NEUTRAL CITATION NUMBER [2010] IEHC 536

THE HIGH COURT

[2009 No. 11576P]

BETWEEN

PATRICK McGLINCHEY

PLAINTIFF

AND

SILE RYAN

DEFENDANT

Judgment of Miss Justice Laffoy delivered on the 21st day of July, 2010.

1. Background

1.1 Although these proceedings arise out of the settlement of judicial review proceedings in May 2009, in order to put that settlement and what subsequently transpired into context, it is necessary to set out the factual background in broad outline.

1.2 In September 1994 the plaintiff commenced employment as a special needs primary teacher at St. Vincent's School, Lisnagry, County Limerick (the school). The school, which is owned by the Daughters of Charity and operated by a Board of Management, provides educational facilities for children and young persons of both genders with intellectual and learning disabilities. The defendant is the current chairperson of the Board of Management of the school and she is sued in these proceedings in that capacity.

1.3 On 5th March, 1997 the plaintiff was suspended from his duties as a teacher as a result of an allegation of sexual abuse against him involving a male pupil, J.L., made by the mother of the pupil to the school. The school notified An Garda Síochána about the allegation. Subsequently, the Mid Western Health Board, the predecessor in the area in which the school is located of the Health Service Executive (the relevant body being referred to as "the Health Board" hereafter) instigated an investigation into that complaint and other complaints of sexual abuse involving pupils of the school which were made against the plaintiff. An Garda Síochána also commenced a criminal investigation of those complaints. The plaintiff was arrested on the 19th June, 1997. Subsequently he was charged with criminal offences against two male pupils, D.M. and K.W. The Health Board investigation did not result in any disciplinary process while the criminal proceedings were pending.

1.4 The trial of the plaintiff took place in the Dublin Circuit Criminal Court in November 2002. The trial lasted for seventeen days. At the end of the trial the verdict of the jury acquitted the plaintiff on all counts.

1.5 The plaintiff had remained suspended on full pay from his duties as a teacher throughout the period from 5th March, 1997 to his date of his acquittal on the criminal charges and beyond that date. The Health Board, apparently, resumed its investigation after the plaintiff was acquitted and concluded its investigation in November 2003 when it made findings against the plaintiff to the effect that the allegations that he had sexually abused nine pupils in the school (including J.L., D.M. and K.W.) were credible, while in the case of a tenth pupil the allegations were inconclusive. It also found that he remained a risk to vulnerable children. The position of the school is that thereafter it wished to hold an internal disciplinary inquiry and that it endeavoured, but was unable, to do so. It was not in a position to reinstate the plaintiff while the findings of the Health Board in relation to the complaints remained extant and unchallenged by him.

1.6 The plaintiff remained suspended on full pay until the settlement of the judicial review proceedings to which I have referred at the outset.

2. Judicial review proceedings: terms of settlement

2.1 The judicial review proceedings (Record No. 2008 No. 692 J.R.) were between the plaintiff, as applicant, and the defendant and the Health Board as respondents. The proceedings came on for hearing before the High Court (Hedigan J.) and were settled by all of the parties on 15th May, 2009.

2.2 The Terms of Settlement, in so far as they are relevant for present purposes, provided as follows:

> "1. The [defendant] agrees that the suspension of the [plaintiff] will be lifted with immediate effect, provided always that the [plaintiff] agrees not to return to work unless and until the Adjudicator by written decision determines that it is appropriate that he should do so.
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> 2. The [defendant] will as soon as practicable establish an inquiry in accordance with the terms of reference set out in Annex 1 of this settlement. The [plaintiff] agrees to attend to such an inquiry and to co-operate with same. The [Health Board] agrees to use its best endeavours to ensure that any of its servants or agents or former servants or agents will co-operate with this inquiry.
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> 3. The proceedings will be struck out as against the [defendant] with an order quashing the [plaintiff's] suspension and an order directing the hearing in private of an independent inquiry in accordance with the terms of reference set out in Annex 1 of this settlement. The proceedings will otherwise be dismissed as against [the defendant and the Health Board].
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> 4. This settlement is in full and final settlement of all claims (howsoever arising) between the parties."

2.3 By order of the Court made on 15th May, 2009 by Hedigan J. it was ordered that the terms of settlement, which were annexed to the order as a schedule, be received and filed and it was further ordered, by consent that –

> (a) the decision to suspend the plaintiff from his post as a teacher in the school be quashed forthwith,

(b) an independent inquiry into the suspension of the plaintiff from his post as a teacher in the school be convened and held in private,

(c) the plaintiff should not return to work pending the outcome of the said inquiry,

(d) the proceedings against the Health Board be dismissed, and

(e) the terms of settlement be in full and final settlement of the proceedings.

2.4 Annex 1 annexed to the terms of settlement was headed "Terms of Reference of the Inquiry". It provided for the establishment of an inquiry (the Inquiry) by a member of the Bar (the Adjudicator), who was to be appointed by the Chairman of the Bar Council. Annex 1 set out the procedures to be adopted in the lead up to, and provided for the conduct of, the Inquiry as follows:

(a) The Adjudicator should abide by and apply the generally recognised principles of fair procedure and should be entitled to rule on all issues of procedure and evidence (para. 4).

(b) Both the defendant and the plaintiff should have the right to be heard, to examine and cross-examine witnesses and to make closing submissions.

(c) The Health Board would, subject to appropriate confidentiality arrangements, furnish the defendant with all reports or documents (including any assessment or validation) concerning the plaintiff and relevant to the subject matter of the Inquiry for the purposes of the Inquiry and confirm which of the author or authors of the said documents would be available to give evidence.

