previously, it was the function of the Board to recruit and employ teachers.

15. It should perhaps be noted that the applicant had been suffering from ill-health for some weeks. She took a week's holiday in late August, during which time Mr. Horan spoke to a young teacher who had previously worked in the school and, apparently, offered her a "fixed term contract". The parties have offered differing hearsay evidence as to what she thought this meant. The Chairperson says that she knew that it only meant a contract of the sort she had had before (i.e. as a substitute) and was happy to take it. The applicant says the teacher thought it was a fixed term contract in the sense that teachers understand the phrase - that is, carrying very much more desirable terms and conditions than those afforded to substitutes. The teacher herself has not sworn an affidavit, whether because she was not asked or because she preferred to stay out of the matter (which would be completely understandable).

16. On the 27th August, 2012 the Chairperson of the Board instructed the applicant to "prepare a fixed term contract" for this teacher to cover for "Teacher X"'s continued absence for the coming school year. The applicant decided that without written documentation authorising her so to do from the Department she could not offer such a contract. On the 29th August, the first day of the new school year, the teacher in question turned up at the school but the applicant did not give her a contract. In her affidavit grounding the leave application, she has deposed that

"I genuinely believed that without documentary evidence from the Department of Education and Skills (DES) I could not validly do that and I genuinely believed that any such teacher would not be paid as advised by the DES in July 2012."

17. This sentence was the subject of intense analysis and dispute in the hearing, with the respondent contending that she could not have held such a belief and had therefore misled the court to the extent that relief should be refused on the basis of lack of candour.

18. Having heard that the contract had not been offered, the Chairperson convened a meeting of the Board. It was decided to commence disciplinary action against the applicant for failure to carry out a legitimate instruction. The specified instruction was that which required her to prepare a "fixed term contract."

The disciplinary process - Board of Management phase

19. The disciplinary process relating to school principals is governed by DES Circular 60/2009. This Circular was issued under the provisions of s. 24 (3) of the Education Act, 1998, which mandates the drafting of disciplinary procedures following a consultation procedure involving all the interested parties in the education sector.

20. In accordance with the Circular the Chairperson of the Board compiled a report for the Board, dated the 21st September and duly furnished to the applicant.

21. The report says in its first paragraph that it has been prepared, in accordance with the provisions of the Circular, in relation to the applicant. The second paragraph states that the report

"...arises from longstanding concerns about her conduct, particularly in relation to her dealings with Boards of Management and others over a number of years. These matters have "come to a head" in recent weeks and are now having serious consequences affecting the pupils in the school directly."

22. There is reference to the fact that the Circular provides for the possibility of commencing the procedure at Stage 4 in cases of serious misconduct, and that the latter concept covers "refusal to comply with legitimate instruction resulting in serious consequences."

23. The Chairperson goes on to state that all matters contained in the report were based on his own knowledge or on reports or documents which he believes to be true.

24. He refers to the seniority problem as being "the major issue which has given rise to conflict between the Principal and Boards of Management". The report deals with this issue as follows:

"The current seniority list was established by the Board of Management in June 2009. At that time and consistently and persistently since then the Principal has objected to it. Despite masses of correspondence and lengthy discussions at Board meetings at which this listing has been upheld the Principal refuses to accept the established position. Incidentally, the Board's position on seniority has been endorsed as correct by legal advice received, by the Education Secretariat of the Archdiocese and by the Department of Education."

While the Principal's approach has been difficult in itself, the impact on the school was kept to a minimum by keeping the matter at Board level. In more recent months however other teachers have become involved with the Principal and the matter became a subject of "protest" from them. It moved on from there to involve the parents when the Principal and three other teachers sent a letter to parents about the matter- in direct contravention of the wishes of the Board of Management. In the last couple of weeks the Principal has escalated the matter further by refusing to carry out instructions from the Board in relation to the recruitment of a teacher. On the first day of the school year, a teacher employed by the Board arrived at the school to take up duty but she went home when the Principal would not allocate duties to her. This has meant that the pupils are being denied the benefit of the school's approved complement of teachers, as per Department allocation. Additionally, because of the Principal's actions the Board of Management are now failing the pupils under the requirements of the Education Act 1998. These are the main reasons the Board views the conduct of the Principal to be of a serious nature as contemplated in Circular 60/2009.

25. The report then goes on to deal with what is described as *"the conduct being complained of [which] extends also to disruptive and un-cooperative behaviour by the Principal in her dealings with Boards of Management for a number of years"*. The first item under this heading is the resignation of a former Chairman of the Board, Mr. Philip Ryan, in September, 2009. In his letter of resignation to the patron he stated that he found dealing with the applicant *"extremely difficult"*: He described her as *"dictatorial and closed to the views of others"*. He said that he suspected that she was adversely affecting staff morale and believed that she had lost the confidence of some of the parents. The letter also referred to a previous Vice Principal who had been disappointed by his removal from certain duties and who was said to have resigned.

26. The Chairperson's report then mentions a former Chairperson of the Parent Teacher Association, Colette O'Connor, said to have resigned from that position in 2010 [actually, this occurred in 2009] and withdrawn her children from the school because of the behaviour of the applicant. The Chairperson said that Ms. O'Connor had told him directly

"that she did this because of the treatment that she received from the Principal at meetings which caused her great distress. At several such meetings the Principal "shouted and screamed" at her."

27. Reference is then made in the report to the resignation of a Board member, Betty McEvoy, on the 7th September, 2012 (that is, after the disciplinary process had begun but before the hearings). Ms. McEvoy's letter of resignation is quoted, wherein she says that

"Each Board meeting I have attended has been taken up by the Principal (who is also Secretary to the Board) shouting at anyone who does not agree (or cannot for legal reasons agree) with her point of view. This type of behaviour is totally unacceptable to me and is not what I signed up for.... In my opinion the Board is being thwarted by the Board Secretary at each meeting in doing what it is meant to do, e.g. set policies etc."

28. Ms. McEvoy referred to the position of the Chairperson as not being "easy" to hold. The Chairperson, having noted that, goes on to say

"In this regard and on a personal note I have to say that the behaviour of the Principal towards myself as Chairperson, both at Board meetings and in one to one meetings, has been deplorable. I have been subjected to verbal abuse, shouting, interrupting and general derogatory comments from her. This has continued almost from the very beginning of my appointment as Chairperson right up to now- a period of almost two years. I have endured this conduct for that period in the [now obviously mistaken] expectation that it would improve over time. As with other Board members all my efforts have been directed towards supporting the Principal and other teachers in the important work that they do. My approach has for whatever reason been rebuffed at every turn and I now realise that this pattern of behaviour which was being exhibited by the Principal before my appointment shows no sign whatever of abating. I have now reached the point where I believe that this conduct cannot be allowed to continue."

29. The Chairperson then referred to the minutes of a Board meeting held on the 21st August, 2012- at which the applicant was not present- where strong criticism had been expressed of the applicant's behaviour at meetings. The Board members had concluded that

"they would not be prepared to tolerate a continuation of this disruptive and un-cooperative behaviour in the future. The Members present insisted that if it were to recur at any future date that the Board meeting should be terminated immediately."

30. It was agreed at that meeting that these concerns were to be presented to the applicant by the Board "initially" via those minutes, which would be presented in the normal way for approval at the next meeting.

31. The report then goes on to deal with the fact that the Board had on a number of occasions suggested to the applicant that she should consult the INTO on the seniority issue. In May, 2012 she said that she would do so at the next Branch meeting but added that, as teachers from other schools would be there, she would send a letter to the St. Joseph's parents so that they would hear about it from the school first. The Board was "of the strong view" that this should not be done and that the consultation proposed by it should be with the Union executive. The applicant was requested, at a Board meeting and by e-mail from the Chairperson not to make contact with parents about the matter. Despite these requests, a letter was sent to parents, signed by all of the teachers, on the 22nd May, 2012.

32. The report then deals with the events leading up to and surrounding the refusal to offer the contract to the teacher on the 29th August, 2012.

33. In conclusion, the Chairperson says that

"While endeavouring to carry out [its statutory duties] this Board of management, and previous Boards, have had to endure most unacceptable behaviour by the Principal, Nora Kelly, at Board meetings and otherwise. The Principal's conduct has been most disruptive at Board meetings and has been the cause of the Board's time being diverted from important work. The current Board allowed this matter to continue up to now without invoking disciplinary procedures on the basis that it was hoped that it was not "directly" affecting the pupils' learning. Because of this and because Board members wished to act as "reasonably" as we possibly could in all the circumstances we were slow to consider sanctioning the Principal.

A point has now been reached however where it has to be clearly shown that such behaviour from the Principal is not acceptable and cannot be allowed to continue. While some more recent examples of the Principal's misconduct are of

necessity cited above the Board is also very conscious that unacceptable conduct has been happening over a period of years. This has caused the resignation of a Chairperson of the Board of Management, the resignation of a Vice Principal, the resignation of a Chairperson of the P.T.A. and the moving of children out of the school and now the resignation of one of the Community representatives on the current Board.

The more recent actions of the Principal are clear examples of refusing to comply with legitimate, specific, instructions from the Board of Management on a number of occasions with serious consequences, particularly for pupils in the school, and a continuation of the unacceptable behaviour towards Board members. Accordingly, the Board has been left with no option but to invoke the disciplinary procedures set down in Circular 60/2009 and to move immediately to Stage 4 of that process which deals with such serious matters."

34. In response to the Chairperson's report the applicant prepared a 37- page document with 78 Appendices. I have picked out the aspects that I consider to be of relevance.

35. The document deals with the issues raised by the Chairman under various headings, the first of which is "Refusal to comply with legitimate instructions resulting in serious consequences".

36. Under that heading the applicant denies the charge. She says that the instruction given was to prepare a fixed-term contract, which she could not do because it was not in accordance with DES advice/policy and CPSMA guidelines; it was not clear whether the absent staff member was on "sick leave"; the instruction was not in accordance with the allocation of posts as advised by the DES and no documentation had been provided by the Board to indicate that the instruction was "legitimate".

37. Reference is made to various advices received from the Department and from the CPSMA to the effect that fixed-term contracts are only to be awarded in certain specified circumstances, while a teacher covering sick leave is a substitute. In this context, and having regard to the email from Mr. McDonagh as to the allocation of posts for the year, it was not possible to give a fixed-term contract as proposed.

38. Further, she denies having "refused" to carry out the instruction - rather, she says, she requested the documentation to demonstrate that it was legitimate.

39. The applicant also queries the assertion that there had been "serious consequences" resulting from her actions. The fact that the school was operating without its full complement of teachers is described as "regrettable" and as placing an extra burden on the other staff. However, she believes that there is no evidence of any serious consequences for the pupils. All pupils had been adequately catered for, no classroom had exceeded the numbers permitted and the numbers were in fact similar to that pertaining in many classrooms around the country. It is said that there could, on the other hand, have been serious consequences for the teacher proposed to be engaged, if she had the impression that she was being hired in a fixed term capacity. The point is made that "fixed term positions are viewed as considerably superior to substitute positions".

40. The Board is criticised for its handling of the "teacher X" situation over the previous years, while the conflicting advices received by the Board are also noted. The teachers' protest is referred to and letters from the staff to the Board are cited.

41. Under the heading "Conduct", the applicant sets out the difficulties caused for her in carrying out her job in the context of the "teacher X situation", in terms of allocating duties to other staff and recruiting cover for him. She makes the point that these problems had impacts on other people, including the substitute teachers and, in some cases, pupils.

42. On p. 20 the applicant makes the following observations:

"Judging a person's conduct or behaviour is very subjective and can be greatly influenced by the frame of mind, agenda, constraints and pre determined views of those doing the judging. For example what some view as assertive, others view as aggressive; what some view as constructive, others view as destructive; what some view as determined others view as domineering; what some view as aggrieved others view as hysterical and so on.

I most certainly refute your claim in your report that my behaviour towards you has been "deplorable". I could equally list numerous complaints in relation to your behaviour towards me. However, as we have been dealing with very difficult issues it is perhaps not surprising that on occasions, due to the protracted nature of these issues, we have all become a bit frustrated

...I appreciate that none of us on the Board was in a position to prevent these difficulties from arising but I firmly believe that we are in a position to resolve them now if we work together."

43. In this context the applicant makes the point that on issues not related to teacher X there was usually a huge amount of agreement at Board meetings. She also cites the ability of both the Chairperson and herself to put their differences aside when necessary. She refers to a then-recent interview process, and comments that the external interviewer who sat with the two of them would, she believed, have had no idea what was going on or that the Chairperson was actually in the process of compiling his report against her at the time.

44. The point is also made that the Chairperson had given her a positive report in the Whole School Evaluation process, stating that he was "very happy" to leave the day-to-day running of the school to her.

45. In something of a change of tone, the applicant then goes on to accuse the Chairperson of bias and of compiling his report in a such a way as to cast her in the most unfavourable light. She considers it to be "totally disgraceful" that he makes "a totally unsubstantiated allegation" that her conduct was to blame for the resignations referred to by him. She deals with each of those persons individually in considerable detail, on occasion in scathing terms.

46. The Board met on four evenings to conduct the hearing- the 16th October, 22nd October, 7th November and 22nd November. The applicant was represented by the Deputy General Secretary of the Irish National Teachers Organisation, Mr. Noel Ward.

47. The format adopted, without objection, was that the Chairperson would chair the meeting and present his report. He would then take questions. Then the applicant would present her response and take questions.

48. A detailed note was taken of the proceedings over the four nights. I do not propose considering it to any great extent but will

pick out certain relevant matters.

49. Mr. Ward made objections to part of the content of the chairperson's report and in particular to the references to Mr. Ryan and Ms. O'Connor for a number of reasons including the fact that they concerned matters in the past involving persons no longer connected with the school. It was then decided that they, and Ms. McEvoy, would be invited to the next session of the hearing. There followed a prolonged exchange between the applicant and the Chair on issues in dispute.

50. The Chairperson said that the Board had recruited a teacher to begin on the 29th August. The school would then have had five teachers but the applicant had refused to allocate duties to her. He said that the applicant had told the Board at 3 pm on the 29th August that she could not employ the teacher on a fixed term contract under the guidelines. The Board had told the applicant that she could and she did not accept this.

51. The applicant said that she had given an explanation as to why she could not do it and there was nothing from the Department to say she could.

52. There was an issue as to whether the letter sent by the staff to parents in May, 2012 was properly under consideration. Mr. Ward made the point that there had been no instruction not to send it, just an expression of wishes. It is not entirely clear whether this objection was accepted or not but Mr. Ward repeatedly made the argument that only one instruction - in relation to the contract - was properly the subject of consideration.

53. The applicant distributed copies of her written response and the Board members started reading it. After about an hour they adjourned.

54. On the 23rd October the three individuals attended and stood over their criticism of the applicant. Mr. Ryan and Ms. O'Connor confirmed that the Chairperson had approached them in the recent past and asked them for their comments on the applicant. It was accepted by Mr. Ryan that the previous Vice Principal had written a letter of retirement rather than resignation.

55. At the meeting some time was spent debating the issue of the Vice Principal's departure. Minutes from meetings in 2009 were considered. The applicant commenced reading her oral presentation. In written form, this is another very lengthy document of about 100 pages including appendices. It ranges over a wide variety of topics, including the issues of the nature of fixed term contracts. The applicant said that she did not want to hand it over before she had finished reading it out, for fear that it would not be read, so the meeting adjourned again. I do not consider it necessary to quote from the document.

56. On the fourth night the applicant finished reading her presentation and handed it to the members of the Board. The Chairperson invited questions from members. There were none.

57. The Chairperson made his closing submissions. He referred to Mr. Ward's objection to events of three years earlier being brought up and said that the conduct complained of had been happening for many years and Mr. Ryan's resignation was a clear consequence of it. It was not, in his view unfair to the applicant to consider it. He said that he himself had been a General Secretary of a trade union for ten years and a member of the Employment Appeals Tribunal for five. He referred to Mr. Ryan's letter as having been "an integral part" of his report.

58. He said that his report had demonstrated that this and previous boards had had to endure "most unacceptable" behaviour from the applicant at Board meetings and otherwise for years. He referred again to the reluctance of the Board to invoke disciplinary procedures, and to his view that the point had been reached where it had to show that such behaviour could not be allowed to continue. It was stated that "this misconduct has caused serious disruption to the operations of the Boards of Management over a period of years". These, it was said were "most serious matters".

59. Mr. Horan went on to say that "more recent actions of the principal are clear examples of refusing to comply with legitimate, specific, instructions from the Board of Management on a number of occasions with serious consequences". In this category he included the letter to the parents.

60. In relation to the contract issue he said that he did not believe that any of the explanations put forward constituted in any way an adequate excuse.

61. Complaint was made of the fact that the applicant had notified parents that she was being subjected to disciplinary proceedings, which had led to the Board being subjected to "nasty allegations" from parents.

62. It was stressed that the most important thing was that the children were still without a full complement of teachers twelve weeks after the start of the school year.

63. Mr. Ward then made his closing submission. He said that a process that had been introduced with the words "in the light of recent events" had in fact relied heavily on "old material from persons who have long since ended their connections with the school" and made submissions on the content of the evidence from those persons.

64. The Board was asked to be objective in its deliberations. Mr. Ward noted the difficulty for Board members, who might feel that they were being asked to choose between their Chair and their principal.