(d) The defendant would furnish the documents received from the Health Board to the Adjudicator and the plaintiff "with such allegations as are in its possession which contain allegations of sexual abuse in respect of current or former pupils [of the school] concerning [the plaintiff]" (para. 7).

(e) The defendant should be entitled "to lead all appropriate evidence (including evidence from parents, students, former students and social workers) in support of the said allegations before the Inquiry".

(f) The plaintiff should also be entitled to lead "such appropriate evidence including evidence of teachers whether currently serving or retired of the [school], members of An Garda Síochána, any lay person, psychologist, doctor, psychiatrist or suitably qualified expert".

(g) The reports and documents prepared by the Health Board concerning any child who attended the school, including "any assessment or validation", should be admissible without proof before the Inquiry, provided that the Adjudicator should disregard any such reports or documents unless the author (or one or other of the authors) should attend and give evidence at the Inquiry and be available for cross-examination in respect of the same. (para. 9).

2.5 The task of the Adjudicator was set out as follows in Annex 1 (para. 11):

"It shall be the task of the Adjudicator to determine in accordance with accepted evidential rules whether the said allegations are well founded and, specifically, whether the [plaintiff] posed or poses a threat to children."

The consequences of the finding of the Adjudicator were then set out. In the event that the Adjudicator should conclude "that the said allegations or any of them are well founded and/or that the [plaintiff] posed or poses a threat to children", the plaintiff agreed that he would resign forthwith. In the event that the Adjudicator should conclude "that the said allegations are not well founded and that the [plaintiff] did not pose or does not pose a threat to children", the defendant agreed that the plaintiff should resume his employment at the earliest convenient opportunity.

3. The Inquiry

3.1 The Chairman of the Bar Council appointed Mr. Paul McDermott, S.C. (the Adjudicator) to conduct the Inquiry. The Adjudicator commenced the substantive hearing in Limerick on 7th December, 2009 and it continued on the next day.

3.2 On 23rd October, 2009 the defendant's solicitors furnished the "Book of Complaints" in connection with the Inquiry to the plaintiff's solicitors. It contained the following documentation:

(a) a list of witnesses;

(b) statements, which were described as "general statements", which I understand to mean statements of witnesses whose evidence before the Inquiry would relate to general matters rather than to the specific complaints of the pupils; and

(c) in relation to the individual complaints of each of the ten pupils, the complaint and other documentation.

An updated list of witnesses was furnished by the defendant's solicitors to the plaintiff's solicitors on 18th November, 2009. On 30th November, 2009 the defendant's solicitors apprised the plaintiff's solicitors as to the video tape evidence of interviews conducted under the aegis of the Health Board of all of the ten pupils who had made complaints against the plaintiff which it was proposed to put in evidence, setting out the number and duration of the interviews and the name of the interviewers in each case.

3.3 When the Inquiry opened before the Adjudicator on the 7th December, 2009, he was given the Book of Complaints. In the light of the issues which arise in these proceedings, I consider that it is useful to set out at this juncture, by way of example, in relation to the allegations involving J.L. –

(a) the complaint against the plaintiff,

(b) the witnesses whom the defendant intended to call to give evidence at the Inquiry, and

(c) the other documentation contained in the Book.

3.4 The complaint in relation to J.L. and, indeed, the complaints in relation to all of the complainants, were sub-divided into two categories. In the case of J.L., the first category alleged that on divers dates unknown, but since in or around 1994 and prior to 17th February, 1997, while employed as a teacher by the school, the plaintiff had sexually abused J.L. thereby rendering him unfit to hold the position of teacher. Particulars as to the location and the nature of the alleged abuse were then set out. The second category was in the following terms:

> "The findings in the Report of the HSE in respect of [J.L.] and/or your failure to have them set aside despite having them in your possession since 30th April, 2004, thereby leaving them extant against you, constitutes professional misconduct on your part, rendering you unsuitable to hold your office as teacher in that the said Reports concluded that the findings of child sexual abuse against you … and that the findings of physical abuse against you … were credible and that you represented 'an ongoing risk to vulnerable children'".

The complaints in relation to each of the complainants followed the same format, although the particulars varied and allegations of physical and verbal, as well as sexual, abuse were made in some cases.

3.5 In the case of J.L., the witnesses to be called on behalf of the defendant were identified as: a Senior Clinical Psychologist with the Health Board; the mother of J.L.; and Dr. Alice Swann, who was described as an "independent Medical Specialist".

3.6 The documents included in the Book in relation to the complaints involving J.L. were the following:

> (a) a document headed "Child Sexual Abuse Investigative Assessment Report" dated 3rd February, 1999, which ran to sixteen pages and was signed by the Senior Clinical Psychologist who was to be called as a witness;
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> (b) a document headed "Summary Report – Child Sexual Assessment", which was dated 26th November, 2003, and which was signed by Kevin O'Farrell, who was identified as one of the general witnesses to be called by the defendant, and which contained the findings that the allegations were credible and that the plaintiff represented an ongoing risk to vulnerable children;
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> (c) a report dated 7th January, 2000 of Dr. Alice Swann; and
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> (d) the statement given by the mother of J.L. to Gardaí on 14th June, 1997.

3.7 In opening the defendant's case at the Inquiry, counsel for the defendant apprised the Adjudicator that between November 2000 and November 2001 38 High Court summonses had been issued against the school initiating proceedings making claims on behalf of pupils who alleged that they had been the subject of sexual assaults by the plaintiff and another member of the staff of the school and, in some cases, on behalf of parents and siblings of the pupils. The Adjudicator was apprised that at that stage none of those actions had been settled as against the school. The Adjudicator was also informed that there was pending in the High Court an issue in relation to the competence of the pupil complainants to give evidence in the High Court litigation.