65. Mr. Ward submitted that there were only two matters before the board- the principal's alleged conduct at meetings over a number of years and the alleged refusal to comply with the instructions. It was again submitted that there was only one instruction in question. He said that it was clear that the conduct was by far the lesser charge and noted that not one of the Boards the applicant had been involved with since 2007 had ever initiated a disciplinary process, even at the stage of verbal warning.

66. On the "instruction" issue, Mr. Ward referred to "the elephant in the room" - the position relating to teacher X and the principal's objection to the board's handling of the matter. He referred to her unblemished record, the support of the staff and a majority of parents and the excellent Whole School Evaluation. He submitted that sanctions were not necessary or appropriate and would be seriously disproportionate. He asked the Board not to adopt a punitive approach.

67. When the hearing concluded on the 22nd November, the Board (not including the chairman) deliberated for, it appears, about an hour. The minutes of that portion of the meeting are set out in full as follows:

"Minutes of Board of Management Meeting

St Joseph's National School

Held on 22 November 2012

In Attendance: Don O'Sullivan, Fr Teddy Downes, Brenda Kavanagh, Gerard Kelly and Margaret Sweeney

*First item: Don O'Sullivan selected as "acting" Chairperson. **Agreed unanimously***

1. Reviewed emails from Noel Ward (INTO) and John Horan (Chairman of BOM) Emails discussed -1) 12th Oct from Noel to John & John's response

Subject: BOM Meeting 16th October 2012

2. 12th Oct from John Horan to Noel Ward

Subject: BOM meeting 16th October 2012

3. 19th Oct from John Horan to Noel Ward

Subject: Valleymount N.S

2. Don circulated emails as outlined above, to the Board members. Don then circulated circular no. 60/2009 page 17 & 18 stage 4. re the various disciplinary actions appropriate for deliberation.

*3. It was then put to the vote that all board members were satisfied that all relevant facts of the hearing were addressed and that the Board were equipped with sufficient information to progress to the next stage of deliberations. **Agreed unanimously.***

*4. A second vote was taken to ascertain if the board members were all in agreement that the Principal had been given appropriate time scale and hearing to deliver her response in relation to accusations being brought against her. **Agreed unanimously.***

5. Each Board Member was then given an opportunity to give their views, based on the information afforded to them over the entire Disciplinary hearing:

Brenda Kavanagh: Brenda felt that no action should be taken against Nora Kelly based on the fact that the situation has only escalated to this level as a result of the ongoing issue with Teacher X not being dealt with appropriately. It was Brenda's opinion that this issue was the primary cause of ongoing issues in the school. She felt that as no disciplinary action was being taken toward Teacher X, why should Nora Kelly be in this situation. She made comment that she spoke for all teachers by saying if Teacher X were to return to the school that the situation would escalate further.

Don O'Sullivan: Don initially responded to Brenda's comment about the non disciplinary action being taken on Teacher X. Don advised Brenda that the Board were acting on legal advice that we as a Board could not issue Disciplinary action on Teacher X as he was on Sick Leave. However, we were in a position to reconsider this once Teacher X had returned to the school. Don then said that he felt that the BOM could not continue to function in a productive and united manner if Nora Kelly were to continue in her position on the Board and as Principal of the school. He felt that should Nora continue to serve on the Board that we would have to disband as a board.

Gerard Kelly: Gerard agreed with Don in relation to his comments regarding Nora's continuing serving on the Board. Gerard also concurred in Dan's opinion that should Nora continue in her current role that the Board will be left with no option but to disband. Gerard acknowledged the ongoing issues regarding teacher X and accepted that it is a contributing factor to the current situation. Gerard expressed great concern regarding the schools lack of its full complement of teachers and the effect this was having on the pupils and parents and on the school.

The situation regarding the school not being afforded its full complement of teachers is a priority issue that needs to be addressed for the sake of the pupils.

Fr. T Downes: Fr Downes referred to the verbal abuse he was exposed to by Nora Kelly in his dealing with her on a one to one basis and at BOM meetings. Fr Downes said that Nora's conduct was intolerable. He agreed that her uncooperative behaviour and conduct, her obsession regarding the teacher X situation and her persistence in challenging and the non-acceptance of all decisions made by the Department of Education, the BOM, the INTO, and legal advisors regarding the Teacher X situation has brought these ongoing issues to a head. While in turn has instigated this action to be taken by the BOM.

Margaret Sweeney: Margaret agreed with the comments/views from all parties on the Board present. She also acknowledged the frustration that Nora may have experienced in relation to the non resolution of the situation regarding Teacher X However she did not agree that these possible frustrations warranted the disruptive conduct of Nora Kelly, her objection to act in accordance with Board instructions and her lack of recognition for the status or authority of the BOM. She agreed with Gerard Kelly that the issue regarding the school's current shortfall in teachers is of paramount importance, and Nora's objection to comply with Board instruction to issue a contract to a teacher recruited by the board on the 29th Aug has had a detrimental effect on the school and its pupils. It was her opinion as a result of Nora's communication to the parents of the school in part advising them that the Board were taking disciplinary action against her has contributed to the bad feeling between parents, the school and the

Board of Management, and in tandem with same has had a detrimental effect on the reputation of Valleymount National School. Margaret also acknowledged that Nora did in fact apologise for this communication to parents.

6. After reviewing all the information in both the Reports of John Horan Chairperson and the Response to same from Nora Kelly Principal it was put to a vote as to whether Disciplinary action be taken.

Vote: 4:1 agreed to take action

7. Board decided to take a vote and support the disciplinary action they felt should be taken

It was noted as set out in Circ 60/2009 Page 18, headed Gross Misconduct where it states that the action of dismissal can apply if the offences result in serious consequences. (Refusal to comply with legitimate instructions resulting in serious consequences)

8. While the Board was of the view that dismissal was appropriate the board then discussed other considerations to be taken into account prior to issuing a formal dismissal notice against Nora Kelly. It was noted that Nora has devoted her life time career in teaching and has been recognised at a high level for her capabilities in her role as a classroom Teacher. It was also noted the term Nora has served in the school and her overall contribution to the school in her years of service. Therefore on reflection the Board decided to **lower the disciplinary action** to be taken to Demotion (loss of Principal's allowance).

Vote: 4: 1 agreed on reflection that the disciplinary action to be taken is as follows:

Demotion (loss of principal's allowance) and in addition Nora Kelly is not permitted to serve on the school's Board of Management in the future as a Teachers Representative.

It is also agreed that Nora's performance/behaviour will be reviewed after 6 months from date of sanction of the above action."

68. The Board then communicated its decision to the applicant by letter of the same date. That letter is here set out in full:

Dear Nora

Further to the letter to you dated 21 September 2012 and the Report on Disciplinary Matters attached to that letter a Disciplinary Hearing took place over a period of five weeks with meetings on 16 and 22 October and 7 and 22 November. This was done in full accordance with the provisions of the Department of Education Circular 60/2009 on Disciplinary Matters.

At these meetings the Chairperson's Report was presented and considered. This arose from longstanding concerns about your conduct, particularly in relation to your dealings with Boards of Management and others over a number of years. In addition, very direct refusals by you as Principal to carry out instructions from the Board of Management were having serious impacts on the pupils and the school community in general. Your written and verbal responses to that Report which were presented at length were also considered. Throughout the Hearing you were represented by Noel Ward, Deputy General Secretary of the INTO and you were accompanied by your colleague the Deputy Principal, Caroline Kelly.

At the conclusion of the Hearing both yourself and the Chairperson withdrew and the remaining five Board members then met to consider the outcome. At that meeting the Board members gave careful consideration to all the matters before them. They were satisfied that all relevant facts of the hearing were addressed and that they were equipped with sufficient information to progress to the next stage of deliberations. The Board members agreed that you had been given appropriate timescale and hearing to deliver your response in relation to the accusations brought against you.

Taking into account all of the information in both the Chairperson's Report and your written and verbal responses and also in evidence presented to the Hearing the Board was of the view that the appropriate disciplinary action in this case was dismissal.

Your lengthy career in teaching and your service to the School in Valleymount together with the recognition for your capabilities as a classroom Teacher were then taken into account. In the light of these factors it was therefore decided that the disciplinary action proposed to be taken would be; demotion (loss of Principal's allowance) and in addition that you would not be permitted to serve on the School Board of Management in the future as a Teachers Representative. It was also agreed that your performance/behaviour would be reviewed after six months from the date of sanction of this action.

Circular 60/2009 provides that it is open to you to appeal against the proposed disciplinary action. In this case such an appeal would be to a Disciplinary Appeal Panel appointed by the Board of Management in accordance with Appendix A of the Circular. Specifically, this Appendix provides that you may, within ten days of receiving the notification of this decision, request in writing that the disciplinary proceedings be reviewed by the Panel. In the event that you should decide to make such a request then the further provisions of the Circular will apply. If no such request is received within that period then the Board of Management may proceed to implement the disciplinary action proposed as provided for in the Circular.