3.8 The fact that the civil proceedings were pending when the Inquiry opened is of some, if limited, relevance in the overall context of these proceedings. The first day of the Inquiry, 7th December, 2009, was taken up by the opening on behalf of the defendant and, in particular, an outline of the evidence which the defendant intended to call, legal submissions by counsel for the defendant in support of the approach which it was proposed to adopt, objections by counsel for the plaintiff to that approach and legal submissions in support of his objections, and an exploration by the Adjudicator as to his role and, in particular, the basis on which he could hear the evidence which was to be proffered by the defendant, including the video tapes of the interviews with the complainants which had been conducted by the Health Board.

3.9 The transcripts of both days of the Inquiry, 7th December and 8th December, 2009, have been put in evidence. On the first day, counsel for the plaintiff raised many objections to the evidence which the defendant proposed to adduce at the Inquiry, which are outlined in paragraphs 98 to 107 of the plaintiff's statement of claim in these proceedings and addressed by the defendant in paragraphs 98 to 115 of the defence. Ultimately, the plaintiff's objections to the evidence crystallised into two main objections.

3.10 The first arose out of the fact that, with one possible exception, the pupil complainants would not be available to testify. This was clarified when a letter dated 4th December, 2009 from the solicitor acting for the pupil complainants and their parents in the civil proceedings to the defendant's solicitors was read into the record of the Inquiry. In that letter, the defendant was informed that "with one possible exception, none of the guardians of the former students will consent to the former students giving evidence and being cross-examined at the Inquiry which the school is conducting". The letter linked the refusal of the former students to give evidence to the pending civil proceedings in the High Court and the motion which was pending in those proceedings. In addition, the point was made that the former students and parents had already consented to the information held by the Health Board, including the video tapes, being made available to the Inquiry. It was clarified at the Inquiry on 8th December, 2010 that the possible exception was D.M. The position, accordingly, was that the defendant was not in a position to adduce the evidence of the complainants at the Inquiry. Arising out of that, the Adjudicator queried whether he could proceed on the basis of the video tapes of the interviews and the other evidence available to him, namely, the evidence of the Health Board personnel who were involved in conducting the interviews and who made the findings that the allegations of abuse against the plaintiff were credible and that he represented "an ongoing risk to vulnerable children" on the basis of the recorded interviews. Counsel for the plaintiff submitted that he could not.

3.11 The second objection of the plaintiff related to the proposal of the defendant to adduce evidence in relation to the complaints made by D.M. and K.W., on the basis that, the plaintiff having been acquitted by a jury in the Circuit Court on the charges based on the complaints made by those complainants, as a matter of law, those complaints could not be the subject of the Inquiry. As regards D.M., counsel for the plaintiff contended that the objection was valid whether it transpired that D.M. was available to testify at the Inquiry or not.

3.12 The Adjudicator ruled on the issues which had been raised on behalf of the plaintiff on the afternoon of 8th December, 2009. It was a reasoned ruling on the basis of the submissions made to him and the authorities which had been cited by counsel on both sides.

3.13 On the first issue, namely, whether, in the absence of the pupil complainants to give evidence, he could receive evidence in the form of video tapes of the interviews of the complainants and the accompanying expert evidence, the Adjudicator found that he could, subject to the reservations set out in the ruling. In reaching that conclusion, the Adjudicator pointed to the fact that the complainants were not available to the Inquiry through no fault of the school. Having regard to the authorities which had been cited to him, the Adjudicator reached the following conclusions:

(a) The rules of natural justice to be applied in any particular case must depend on the circumstances of the case and the nature of the particular inquiry being carried out. In the case before him, he noted that the plaintiff had been furnished with all the materials concerning the taping of the interviews, and the conclusions drawn from them, that had been furnished to the school. He pointed out that the plaintiff was entitled to challenge the conclusions of the Health Board personnel and the contents of the videos by adducing his own expert evidence, by giving evidence and by cross-examination of the experts called.

(b) He recognised that tribunals exercising quasi-judicial functions are frequently allowed to act informally, to receive unsworn evidence, to act on hearsay and to depart from the rules of evidence. Earlier, the Adjudicator had outlined his terms of reference provided for in Annex 1. An issue which was mooted during the hearing before him had been whether the witnesses would be required to give evidence on oath. As will appear from a quotation from the ruling later, he stated that he had no power to make witnesses take an oath or affirm before giving evidence.

(c) The Adjudicator rejected a submission made on behalf of the defendant, in reliance on the decision of the High Court (Barr J.) in *M.Q. v. Gleeson* [1998] 4 I.R. 85, that in the Inquiry he could rely upon the Health Board's opinion, if satisfied that it was reasonably based, unless the plaintiff's defence established that there was no reasonable justification for it or there were serious reasons for doubting its validity. In relation to that submission, the Adjudicator pointed out:

> "The terms of reference do not direct me to proceed on the basis of being satisfied that the Health [Board's] reports were reasonably based and should form the basis of a conclusion against the [plaintiff], should its defence not establish that there was no reasonable basis for the report's conclusions. In order to make an adverse finding against [the plaintiff], I would have to be satisfied, on the balance of probabilities, based on what I regarded as cogent evidence, that he committed the acts alleged. I cannot proceed on the basis that the assessment carried out raises a presumption against [the plaintiff] of guilt which he must rebut. If they are to be received in evidence, the video tapes and reports must be carefully scrutinised, as they would, in effect, be the main evidence against [the plaintiff]. They would have to be considered … in the light of all evidence presented, including that of [the plaintiff] and any witness called on his behalf."

(d) The Adjudicator recognised that there was no evidence before him as to the factors which are identified in the jurisprudence as justifying the relaxation of the hearsay rule in civil proceedings where issues of child protection arise in the context of allegations of sexual abuse – lack of competence on the part of a complainant, or the likelihood of a detrimental effect as a result of being required to give evidence on a complainant. He considered whether, without evidence as to the existence of either of those factors, he could proceed to receive the video tapes and the accompanying expert evidence in the Inquiry. Having analysed the authorities, he stated:

> "In this case, the school and [the plaintiff] have been placed in a very difficult position. The school has material which gives rise to grave concern that one of its teachers, [the plaintiff], is a threat to children in its care. The adjudication upon which I am engaged has no authority other than that between the parties. It has no power to compel witnesses, it has no power to make witnesses take an oath or affirm before giving evidence. I view the adjudication as an inquiry, a quest for the truth, in so far as it can be determined from the material placed before me. To that extent, the process is inquisitorial. The employer/ employee relationship and the continuing care for intellectually-disabled children constitute the vital context in which this dispute must be set.
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> In this dispute, the core allegations are presented in a format similar to that which arose in the Supreme Court cases considered. No school could responsibly fail to respond to such allegations and it does so by means of this Inquiry. It is not a criminal trial and it does not attract the trappings of one. It is an administrative process requiring appropriate fair procedures."

3.14 The Adjudicator reiterated that the weight to be attached to the video tape evidence and the accompanying expert evidence and the assessment of its reliability would fall to be measured on the basis of "the very high degree of cogency of evidence required if these allegations are to be established on the balance of probability".

3.15 On the second issue, whether the Adjudicator could proceed with an adjudication in respect of the complaints of D.M. and K.W. in the face of an acquittal on the merits of criminal charges based on those complaints following a trial at which both complainants gave evidence and were cross-examined and the plaintiff had given evidence, the Adjudicator treated the complaints in relation to K.W. differently from the complaints in relation to D.M. He noted that K.W., who had been deemed to be a competent witness at the criminal trial, would not be available for cross-examination on behalf of the plaintiff at the Inquiry. He expressed the view that it would be oppressive and unfair to subject the plaintiff to a further hearing with the significant disadvantage of no opportunity to cross-examine K.W. On that basis he decided that it would not be appropriate to proceed any further with the consideration of the allegations in relation to K.W. He considered that different considerations would apply, if D.M. attended as a witness at the Inquiry, and stated:

> "Though there was an acquittal on the merits, it seems to me appropriate that this Inquiry receive his evidence, if he is available, and can be subject to cross-examination. If issues arise as to his competence during the Inquiry, this aspect of the ruling may be re-visited. If he does not attend, I will make the same ruling as in the case of K.W."

3.16 It is probable that I have outlined, and quoted from, the ruling of the Adjudicator more extensively than is usual in circumstances such as arise here, and I will refer to other aspects of it later. However, having regard to what subsequently transpired and the basis of these proceedings, I considered it appropriate to illustrate the reasoning of the Adjudicator in reaching his conclusions on the objections made by counsel for the plaintiff and his stated intentions as to the manner in which he proposed to conduct the Inquiry thoroughly.

3.17 Following the ruling and following a brief adjournment, when the hearing resumed, counsel for the plaintiff informed the Adjudicator that the plaintiff was exercising his rights in law "to take the matter elsewhere". The consequences of that decision were then debated. In response to a question from the Adjudicator, counsel stated that it was "a fair interpretation" of the plaintiff's position that, effectively, there was a termination of the adjudication because the plaintiff did not wish to proceed further on the basis of the ruling which the Adjudicator had made. On that basis, the Adjudicator stated that the adjudication was at an end, because the plaintiff did not wish to participate in it on the basis of the ruling which he had made. He then stated that the adjudication was complete and that he was declaring himself to be *functus officio*.

4. Post-Inquiry

4.1 On the following day, by letter dated 9th December, 2009, the plaintiff's solicitors wrote to the defendant pointing out that the plaintiff was no longer suspended from his post and that, in the circumstances which prevailed, it was unfair to keep the plaintiff away from his post as a teacher any longer, bearing in mind that he had been in that unfortunate position for over twelve years. It was pointed out that the plaintiff continued to be paid by the Department of Education and had always been keen to perform his duties as a teacher. The defendant was called on to allow the plaintiff to return to work.

4.2 The response of the defendant was contained in letters dated 18th December, 2009 from the defendant's solicitors to the plaintiff's solicitors and from the school to the plaintiff, both of which were in the same terms. It was contended that the plaintiff's withdrawal from the Inquiry and his failure to participate in or co-operate with the Inquiry so that the Adjudicator could make a determination in accordance with the evidence potentially gave rise to gross misconduct within the meaning of Gross Misconduct (Stage 4) of the Revised Procedures for Suspension and Dismissal of Teachers 2009, a copy of which was enclosed, entitling the Board of Management to terminate the plaintiff's employment. Accordingly, in accordance with those Procedures, the plaintiff would be suspended on full pay from 18th December, 2009 pending the investigation of the matters referred to and the conclusion of any appeal process (if applicable) into "the following very serious allegations, which may give rise to an entitlement on the part of the Board of Management to terminate" the plaintiff's employment. The following allegations were then outlined:

> (a) that the plaintiff had frustrated the Inquiry;
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> (b) that the plaintiff had failed to comply with the Inquiry's legal remit and directions;
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> (c) that the plaintiff had failed to abide by the Terms of Settlement, whereby he had agreed to co-operate with the Inquiry;
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> (d) that the plaintiff had put himself and the school in a situation whereby he had not challenged the very serious findings of the Health Board against him, in circumstances where he alone had *locus standi* to do so, and had precluded the school from conducting an investigation into the findings, thereby leaving them extant against him; and
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> (e) that by failing to co-operate with the Inquiry, the plaintiff had frustrated his contract of employment, in that he had rendered the investigation of the allegations made against him by the HSE and by or on behalf of the pupils impossible.