Yours sincerely

On Behalf of the Board of Management

The appeal to the Disciplinary Appeals Panel

69. Appeals to the Disciplinary Appeals Panel ("the DAP") are governed by Circular 60/2009, which is dealt with in greater detail below. This is an advisory appeal process, with the final decision being reserved to the Board of Management as the employer.

70. The DAP conducted a hearing on the 18th February, 2013. At the commencement the Chair emphasised that the purpose of the hearing was not to rehear the issues but to establish whether or not the procedure set out in the Circular had been adhered to.

71. Before submissions began Mr. Horan mentioned the fact that Mr. Maurice Kearney, member of the Panel, had been awarded honorary life membership of the Navan branch of the INTO some months earlier and that Mr. Noel Ward had spoken at the ceremony. This matter is dealt with below under the heading "Composition of the Panel".

72. Mr. Ward and the Chairman addressed the Panel. In brief, the emphasis of the submissions made on behalf of the applicant was on fairness, impartiality and the presumption of innocence. It was stated that on the information available to the applicant at the time it was not possible for her to carry out the Board's instruction. Reference was made to the support of staff and parents, and to the fact that there had been no previous complaint. The Chair had set out to gather evidence.

73. The Deputy Principal said that the applicant conducted meetings with parents in a fair and calm manner and that she had never seen her "screaming and shouting".

74. It was confirmed that at no stage of the disciplinary proceeding had the possibility of dismissal been mentioned.

75. Mr. Horan said that the applicant had been impacting negatively on board meeting through constant raising of the teacher X problem. She had treated board members badly and had made derogatory remarks about individual members. He said every effort had been made to give her a fair opportunity to defend herself over the four nights of the hearing.

76. The DAP questioned both parties at some length.

77. In his closing statement the Chairperson of the Board submitted that the sanction was perfectly justifiable. He also said that he and his fellow Board members would resign from the Board if the DAP did not find in their favour.

78. The DAP issued its recommendation on the 25th February. The relevant parts of its written findings are as follows:

"...

In its review, the DAP focussed its deliberations on the matters considered at the Disciplinary Hearing conducted on the dates mentioned above. In conducting their review the DAP took in to consideration all oral and written submissions and statements put before it. The DAP linked the information obtained from these sources to the grounds stated by Ms. Kelly in seeking a review. The Panel members considered and weighed the material before it, and in so doing, have formed the following opinions:

(i) That the agreed procedures set out in Circular 60/2009 were not adhered to

(ii) That all of the relevant facts were ascertained

(iii) That all of the relevant facts were not considered in a reasonable manner

(iv) That the appellant could have understood that the behaviour alleged would attract disciplinary action but would not have understood that the disciplinary action would be invoked at Stage 4.

(v) With regard to item v, referring to the disproportionate nature of the action, the DAP is of the opinion that there is sufficient evidence before it to indicate that the existing proposed sanction is disproportionate. In view of the established record of Ms Kelly's professional competence, the sanction of demotion was found to be excessive. With regard to the proposed sanction to disbar Ms Kelly from serving as teacher representative on the Board of Management, the DAP respectfully refers the Board to Section 7, pg 15ff in the 'Constitution of Boards and Rules of Procedure 2011' in the volume of the DES 'Boards of Management of National Schools' (2011). The Education Act, 1998, Section 16, is also of relevance to the proposed sanction.

The DAP is of the opinion that Ms Kelly be reprimanded by the Board of Management for the manner in which she conducted herself in dealings with the Board, as outlined in the submissions, both oral and written out before it. The Panel recommends that the Board asks Ms Kelly to behave with more restraint, more courtesy and civility when interacting with the Board. The Panel recommends that the Board asks Ms Kelly to understand the importance of working cooperatively with the Board, and the importance of complying with legitimate directives/instructions which may issue from the Board. The Board should make clear to Ms Kelly that any further instances of the alleged unacceptable conduct of the kind set out in the documentation and oral submissions to the panel would result in the initiation by the Board of disciplinary procedures. The Board should invite Ms. Kelly to reflect on this, and to consider the consequences to date for the Board arising from the behaviour, documented through the submissions, both written and oral. The Board might like to suggest that it would be a positive first step on the road to bringing about harmonious working relationships on the Board, if Ms Kelly were to apologise for her documented intransigence as set forth in the submissions to the DAP.

In recognition of the genuine and grave concerns expressed by the Board of Management to the DAP, it is of the opinion that the Board consider the application of the Informal Stage as outlined on pg. 14 of C60/2009. In the event of the Board of Management embarking on the Informal Stage, it should set a reasonable timeframe for Ms Kelly to meet the required standards of behaviour envisaged through engagement in the informal stage."

The final decision of the Board

79. It is important to note that the applicant has deposed that she was and remains prepared to accept the DAP recommendation. However, the Board took a different view. It considered the matter at a meeting on the 12th March and resolved not to accept it. The minutes of the meeting, which also dealt with other business, simply record that

"A full discussion took place and the Board decided not to accept the Appeals Panel recommendation. The Chairperson did not partake in the vote but at the conclusion of the vote the Chairperson said that for the record he agreed with this decision. The Board decided that a letter would be hand delivered to the Principal informing her of this decision and also that the Board intended to proceed with the recruitment of a new Principal without delay".

80. The letter written to the applicant, on the 19th March 2013, sets out the Board's position in greater detail. The following extracts are relevant:

"You exercised your right to appeal the Board's decision to the Teachers Disciplinary Appeal Panel on a number of grounds. The appeal hearing took place on 18 February last. You will also be aware that in advance of the hearing, and again at the beginning of the hearing, we raised concerns about the possibility of a reasonable perception or concern of bias on the part of one member of the panel. On receipt of the panel's recommendation the Board met on 12 March 2013 to give consideration to the recommendation of the appeal panel..."

...Having considered the matter it is the Board's view that the appeal panel's findings are flawed and that their recommendation is totally at odds with the facts as presented to the panel in writing and orally at the appeal hearing.

The appeal panel formed the opinion "that the agreed procedures set out in Circular 60/2009 were not adhered to. The panel gives no basis for reaching this conclusion. The Board believes that there is no possible basis for the formation of this opinion, given the lengths the Board went to in order to ensure that the agreed procedures were rigidly adhered to at every stage of the process..."

...The panel formed the opinion "that all of the relevant facts were ascertained"- thus rejecting your ground of appeal that they were not ascertained.

The panel then went on to form the opinion "that all the relevant facts were not considered in a reasonable manner". Again the panel findings present absolutely no basis for reaching this conclusion, which flies in the face of what actually occurred. Both you and your trade union representative were given the opportunity to respond to the charges contained in the Chairperson's report over the course of four separate hearings, the minutes of which were subsequently agreed with your trade union representative. The Board was fully entitled to conclude that your response did not adequately address the concerns as set out and that you had misconducted yourself in the terms set out in the report.

81. The Board then refers to the finding that, while the applicant "could have understood that the behaviour alleged would attract disciplinary action", she "would not have understood that the disciplinary action would be invoked at Stage 4". The Board's view of this finding is that the panel had established "a brand new ground of appeal of their own" which had not been presented by the applicant, and indeed could not have been since it was not provided for in the Circular.

82. The letter goes on

"The Board is fully satisfied that in refusing to comply with legitimate and serious instructions of the Board, you understood that disciplinary action would have been taken at Stage 4 of the Disciplinary Procedures. Indeed, one of the examples of gross misconduct for which any or each of stages 1 to 3 may not apply include: "Refusal to comply with legitimate instructions resulting in serious consequences."

The panel formed the view that "the proposed sanction is disproportionate". They state that there is sufficient evidence before it to indicate this and cite "the established record of [your] professional competence" in support of their opinion. Your professional competence has at no time been called into question and this was made perfectly clear at the appeal hearing. Professional competence or the lack of it is dealt with in an entirely separate procedure as laid down in the Circular. In relation to unacceptable conduct, which we are dealing with, the Circular states very specifically that "If the investigation upholds a case of serious misconduct the normal consequence will be dismissal".

Accordingly, as provided for in the Circular, dismissal would not be disproportionate to your misconduct. However, even this proportionate sanction as stipulated in the Circular was mitigated to demotion by the Board, in recognition of your long service with the school.

83. The recommendations made by the panel are then recapitulated and described as "bizarre".

84. The Board then says:

"Finally, and most tellingly perhaps, the panel- in setting out their opinions - make absolutely no reference whatsoever to the pupils in the school who have been disadvantaged in a major way by your actions and by your refusal to follow legitimate Board instructions. The pupils have had only three classroom teachers, when they should have had four, for a period of five months. The welfare of the pupils in the school is the primary concern of the Board."

85. The letter concludes by stating that the Board had decided not to accept the appeal panel recommendation and to proceed with implementation of the sanction of demotion as determined at the meeting of the 22nd November meeting. The sanction relating to membership of the Board was withdrawn in view of the issue raised as to whether it was within the Board's powers but it was noted that the Board intended to write to the patron to communicate its objection to the applicant sitting as the "teacher nominee".

86. It should be noted that the letter refers to concerns raised before and at the DAP hearing "about the possibility of a reasonable perception or concern of bias on the part of one member of the panel" but does not elaborate further.

Availability of judicial review

87. The Board contends that the applicant is not entitled to seek judicial review because, it is said, the relationship between the parties is based in a private law contract of employment.

88. In considering this issue it is necessary to examine both the statutory context and the authorities.

The Education Act, 1998

89. The Board of Management in a school such as St. Joseph's is established as a body corporate under s. 14 of the Act, the relevant parts of which are as follows:-

14.-(1) It shall be the duty of a patron, for the purposes of ensuring that a recognised school is managed in a spirit of partnership, to appoint where practicable a board of management the composition of which is agreed between patrons of schools, national associations of parents, recognised school management organisations, recognised trade unions and staff associations representing teachers and the Minister.

(2) A board established in accordance with subsection (1) shall fulfil in respect of the school the functions assigned to that school by this Act, and, except in the case of a school established or maintained by a vocational education committee, each board shall be a body corporate with perpetual succession and power to sue and may be sued in its corporate name.

.....

(4) The members of a board shall, except where articles of management otherwise provide, be appointed by the patron of the school.

(5) When making appointments to a board established in accordance with subsection (1) the patron shall comply with directions given by the Minister in respect of an appropriate gender balance and the Minister, before giving any such directions, shall consult with patrons, national associations of parents, recognised school management organisations and recognised trade unions and staff associations representing teachers.

(6) The Minister, with the agreement of the patron, national associations of parents, recognised school management organisations and recognised trade unions and staff associations representing teachers, shall prescribe matters relating to the appointment of a board.

(7) Except as provided by this Act, no action shall lie against a member of a board in respect of anything done by that member in good faith and in pursuance of this Act or any regulations made by the Minister under this Act.

90. The Board is therefore appointed according to criteria agreed between representatives of relevant interested parties under statutory authority.

91. The functions of the Board, in so far as they pertain to this case, are set out in the following provisions of s. 15:-

15.-(1) It shall be the duty of a board to manage the school on behalf of the patron and for the benefit of the students and their parents and to provide or cause to be provided an appropriate education for each student at the school for which that board has responsibility.

(2) A board shall perform the functions conferred on it and on a school by this Act and in carrying out its functions the board shall-

(a) do so in accordance with the policies determined by the Minister from time to time...

92. The Board is therefore constrained by statute to act in accordance with Ministerial policy.

93. The position of school principal is dealt with in ss. 22 to 24.

22.-(1) The Principal of a recognised school and the teachers in a recognised school, under the direction of the Principal, shall have responsibility, in accordance with this Act, for the instruction provided to students in the school and shall contribute, generally, to the education and personal development of students in that school.

(2) Without prejudice to subsection (1), the Principal and teachers shall- (a) encourage and foster learning in students,

(b) regularly evaluate students and periodically report the results of the evaluation to the students and their parents,

(c) collectively promote co-operation between the school and the community which it serves, and

(d) subject to the terms of any applicable collective agreement and their contract of employment, carry out those duties that-

(i) in the case of teachers, are assigned to them by or at the direction of the

Principal, and

(ii) in the case of the Principal, are assigned to him or her by the board.

23.-(1) A board shall, in accordance with procedures agreed from time to time between the Minister, the patron, recognised school management organisations and any recognised trade union or staff association representing teachers, appoint to the school in a whole-time capacity a person to be Principal of that school subject to such terms and conditions as may be determined from time to time by the Minister with the consent of the Minister for Finance.

(2) In addition to the functions of a Principal provided for in section 22, the Principal shall-

(a) be responsible for the day-to-day management of the school, including guidance and direction of the teachers and other staff of the school, and be accountable to the board for that management,

(b) provide leadership to the teachers and other staff and the students of the school,

(c) be responsible for the creation, together with the board, parents of students and the teachers, of a school environment which is supportive of learning among the students and which promotes the professional development of the teachers,

(d) under the direction of the board and, in consultation with the teachers, the parents and, to the extent appropriate to their age and experience, the students, set objectives for the school and monitor the achievement of those objectives, and

(e) encourage the involvement of parents of students in the school in the education of those students and in the achievement of the objectives of the school.

(3) For the purpose of carrying out his or her functions under this Act, a Principal shall have all such powers as are necessary or expedient in that regard, and shall carry out his or her functions in accordance with such policies as may be determined from time to time by the board and regulations made in accordance with section 33.

(4) The Principal shall be entitled to be a member of any and every committee appointed by a board.

(5) Where, at the commencement of this section, the employer of the Principal in a post-primary school is a person or body of persons other than the board of the school then subsection (1) shall apply as if the person who or the body which at such commencement and from time to time thereafter, is such employer, is substituted for the board as therein referred to.

(6) Wherever practicable, the Principal shall, in exercising his or her functions under this section, consult with teachers and other staff of the school.

94. Thus, the appointment of a principal must be in accordance with agreed procedures, while the terms and conditions of the post are set by the Minister. The principal has his or her own statutory obligations and is accountable to the board.

24.-(1) Subject to this section, a board may appoint such and so many persons as teachers and other staff of a school as the board from time to time thinks necessary for the performance of its powers and functions under this Act.

(2) The numbers and qualifications of teachers and other staff of a school, who are to be paid from monies provided by the Oireachtas, shall be subject to the approval of the Minister, with the concurrence of the Minister for Finance.

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

(4) Pending the agreement of procedures provided for in subsection (3), the procedures applied in the appointment, suspension and dismissal of teachers or other staff immediately before the commencement of this section shall, after such commencement, continue to be applied.

(5) The terms and conditions of employment of teachers and other staff of a school appointed by a board and who are to be paid from monies provided by the Oireachtas shall be determined by the Minister, with the concurrence of the Minister for Finance.

(6) Where all or part of the remuneration and superannuation of teachers and other staff of a school is paid or is to be paid from monies provided by the Oireachtas, such remuneration or superannuation shall be determined from time to time by the Minister, with the concurrence of the Minister for Finance.

(7) Where, at the commencement of this section the employer of the teachers or other staff in a post-primary school is a person or body of persons other than the board of the school, then subsections (1), (3) and (5) shall apply as if the person who or the body which, at such commencement and from time to time thereafter, is such employer, is substituted for the board as therein referred to.

(8) Except in the case of an agreement as provided for in subsection (3), nothing in this Act shall have the effect of altering, after the commencement of this Act the terms and conditions of teachers and other staff of a school under which they were employed before such commencement.

(9) This section shall not apply to teachers or other staff of a school which is established or maintained by a vocational education committee.

95. It is common case that s. 23(4) is applicable to this case. The procedures referred to in that subsection, negotiated between the various parties mentioned therein, are currently those set out in Circular 60/2009, which came into force from the commencement of the 2009/2010 school year.

Circular 60/2009

96. The section of the Circular dealing with school principals is lengthy and will not be set out here in full but it is worth quoting some extracts.

97. The second paragraph of the document notes that

"Boards of management and principals have a responsibility for the quality and effectiveness of education and the management of staff in a school as set out in the Education Act 1998."

98. Two separate procedural strands are envisaged for the separate issues that may arise in relation to competence and conduct. Under the heading "General Principles underpinning these procedures" there are the following important paragraphs: -

"Apart from considerations of equity and justice, the maintenance of a good industrial relations atmosphere at workplace level requires that acceptable procedures be in place and be observed. Disciplinary procedures are necessary to ensure both that discipline is maintained in the workplace and that disciplinary measures can be applied in a fair and consistent manner.

Such procedures serve a dual purpose in that they provide a framework which enables management to maintain satisfactory standards and employees to have access to procedures whereby alleged failures to comply with these standards may be fairly and sensitively addressed.

The essential elements of any procedures for disciplinary issues are that they be rational and fair, that the basis for disciplinary action is clear, that the range of penalties that can be imposed is well-defined and that an internal appeal mechanism is available.

Every Principal is personally accountable for his/her own behaviour and work performance. Early intervention at the appropriate level to address perceived inappropriate behaviour is desirable for all parties so as to minimise the risk of having to escalate sanctions as provided for in these procedures.

Every effort will be made by the employer to address alleged or perceived shortcomings in work and conduct through informal means without invoking the formal disciplinary procedure." [Emphasis added.]

99. There are references to the necessity to ensure that the rules of natural justice are observed.

100. The Preamble to the section on disciplinary procedures for principals notes the fact that the procedure was developed and agreed following discussions between the Department, school managerial bodies and recognised teacher unions representing teachers in the relevant sectors.