It was stated that the question of the plaintiff returning to work did not arise in the circumstances. The plaintiff was invited to respond to the allegations before 12th January, 2010. Once the response was considered, the Board of Management would then decide on the appropriate disciplinary sanction, if any.

4.3 These proceedings were initiated by plenary summons which issued on 18th December, 2009.

5. The pleadings

5.1 The greater part of the plaintiff's statement of claim is a narrative of the contractual relationship and the issues between the plaintiff, as employee, and the defendant, as his employer, and the external circumstances which affected that relationship, namely, the investigations by the Health Board and the Gardaí and the criminal trial, followed by the judicial review proceedings and their resolution via the Terms of Settlement. As I have already recorded, in the statement of claim the plaintiff has set out his objections to the evidence which the defendant proposed adducing at the Inquiry. The plaintiff's objection to the ruling of the Adjudicator is pleaded on the basis that he failed "to direct the complainants to give evidence at the Inquiry in order for him to test their competency to give evidence and … acted in a manner contrary to fair procedure and the procedure stipulated in the judgment of the Supreme Court" in *Eastern Health Board v. M.K.* [1999] 2 I.R. 99. The plaintiff has further pleaded that the Adjudicator was informed that he was "unwilling to continue [his] participation in what [he] believed had become an unlawful process". It is further pleaded that the plaintiff "withdrew" from the Inquiry.

5.2 In relation to the relief claimed by the plaintiff, he seeks declaratory relief in relation to various stages in the process since May 2009 which it is convenient to set out chronologically. First, he seeks a declaration that there was a failure by the defendant to comply with the order of the High Court made on 15th May, 2009. Secondly, he seeks various declarations in relation to the hearing of the Inquiry: that it was conducted in an unfair and unlawful manner; that it was not conducted in accordance with fair procedures and within accepted rules of evidence; and that "the purported hearing" ruled on the admissibility of hearsay evidence in an unlawful manner. Thirdly, the plaintiff seeks a declaration that the defendant has acted unlawfully and in breach of his contract of employment in failing to reinstate him to his position and he also seeks a declaration that as a teacher "being paid by the State and not suspended from his post" he is entitled to return to work forthwith. He also seeks a declaration that the defendant has acted in breach of the provisions of "The 1997 Management Handbook", which appears to be what is referred to as "Management Board Members' Handbook" earlier in the statement of claim. He also seeks injunctive relief in the form of permanent orders directing the defendant to permit him to return to work forthwith and restraining the defendant from terminating his contract of employment. He also seeks an order prohibiting the holding "of any further inquiry".

5.3 The plaintiff also claims damages, including aggravated damages. However, it was agreed by the parties that the Court should deal with the issue of liability first.

5.4 It is appropriate to record that it is pleaded in the statement of claim that the plaintiff denies the various allegations made against him and says that they are untrue and without foundation or merit. The plaintiff was the only witness to give evidence at the trial of the action. His evidence was that he attended the Inquiry and that he had intended to give evidence to the Inquiry. He was distressed in the witness box. He stated that he had waited for twelve years and he wanted everybody brought in. He was dissatisfied with the ruling of the Adjudicator and angry. His view was that he was not going to get a proper inquiry.

5.5 In the defence it is alleged that the plaintiff has failed to plead adequately the basis of his claim for the reliefs sought. In this connection I note that the hearing of the action went ahead without a notice for particulars delivered by the defendant's solicitors on 22nd March, 2010 having been complied with. In any event, as a general proposition, in the defence, the defendant put the plaintiff on proof of all matters of fact and traversed all allegations made by the plaintiff. I propose only referring to a number of issues arising out of the defence. An important aspect of the submissions made on behalf of the defendant was that the objections of the plaintiff before the Adjudicator had no bearing on the second category of complaint made in relation to each complainant, which I have quoted above in relation to J.L. In replying to those submissions, counsel for the plaintiff contended that the defendant's reliance on the second category was not pleaded. I do not accept that as being correct. The defendant pleaded that the plaintiff had failed in a timely manner to challenge the findings made by the Health Board and compromised the judicial review proceedings without obtaining any order quashing or otherwise rendering those findings null and void and thereby leaving them extant against him. There were several other references in the defence to the failure of the plaintiff, despite being afforded an opportunity, to answer or challenge

the Health Board findings. Aside from that, I am satisfied, on the basis of the transcript of the hearing before the Adjudicator that, up to the time the Inquiry terminated, the plaintiff had not raised any issue as to the authority of the Adjudicator to adjudicate on the second category of complaint.

5.6 As regards the consequences of the plaintiff's withdrawal from the Inquiry, the defendant pleaded the following matters:

> (a) While it is technically true that, as the plaintiff pleaded, he "was no longer suspended", pursuant to the Terms of Settlement he was obliged not to attend school unless and until the Inquiry made a finding favourable to him. As no such finding has been made he has no entitlement to attend school in circumstances where he failed to partake fully in the Inquiry.
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> (b) The defendant acknowledged that it had "re-suspended" the plaintiff and asserted that it acted lawfully in doing so and in proceeding to discipline the plaintiff by reason of his failure to participate in the Inquiry.
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> (c) It was asserted that, by withdrawing from the Inquiry, and by failing to address the allegations made against him, the defendant had acted in a manner that grossly breached the trust required to maintain an employment relationship with the defendant, particularly in the circumstances that the defendant is responsible for the education and welfare of extremely vulnerable children and young persons.
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> (d) The defendant asserted that the plaintiff's withdrawal from the Inquiry and his failure to address the serious allegations maintained against him constituted gross misconduct on his part.