The Introduction acknowledges that

"As is the norm with any profession it is a matter for the individual Principal, in the first instance, to maintain appropriate standards of work and conduct and to personally address such issues if and when they arise..."

...[the] process must recognise the reality that such matters are often of a transient nature and may have their origin in issues of a personal or professional nature which are of relatively short duration. Isolated issues or omissions of a minor nature where possible, be dealt with informally."

It follows that the approach to dealing with matters of work and conduct should involve a number of stages moving from informal stages which may at the end of the process have recourse to disciplinary action (up to and including dismissal). Although disciplinary action will normally follow the progressive stages the procedure may be commenced by the school at any stage of the process if the alleged misconduct warrants such an approach."

101. The informal stage envisages a situation where the board of Management forms a view that there are issues relating to the conduct of the principal. The Chairperson should discuss the issue with the principal and inform him or her of the required improvement. The principal will be given an opportunity to offer explanation and comment. The principal will also be informed that unless the necessary improvement is made the matter may proceed to the formal disciplinary procedure.

102. There are four stages in the formal disciplinary procedure. The first three are: -

1. Verbal warning.
2. Written warning.
3. Final written warning.

103. Each of these stages envisages the possibility that an improvement will be followed by a lapse soon thereafter. Where a pattern emerges which undermines the disciplinary process, the employee's previous conduct and pattern of behaviour may be considered as a whole in a future disciplinary procedure.

104. Stage 4 applies where poor conduct has continued after a final written warning or the conduct issue is of a serious nature.

105. The procedure here requires the Chairperson of the Board of Management to prepare a report for the Board. The principal is to be furnished with the report and invited to make a written response. There is then a meeting at which the principal may make a formal presentation, challenge any evidence and respond to any matter.

106. Having considered the response the Board is to decide on the appropriate action to be taken. It has the option of taking no action. Where it decides that further disciplinary action is warranted it may avail of any of the following options:

- Deferral of an increment
- Withdrawal of an increment or increments
- Demotion (Loss of Principal's allowance)
- Other disciplinary action short of suspension or dismissal
- Suspension (for a limited period and/or specific purpose) with pay
- Suspension (for a limited period and/or specific purpose) without pay
- Dismissal

107. It is an express requirement that the Board act reasonably in all cases when deciding on appropriate disciplinary action. The nature of the action should be proportionate to the conduct issue that has resulted in the sanction being imposed.

108. Under the heading "Gross Misconduct" the Circular provides that

"In the cases of serious misconduct at work or a threat to health and safety to children or other personnel in the school the stages outlined above do not normally apply and a Principal may be dismissed without recourse to the previous stages."

109. A non-exhaustive list of examples of gross misconduct offences is given

"for which any or each of stages 1 to 3 of the disciplinary procedure may not apply depending on the gravity of the alleged offence."

110. This list includes "refusal to comply with legitimate instructions resulting in serious consequences".

111. If there is an allegation of serious misconduct the Principal may be suspended on full pay pending an investigation and the conclusion of any appeal process. If the investigation upholds a case of serious misconduct the normal consequence will be dismissal.

112. The Circular provides for a right of appeal. In the case of sanctions imposed at stages 1, 2 or 3 the appeal is internal. In the case of a stage 4 sanction the appeal, or request for review, is to a disciplinary appeal panel appointed by the board of management. The panel is to have three members- an independent Chairperson from a panel nominated by the Minister, a representative of the recognised management body and a nominee of the relevant teacher union.

113. The grounds upon which the disciplinary proceedings may be reviewed are set out as follows:

- I. the provisions of the agreed procedures were not adhered to
- II. all of the relevant facts were not ascertained
- III. all the relevant facts were not considered or not considered in a reasonable manner
- IV. the Principal concerned was not afforded a reasonable opportunity to answer the allegation
- V. the Principal concerned could not be reasonably expected to have understood that the behaviour alleged would attract disciplinary action
- VI. the sanction recommended is disproportionate to the underperformance or misconduct alleged.

114. The Panel procedure provides for the making of written statements by the parties, followed by a hearing (unless the Panel considers that it should reject the request for a review on specified grounds). The Principal is entitled to be represented by a serving teacher, a wholetime official of the union holding recognition for his or her grade or such other person as the Panel agrees may be present for that purpose. The chair of the Board of Management and a serving member of the Board designated to assist the Board are also entitled to be present. The proceedings are to be informal.

115. Where the Panel is of the opinion that a case has been established by the Principal concerned, the Panel may, at its sole discretion, recommend to the Board of Management that:

- I. No further action should be taken in the matter, or
- II. The disciplinary action decided by the Board of Management should be amended in a specified manner, or
- III. The case should be re-considered by the Board of Management to remedy a specified deficiency in the disciplinary procedures.

116. If the Panel considers that no case has been established by the Principal the Board will proceed with the disciplinary action.

117. Paragraph 18 of Disciplinary Appeal Panel code stipulates that the final decision in respect of the appeal panel recommendation rests with the Board of Management, which shall set out in writing the basis for its decision.

Relevant authorities

118. The criteria for assessment of the amenability to judicial review of disputes are not in doubt and are set out in the judgment of the Supreme Court in *Geoghegan v. The Institute of Chartered Accountants* [1995] 3 IR 86.

119. The applicant relies on the Supreme Court decisions in *Beirne v. Commissioner of An Garda Síochána* [1993] ILRM 1 and *O'Donnell v. Tipperary (South Riding) County Council* [2005] 2 ILRM 168 in relation to the applicability of judicial review procedures to certain types of employment-related issues. A number of High Court judgments relating specifically to employment in the education sector have also been canvassed.

120. In *Beirne*, the applicant was a trainee Garda who was granted an order of certiorari in respect of a decision by the Commissioner to terminate his assignment as a trainee. The Commissioner contended that his right to make the decision arose from the contract entered into by the applicant. On that issue, Finlay CJ said

"The principle which, in general, excludes from the ambit of judicial review decisions made in the realm of private law by persons or tribunals whose authority derives from contract is, I am satisfied, confined to cases or instances where the duty being performed by the decision-making authority is manifestly a private duty and where his right to make it derives solely from contract or solely from consent or the agreement of the parties affected.

Where the duty being carried out by a decision-making authority, as occurs in this case, is of a nature which might ordinarily be seen as coming within the public domain, that decision can only be excluded if it can be shown that it solely and exclusively derived from an individual contract made in private law."

121. Having considered the context of the case, Finlay CJ held that the function being exercised by the Commissioner was a public statutory function, regulated by statute and by statutory order.

122. Egan J. reached the same conclusion, on the basis that the document containing the applicant's contract, made as it was under statutory regulations, could not be said to constitute a private contractual agreement between the applicant and the Commissioner.

123. O'Flaherty J. considered that judicial review did not lie for a trainee, but was in no doubt that it would for a fully-attested Garda.

124. *O'Donnell v. Tipperary* concerned a fire station officer employed by the respondent county council. In holding that the burden was on the respondent to show that the contract between the parties was one of private law, Denham J. adopted the approach taken by Finlay CJ in *Beirne*. Giving the judgment of the Court she summed up the relevant factors as follows:

"First, this case relates to the fire service and to a station officer of that service, a service of importance in the

community for fighting fires and flooding, amongst other matters. Such a service is necessary within a state either to be provided by the State or delegated by the State. Secondly, the sources of the general powers of the County Council are to be found in legislation. Thirdly, the functions of the County Council, the fire service and the station officer come within the public domain of that State. Fourthly, the consequences of the County Council's decision may be very serious for the applicant. Amongst these factors, I lay emphasis on the functions of the County Council, the fire service, and the station officer as functions manifestly in the public domain of the State.

In conclusion on this issue, I am satisfied that the employment of the station officer of a fire station is a matter within the public domain and amenable to judicial review. While there was a contract between the applicant and the County Council, it has a significant public element and the decision to terminate was amenable to judicial review."

125. The judgments concerning the employment of teachers yield a variety of outcomes. In date order, the first is *Tobin v. Mayfield Community School* (unrep., Kearns J., 21st March, 2000). The applicant was a full-time, permanent vocational teacher in a community school. Having found that a draft deed of trust, which was common to all community schools at the material time, governed the regime in such schools, Kearns J. referred to the judgment of Costello P. in *Campaign to Separate Church and State v Minister for Education* (unrep., Costello P.) where the Minister was described as having

"...a legal responsibility to ensure that the school is conducted in accordance with the trust. In addition, the Minister controls all the school's expenditure and has a supervisory role over the school curriculum."

126. Kearns J. therefore considered that the requisite public law element was present.

127. In *Becker v The Board of Management St Dominick's* (unrep., Peart J., 14th April, 2005) the applicant was a secondary school teacher who found herself the subject of a complaint by a fellow teacher, referred to the Board of Management under the provisions of a document entitled "Professional Charter and Policy on Dignity in the Workplace". This was a document containing grievance procedures relating to bullying and harassment which had been adopted by staff and management in the school. She had been given a written warning as a result. As in the instant case, the respondent submitted that the relationship between the parties was governed solely by contract.

128. Peart J. had no doubt that there was an obvious public law element in the whole area of education "in a general sense". He referred to the provisions of the Education Act, 1998, the objects of which all had a public element. However, he distinguished between the wider aspects of education and the statutory provisions, on the one hand, and the narrower aspects of the applicant's contract of employment. The impugned decision had been made as part of a disciplinary procedure applicable in the school. Peart J. said that there was

"an important distinction between the various public functions of the school which are involved in the provision of education to the public, and what I might describe as the private functions of that body, such as the hiring and firing of a teacher. One could think of other private functions of a school, such as entering into a contract for the supply of food, or school books, or the building of an extension to the school, which have a similar private law element to the hiring and firing of a teacher. Disputes arising in such private contracts are to be dealt with under private law remedies, such as breach of contract, unless there is some particular public law element to the dispute."

129. Peart J. distinguished *Beirne*, on the basis of the nature of the decision under review and the function of An Garda Síochána in the community.

130. Becker was considered and distinguished in *Brown v. The Board of Management of Rathfarnham N.S.* [2008] 1 I.R. 70, where the issue arose from the selection process for the position of principal. This process was governed by the rules of procedure for boards of management made under s.23 of the Act, which were published in November, 2003.

131. The respondents, who were the Board, the patron and the Minister, challenged the availability of judicial review and also argued that the rules were directory rather mandatory. Rejecting these arguments, Quirke J. held that a decision by the Board to nominate a candidate for appointment was made pursuant to powers conferred by the Act. It was subject to term and conditions determined by the Minister for Education with the consent of the Minister for Finance. It was, he added,

"...made expressly in accordance with rules and procedures which had been agreed between the respondents and with other trade unions and staff associations."

132. Citing the principles set out in *Geoghegan*, Quirke J. considered the following to be the relevant factors:

1. *"This case relates to a major profession, important in the community, which is responsible for the provision of primary education for children within the State pursuant to policies implemented by successive governments with the sanction of the Oireachtas."*

2. *The original source of the power to appoint the principal teacher of a national school is the Act of 1998 and in particular s.23 thereof. The power is conferred on the first respondent and may only be exercised "...subject to such terms and conditions as may be determined from time to time by the Minister with the consent of the Minister for Finance" and "in accordance with the procedures agreed from time to time between the Minister, the patron ... etc".*

3. *The functions of the first respondent have a statutory genesis. The decision sought to be impugned was made by the first respondent in exercise of a power conferred upon it by the provisions of s. 23 of the Act of 1998. Those facts strongly, inter alia, suggest that the decision can be said to come within the public domain;*

4. *The method by which the contractual relationship between the respondent and the notice party was created is expressly regulated by a statutory regime."*

133. Having considered *Becker*, Quirke J. distinguished it on the basis that it had concerned a disciplinary procedure adopted privately by the school, rather than the application of rules and procedures which had a statutory derivation and which were imposed pursuant to a public policy sanctioned by the Oireachtas. The rules themselves were not part of a statute or statutory instrument, but since they were authorised by the statute and agreed between parties identified within the statute they could be said to form part of the statutory regime. The appointment of a principal could only be made in accordance with agreed procedures as defined by the Act.

134. In *Hand v. Ludlow* (unrep., O'Keeffe J., 18th December, 2009) the applicant was the principal of a primary school to which a manager had been appointed, under statutory power, in place of a Board of Management. The applicant sought to prohibit the manager from conducting a disciplinary process against him. O'Keeffe J. was referred to *Becker* and *Brown*. He considered that it was clear that each judge had stated that there were issues that arose under the Act which were appropriate for an application by way of judicial review. On the facts of the case before him, he found the decision in *Becker* to be more appropriate and concluded that the dispute should be governed by a private law remedy.

135. Neither *Tobin* nor *O'Donnell* appear to have been cited in *Hand*.

136. Finally, in this context, it might be worth noting that in the more recent case of *McSorley v Minister for Education and Skills* (unrep., Hedigan J., April, 2012), which concerned the purported removal from office of the principal of a vocational school, it does not appear to have been argued by the respondents that the decision to remove her was not amenable to judicial review.

Conclusions on the availability of judicial review

133. I am satisfied that the dispute between the parties meets the criteria set out in *Beirne* and *O'Donnell* and cannot in any reasonable sense be described as arising solely out of a private contractual relationship.

134. I adopt the analysis of Quirke J. in *Brown* as to the public importance of the teaching profession and as to the statutory source for procedures within the sector. The analysis applies as appropriately to the dismissal or demotion of a principal as to the appointment of one. These are decisions which manifestly have a public element. Every aspect of the procedure which must be followed derives its authority from statute rather than from contract. The decision is also very serious for the individual concerned.

135. I do not find it necessary to disagree with the judgment of Peart J. in *Becker*. As pointed out by Quirke J., that case concerned an issue that did indeed arise out of a contractual agreement. It also predates the publication of Circular 60/2009, which mandatorily replaced all previous procedures. Having regard to the provisions of that circular, which is part of the statutory regime established by the Education Act, I do not feel that the hiring and firing of teachers pursuant to procedures prescribed by the Act can now be described as a private contractual issue.

136. I am not certain as to the factual basis for O'Keeffe J.'s preference for the *Becker* formulation but in any event he did not disagree with Quirke J.

137. I do not wish to be taken as saying that every aspect of school disciplinary procedures is a suitable matter for judicial review. There is a very significant difference between, for example, the giving of an oral or written warning, as in *Becker*, and the appointment, demotion or dismissal of a principal. This is so partly because of the profoundly more serious consequences for the individual concerned, but also because of the wider, public implications for the whole school and the community which it serves.

138. I therefore conclude that the applicant is entitled to seek judicial review in this matter.

Challenge to the decision of the 22nd November, 2012

139. The applicant seeks an extension of time within which to challenge this decision ("the November decision"). Leave in the proceedings was sought and granted on the 18th April, 2013.

140. Order 84 rule 21 of the Rules of the Superior Courts, as amended, provides as follows:

21. (1) *An application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose.*

(2) *Where the relief sought is an order of certiorari in respect of any judgement, order, conviction or other proceeding, the date when grounds for the application first arose shall be taken to be the date of that judgement, order, conviction or proceeding.*

(3) *Notwithstanding sub-rule (1), the Court may, on an application for that purpose, extend the period within which an application for leave to apply for judicial review may be made, but the Court shall only extend such period if it is satisfied that:-*

(a) there is good and sufficient reason for doing so, and

(b) the circumstances that resulted in the failure to make the application for leave within the period mentioned in sub-rule (1) either-

(i) were outside the control of, or

(ii) could not reasonably have been anticipated by the applicant for such extension.

(4) *In considering whether good and sufficient reason exists for the purposes of sub-rule (3), the court may have regard to the effect which an extension of the period referred to in that sub-rule might have on a respondent or third party.*

(5) *An application for an extension referred to in sub-rule (3) shall be grounded upon an affidavit sworn by or on behalf of the applicant which shall set out the reasons for the applicant's failure to make the application for leave within the period prescribed by sub-rule (1) and shall verify any facts relied on in support of those reasons.*

(6) *Nothing in sub-rules (1), (3) or (4) shall prevent the Court dismissing the application for judicial review on the ground that the applicant's delay in applying for leave to apply for judicial review (even if otherwise within the period prescribed by sub-rule (1) or within an extended period allowed by an order made in accordance with sub-rule (3)) has caused or is likely to cause prejudice to a respondent or third party.*

(7) *The preceding sub-rules are without prejudice to any statutory provision which has the effect of limiting the time*

within which an application for judicial review may be made.

141. The respondent contends that the applicant does not satisfy the criteria set out in rule 21 and that the broader discretion enjoyed by the court under the rule before the 2011 amendment to extend time "for good and sufficient reason" is now confined by sub-rule 3(b).

142. The respondent also argues that, having appealed the decision to the Disciplinary Appeal Panel, the applicant must be taken to have accepted the legal validity of the November decision and cannot now impugn it.

143. The applicant submits she engaged in a statutory process which involved a number of stages. Had she moved for judicial review after the first stage she would have been met with the argument that she had an alternative remedy. In any event, the time taken by the appeal process and the remittal of the decision back to the Board was a matter that was not within her control.