6. The issues

6.1 Because of the long history of the fractured relationship between the parties, it is important to identify the context in which the issues raised by the parties fall to be determined.

6.2 What precipitated these proceedings was that the plaintiff voluntarily withdrew from the Inquiry, and the defendant responded by "re-suspending" him and embarking on a disciplinary process with a view to terminating his employment. In these proceedings the plaintiff seeks to justify that withdrawal on the basis that the ruling of the Adjudicator on the objections made on his behalf as to the manner in which the defendant intended to adduce evidence at the Inquiry would inevitably result in the Inquiry being conducted in an unfair and an unlawful manner and in a manner which was not in accordance with fair procedures or within the accepted rules of evidence. The justification for the plaintiff's withdrawal is predicated on the Adjudicator's ruling as to the two objections made on his behalf, which, in the interests of brevity, I will refer to as the hearsay objection and the acquittal objection, being wrong in law.

6.3 The plaintiff's withdrawal from the Inquiry being the catalyst for these proceedings, the Inquiry has to be put in context. Its objective was to resolve as between the plaintiff, as employee, and the defendant, as employer, the question whether the allegations of sexual and physical abuse made against the plaintiff were well founded and, specifically, whether the plaintiff posed or poses a threat to children. The objective of the parties was that the finding of the Adjudicator would determine whether the plaintiff would be entitled to resume his employment (or more correctly, resume his teaching duties) in the school or, alternatively, whether he would be obliged to resign from his employment in the school. The overall context, therefore, was a contractual employment relationship between the plaintiff and the defendant and whether that relationship would continue or terminate.

6.4 However, an important facet of that context was that the allegations of abuse against the plaintiff required to be considered against the background that those allegations related to pupils of the school who suffer from intellectual disability. The pupils whom the plaintiff has taught in the past, and would teach in the future, if a finding favourable to him were made by the Adjudicator, are vulnerable children who are especially in need of protection.

6.5 It is well settled, as a matter of constitutional law and of contract law, that an employee who is involved in a disciplinary process in the course of his employment is entitled to be afforded fair procedures, although what constitutes fair procedures may vary from case to case. In this case, the Inquiry was to be governed in accordance with the agreement between the plaintiff and the defendant embodied in the Terms of Settlement and in accordance with Annex 1 thereto. The conduct of the Inquiry was subject to the express terms agreed between the parties and the ruling of the Adjudicator falls to be considered against those terms.

6.6 Whether the Adjudicator was correct or incorrect in his ruling, the plaintiff withdrew without giving him an opportunity to conduct the Inquiry. It was submitted on behalf of the defendant that the plaintiff's withdrawal from the process at that juncture was not justified and that these proceedings are premature.

6.7 Having regard to the foregoing observations, I consider that the issues to be determined by the Court are the following:

> (a) Given the context as outlined, whether the Adjudicator was correct in deciding to proceed with the Inquiry in the manner proposed by the defendant notwithstanding the hearsay objection.
>
> (b) Given the context outlined, whether the Adjudicator was correct in deciding to proceed with the Inquiry into the allegations made by D.M. should he attend and be available for cross-examination at the Inquiry notwithstanding the acquittal objection.
>
> (c) Whether the plaintiff was justified in withdrawing from the Inquiry on 8th October, 2009 and whether these proceedings are premature, as contended on behalf of the defendant.
>
> (d) Insofar as it is relevant to the proceedings, what are the consequences of the plaintiff having withdrawn from the Inquiry in the light of the findings in relation to the issues at (a), (b) and (c) above?

I will consider each of those issues in turn.

7. Hearsay objection

7.1 Counsel on both sides were agreed that the key question is whether the plaintiff would or would not have got a fair hearing at the Inquiry. Where they differed was in the answer to that question.

7.2 Counsel for the plaintiff submitted that the starting point for the Court should be the observations of Henchy J. delivering

judgment in the Supreme Court in *Kiely v. Minister for Social Welfare* [1977] I.R. 267, where he stated (at p. 281):

> "This Court has held, in cases such as *In re Haughey*, that Article 40, s. 3, of the Constitution implies a guarantee to the citizen of basic fairness of procedures. The rules of natural justice must be construed accordingly. Tribunals exercising quasi-judicial functions are frequently allowed to act informally – to receive unsworn evidence, to act on hearsay, to depart from the rules of evidence, to ignore courtroom procedures, and the like – but they may not act in such a way as to imperil a fair hearing or a fair result. I do not attempt an exposition of what they may not do for, to quote the frequently-cited dictum of Tucker L.J. in *Russell v. the Duke of Norfolk*, 'There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with and so forth'."

In the *Kiely* case the appellant was appealing against the rejection by a deciding officer of a claim for death benefit arising from the death of her husband. The dispute between the appellant and the Minister for Social Welfare related to the cause of death. At the hearing before the appeals officer two doctors gave oral evidence on behalf of the appellant to the effect that injuries sustained by her husband in an accident had caused his death, whereas the evidence contra was a letter from another doctor who had been informed of the circumstances by an official of the Department of Social Welfare. It was held by the Supreme Court that the appeals officer had acted without jurisdiction in allowing the *prima facie* proof of the appellant's claim furnished by oral evidence of her witnesses to be rebutted by the written statement of the absent witness. Later in his judgment (at p. 281) Henchy J. stated:

> "Where essential facts are in controversy, a hearing which is required to be oral and confrontational for one side but which is allowed to be based on written and, therefore, effectively unquestionable evidence on the other side had neither the semblance nor the substance of a fair hearing. It is contrary to natural justice."

7.3 Patently what was at issue in the *Kiely* case, the entitlement of a widow to the payment of a death benefit, is far removed from what is at issue in this case, that is to say, whether, having regard to the allegations made against him in the past, the plaintiff poses a threat to children and, in particular, the pupils of the school. Evidence in civil proceedings concerning the welfare of a child is now governed by Part III of the Children Act 1997 (the Act of 1997), which governs such issues as evidence through an intermediary (s. 22), admissibility of hearsay evidence (s. 23), the weight to be attached to hearsay evidence (s. 24) and evidence as to credibility (s. 25). The Inquiry was not, and these proceedings are not, proceedings concerning the welfare of a child. However, there are two decisions of the Supreme Court in which the common law position in relation to the admission of hearsay evidence in cases involving the welfare of children was considered, which pre-dated the Act of 1997. The principles outlined in those proceedings are still relevant to the issues which arise in cases which are not within the ambit of the Act of 1997, such as this case.

7.4 *Southern Health Board v. C.H.* [1996] 1 I.R. 219 concerned the question whether evidence comprising a video recording of an interview with a child who was under six years of age at the time, who alleged sexual abuse by her father, conducted by a social worker, as well as the social worker's opinion as to the validity of the allegations, was admissible in proceedings under s. 58 of the Children Act 1908, which provided for the placing of a child under the age of 15 years in the care of a "fit person" in certain circumstances. The father objected to the admission into evidence of the video tape on the grounds that it was hearsay. The matter came before the High Court by way of consultative case stated from the District Court, which posed the following question:

> "Whether hearsay evidence, and the procedures to be adopted in relation to video evidence, is admissible in proceedings under s. 58 of the Children Act, 1908."

In the High Court, Costello P. answered the case stated in the affirmative, holding that –

> (a) the nature of the proceedings under s. 58 was virtually the same as the jurisdiction exercised by the court in wardship proceedings, and, accordingly, the court had the discretion to admit hearsay evidence of children;
>
> (b) such discretion could only be exercised when the court was satisfied that it was necessary to do so in the interests of the child, as where
>
> > (i) the child was too young to give evidence in court, or
> >
> > (ii) the court was satisfied that the child should not be required to undergo the trauma of giving evidence in court;
>
> (c) the weight to be given to such evidence was a matter for the court; and
>
> (d) when hearsay evidence was contained in a video recording which it was proposed to admit in evidence, (i) it should be given, prior to the hearing, to the person against whom allegations of wrongdoing were made and, (ii), that person should be afforded an opportunity to submit evidence to rebut any conclusions suggested by the hearsay evidence.

7.5 An appeal against that decision was dismissed by the Supreme Court. The Supreme Court was also of the view that the proceedings were in essence an inquiry as to what was best to be done for the child in the particular circumstances pertaining and were similar to proceedings where a Court was exercising its wardship jurisdiction. The Supreme Court was of a similar view to Costello P. as to when it was appropriate to admit evidence of the video recording. As to the nature of the evidence, as is succinctly summarised in the headnote, the Supreme Court held that –

> (a) the key evidence was that of the social worker which would be regarded as expert testimony and, as such, was subject to cross-examination,
>
> (b) it was a matter for the District Judge to accept or reject the evidence having given the respondent every opportunity to engage his own expert testimony in that regard, and
>
> (c) the video recording of the interview with the child was not to be admitted as the independent evidence of the child but rather as a portion of the material on which the expert evidence of the social worker would be based.

7.6 In delivering his judgment in the Supreme Court, O'Flaherty J., with whom the other Judges concurred, emphasised that the proceedings were not of a criminal nature, nor were they a *lis inter-partes*. He noted the dichotomy between the role of a judge as

arbitrator and the role of a judge as the protector of persons. In the case at issue, he stated that "the judge is in essence required to *inquire* as to what is in the best interests of the child" (p. 238), adding that the rights of the father must be safeguarded, as far as practicable, consistent with discharging that primary obligation. O'Flaherty J., in a passage (at p. 239) to which counsel for the plaintiff referred the Court, also pointed out that, given the passage of time since the proceedings in the District Court, the length of which is difficult to assess but was over six months, the District Judge should establish anew that she was indeed incompetent to give evidence.

7.7 The decision of the Supreme Court in *Eastern Health Board v. M.K.* [1999] 2 I.R. 99 is the decision referred to in the plaintiff's statement of claim. Although the judgment of the Supreme Court was delivered on 29th January, 1999, after the Act of 1997 came into operation on 1st January, 1999, the decision of the High Court against which the appeal was brought and the hearing of the appeal both pre-dated the coming into operation of that Act. The case concerned an application to have three children made wards of court. The parents of the children were the respondents on the application. It was alleged that the father had sexually abused one of the children. The evidence relied on in support of the application was:

> (a) the evidence of a speech therapist as to what the child in question had said to her on two occasions, and
>
> (b) the evidence of a senior social worker of what the child said and did at an interview, a video of which was put in evidence.

The children were taken into wardship and were ordered to remain in the custody of the applicant until further order. It was made clear in the High Court that, if the hearsay evidence had been excluded, the other evidence would not have justified the order making the children wards of court.

7.8 An appeal to the Supreme Court was successful. The head note sets out the basis on which the Supreme Court allowed the appeal as that –

> (a) the wardship jurisdiction differed from the norm in relation to a *lis inter partes*, in that it was inquisitorial and concerned primarily with the child and the welfare of the child was paramount;
>
> (b) hearsay evidence was admissible in wardship proceedings, particularly in administrative matters, as the nature of the jurisdiction justified a departure from the normal rules of evidence;
>
> (c) hearsay evidence regarding statements of a child alleging sexual abuse by his or her parents could be received in the context of assessing the risks to the welfare of the child, but it did not follow automatically that it was also capable of proving the truth of its contents, *Southern Health Board v. C.H.* being approved; and
>
> (d) the essential test was not whether the alleged abuse had occurred but whether there were unacceptable risks to the welfare of the child if the child was not taken into wardship.