144. I agree with the submission on behalf of the applicant. The process under consideration is not analogous to, for example, an appeal from the District Court to the Circuit Court. A person who is convicted after a flawed hearing in the District Court has the option of appealing or taking judicial review. If he or she appeals, and is then convicted after a proper hearing in the Circuit Court, there is no point in challenging the District Court hearing. However, the process engaged in by the parties in the instant case is quite different. If the principal appeals, there will be at least two stages after the original decision by the Board. As the Dap recommendation is not final the matter will always have to be remitted to the board, for either reconsideration in the light of the recommendation or the implementation of the proposed sanction. The process may well take more than three months to reach the conclusion of the third stage, as it did in this case. That is not a matter within the control of the applicant. Furthermore, I do not consider that the policy behind the time limits for judicial review (which, as counsel for the Board argues, is to ensure that public law disputes are dealt with when they are ripe) should be understood to incentivise parties to litigate prematurely.

Composition of the Disciplinary Appeal Panel

145. Before the DAP hearing, the Chairperson of the Board wrote to the Appeals Section expressing concern about the inclusion of a Mr. Maurice Kearney on the panel. This was on the basis that some months earlier, Mr. Kearney had been awarded on his retirement as principal of a school in Co. Meath with honorary life membership of the Navan branch of the INTO. Mr. Noel Ward, who was representing the applicant in the disciplinary proceedings, had spoken at the event.

146. This concern was reiterated at the hearing. It appears that the panel did not take it very seriously.

147. At the end of the hearing the Chair of the panel enquired as to whether the parties were happy with the hearing. It appears that Mr. Horan said that he was. However, in his affidavit he has deposed to the fact that Mr. Kearney had with him legal texts relating to natural justice; spent more time asking questions than either of the other two panel members (85 minutes as opposed to 42 minutes and 18 minutes) and asked "more difficult questions" of the Board than of the applicant.

148. The presence of Mr. Kearney on the panel is referred to in the letter of the 19th March in a way that, while not overtly critical, can only be construed as such and as a reason for not accepting the DAP recommendation.

149. This attitude does not seem sustainable in the light of Mr. Horan's response to the enquiry as to whether he was happy with the hearing. In any event, I think that it is an indication of a certain loss of perspective on his part. One member of the Panel had to be from the INTO, another from management. The applicant, if represented by a trade union official, was going to be represented by an INTO official. If the Board really had an issue with the fact that Mr. Kearney had been given honorary membership of the Navan branch of the INTO at the hands of Mr. Ward the case should have been put in a forthright manner to the independent Chair. To time the members' questioning (which presumably includes the time spent answering them and, therefore, the time given to Mr. Horan to explain his case) is quite extraordinary and something that, I have no doubt, Mr. Horan would not expect to see in the Employment Appeals Tribunal.

Conclusions

150. This judgment is not about the rights and wrongs of the teacher X problem and whether he was entitled to seniority. Neither is it about the definition of a fixed-term contract and whether an instruction to offer such a contract on the 29th August was legitimate. The applicant has deposed that she accepts the DAP recommendation. It is implicit in that acceptance that she did something which she could have understood would result in disciplinary action. In my view she is bound by that.

What the court is concerned with is the process by which the board reached the decision to demote her and the rationality of that decision.

151. The structure by which most schools in the country are run, with a professional staff managed by a voluntary board representative of the parents, the community, the patron and the staff, is an admirable one which gives an opportunity for all those groups to participate in this most important field. However, it is a model that does place burdens on those involved. The voluntary members of the board will often be people without any particular experience in the range of matters, from budgeting to health and safety to management of staff, for which they must take responsibility. It is necessary for the board to respect the expertise of its staff, while ensuring that it does not abdicate its responsibilities.

152. Equally, it is incumbent on the staff to respect the voluntary effort of the board members, to accept that the board has the job of management and in particular to respect the role of the board as their employer.

153. I have no doubt but the original cause of the problems in this case was the situation regarding teacher X and his status within the school. It is clear that the Board, which varied in composition over the years, made efforts in good faith to grapple with this issue. However it was only finally resolved in January of this year, with the termination of his employment.

154. The issue was one about which the principal was entitled to be concerned. It caused practical problems for her on an ongoing basis, due to the need to allocate duties. When he went on sick leave it was necessary to recruit substitutes, leading to issues as to continuity of teaching. She was also entitled to be concerned on behalf of the junior staff, who were disadvantaged by the situation in very practical ways.

155. However, there is no doubt that her preoccupation with the issue led her to forget her duty of respect for the Board. Her tone in dealing with the Board, as evidenced by her emails and, indeed, her presentations to the disciplinary hearing, is on occasion both chiding and truculent. She did not accept that her manner in meetings or in one-to-one situations was aggressive but it is clear that the Board members' perception was to the contrary.

156. It is further clear that this led to increasing levels of frustration amongst the Board members. However, rather than confront her, the attitude was to suffer in silence in the apparent hope that she would change. In terms of management, this was a recipe for disaster.

157. As the introductory parts of Circular 60/2009 make clear, the point of the staged disciplinary process is to prevent the establishment of a pattern of misbehaviour and the build-up of bad feeling that is bound to result therefrom.

158. In my view, the Board allowed the situation to deteriorate to the point where they lost a sense of perspective regarding their role as an employer. Then, having finally decided to take action, they launched a disciplinary process at the most serious stage.

159. The disciplinary process, as carried out by the Board, did not accord with the dictates of fairness or rationality.

160. The charges against the applicant were laid in such general terms that even now it is not possible to say whether it was contended that the applicant had refused to comply with more than one instruction.

161. The issue of misconduct regarding the general behaviour of the applicant became entangled in arguments about events of years gone by which had never been the subject of complaint at the time. It is not fair or rational to accuse an employee of serious misconduct and then go looking for evidence from people whose connection with the school had ceased and who had never made complaints at the time. It is not fair or rational to accuse an employee of serious misconduct on the basis of a pattern of behaviour that was never called into question even on an informal basis. Even when the Board finally had a minuted discussion of the issue on the 21st August, 2012, the only action proposed was to send her those minutes and to terminate future meetings in the event of further problems.

162. The position of Ms. McEvoy as a witness in the proceedings was particularly anomalous. She took part of the decision to institute disciplinary proceedings. She then resigned, and her resignation became part of the complaint.

163. Having regard to the minutes of the meeting at the conclusion of the process, coupled with the letter sent by the board, it is impossible to make out whether any consideration had been given to the applicant's explanations of her conduct. Despite the fact that she had not been questioned on any point, there is no recorded discussion of what she had said. There is no analysis of the instruction given, whether it was in fact legitimate and whether the consequences of refusal were necessarily serious. Instead, the members appear to have spent a large part of the time discussing her behaviour to them personally, where the behaviour complained of had not been raised with her by them.

164. Finally, I am firmly of the view that the sanction imposed was unfair and irrational in the sense that it was disproportionate. I do not think that the Board understood that the Circular was to be read as a whole. They saw the reference to failure to comply with an instruction and saw that such behaviour could result in dismissal. They therefore considered that they were being fair to the applicant in mitigating that penalty down to demotion. They did not consider the fact that the Circular envisages that even stage 4 proceedings do not necessarily require a heavy sanction. They did not consider at all the financial consequences to the applicant. The explanation for this- that they were not asked to consider it- is a failure to understand the responsibility they had to treat the applicant fairly and proportionately. Perhaps most seriously, they failed to disentangle the question of refusal to comply with an instruction resulting in serious consequences from the generally resented but less serious issue of disrespect.

165. The approach of the Board to the DAP phase of the process does not appear to have been open-minded. That is perhaps not surprising- the Board had made its own mind up and was not likely to be ready to admit that it was wrong. However, the role of the Panel deserves more respect than it was given.

166. This is a body drawn from the fields of teaching and management, with an experience of these areas that is unlikely to be matched or exceeded by Board members. It has an independent chair. The members are not involved in the dispute and can bring their expertise to bear with an objectivity that is likely to be lacking amongst the parties to the dispute. Although not a statutory body, it is established as part of the statutory regime.

167. It is, therefore, a body of the sort to which the courts generally display a high level of deference on issues within its area of expertise. Its recommendations should, accordingly, carry very substantial weight with boards of management. While a board is not bound to carry out its recommendation, it should in my view depart from it only for very good reasons.

168. In this case the Chairperson of the Board informed the Panel that if it did not support them, the Board would resign. That may well have been a statement of fact, rather than an improper effort to influence the outcome, but it is a clear indicator that the Board was not going to give proper consideration to any adverse recommendation. In my view it did not, in fact, give it such proper consideration. The characterisation of the recommendation by words such as "flawed" and "bizarre" demonstrate an unwillingness to accept, or a lack of understanding of, the overall thrust of the panel's view- that the Board had taken a disproportionate and unreasonable approach to the disciplinary procedure and that it should now step back and re-establish matters at the proper level. In my view, the overriding consideration for the Board was that its voluntary members wanted the applicant off the Board.

169. Finally, there is no explanation given for the finding that the consequence of the applicant's failure to carry out the instruction was that the school could not engage another teacher for five months.

170. In the light of the foregoing I propose to quash both decisions of the respondent Board.