7.9 None of the foregoing propositions really explains why the appeal was successful. Denham J., in her judgment (at p. 114), pointed out that the High Court judge had failed to carry out a separate inquiry as to whether it was necessary to adduce hearsay evidence and, if so, in what circumstances, but rather had received the evidence *de bene esse*, which was an unfair process. It was on that basis that she allowed the appeal. Barrington J. found that the case was distinguishable on the facts from *Southern Health Board v. C.H.*, in that in the earlier case a tape recording of an interview by an expert with the child was held to be admissible, not as evidence, but as constituting the material on which the expert based his opinion, the real evidence being the evidence of the expert, which appeared to him to be a very significant step from what happened in the *M.K.* case, where the real emphasis had been on what the child was alleged to have said to the speech therapist. He stated (at p. 121) that the admission of hearsay evidence should never be regarded as a substitute for a full rigorous inquiry into what happened. Keane J. stated (at p. 137) that he was satisfied that the essential test is not whether the Court is satisfied that as a matter of probability the alleged perpetrator has committed the abuse, but whether there is a substantial risk to the welfare of the child, in the light of the evidence, in leaving the child in the custody of the alleged perpetrator. In the circumstances of the case before him, he was of the view that the unsupported evidence of the allegations of the child did not justify the positive findings made against both parents. Lynch J., who agreed with the other Judges, found that, insofar as the video evidence might be relied upon as background information to support the opinion of the social worker, it did not at all support the serious allegations relied on by the applicant, nor the opinion of the social worker supporting such serious allegations (p. 139). Barron J. also had issues with the manner in which the evidence had been treated at first instance. He expressed the view that the statement made by the child to the speech therapist would have been admissible as source material to support an opinion of a properly qualified expert. However, the speech therapist was not so qualified and upon that ground alone the statements made to her should not have been admitted. What weight might have been given to such statements by properly qualified experts remained speculative.

7.10 Keane J. made some observations on video evidence (at p. 138) stating:

> "Given the significantly different nature of video evidence, it seems to me that to treat its admissibility in certain circumstances and subject to safeguards as a proper exception to the rule against hearsay would be a reasonable development by the courts of law on this topic. In this context, it is of no great practical significance whether one admits it as material upon which an expert has relied (the approach favoured in *Southern Health Board v. C.H.* …) or as a proper exception to the rule against hearsay, the view adopted by the Court of Appeal in England. On either view, it remains hearsay evidence, but evidence which is nonetheless admissible. However, I would also agree that it would be desirable for the courts, in determining whether such evidence is admissible and the weight to be attached to it, to adopt the three principles referred to by Ward L.J. In particular, the court must be satisfied as to the qualifications of the expert who conducted the interview and it may not necessarily be the case – though I would not wish to offer a concluded view on the topic – that experience as a social worker in this field, however extensive, is sufficient: there is much to be said for the view that the interview should be conducted by someone with clinical experience as a child psychologist or a child psychiatrist."

7.11 Before leaving consideration of *Eastern Health Board v. M.K.*, I think it is important to note that, in giving his ruling, the Adjudicator referred on two occasions to a passage in the judgment of Denham J. (at p. 114) which deals with the assessment of admissible hearsay evidence. She stated:

> "Assessing the reliability and weight to be afforded to hearsay evidence will depend on the circumstances of each case. These will include issues such as the child's age, ability, intelligence, comprehension of the circumstances, skill in

communication and coherence. The circumstances in which the hearsay evidence is obtained will be relevant. The content of the hearsay evidence and its consistency, both within the body of hearsay evidence, and its consistency to other relevant evidence, will also be relevant. The list is not intended to be finite. The reliability and weight of the hearsay evidence will be specific issues to be addressed by the judge together with other relevant circumstances."

7.12 The approach advocated by the Supreme Court in *Southern Health Board v. C.H.* was considered by the High Court (Shanley J.) in *Vogel v. Cheeverstown House Limited* [1998] 2 I.R. 46. The plaintiff in that case was an employee of the defendant, which operated a residential and day centre for persons with mental handicaps. A resident of the centre made a complaint of sexual abuse against the plaintiff. The complainant had a moderate level of mental handicap and a validation exercise showed her as being anxious, apprehensive and fearful. The defendant established a committee to investigate the claim which decided on certain procedures including, *inter alia*, that the complainant would not be available for examination and cross-examination at the inquiry on account of her condition. The plaintiff had been offered the opportunity of having the complainant psychiatrically examined, but did not avail of this. The plaintiff sought an interlocutory injunction to restrain the defendant from commencing the disciplinary hearing without affording him an opportunity to cross-examine the complainant. The application was refused. Shanley J. stated (at p. 500):

> "In the present case I am satisfied that the requirements of natural justice do not dictate that the complainant be produced to be examined and cross-examined by the proposed tribunal. I have evidence before me that this may seriously damage her mental health and I have to balance this evidence against any risk that injustice would be done to the plaintiff. The requirements of natural justice must depend on the circumstances of each case and the nature of each particular inquiry. In the present case injustice to the plaintiff (taking into account the complainant's psychiatric condition) can, in my opinion, be avoided by directing that a further validation exercise be performed by a psychologist or a psychiatrist nominated by the plaintiff's legal representatives, such validation to take place in the presence of Dr. McCormack (the Clinical Director of the defendant) and Dr. Caffrey (a Clinical Psychologist who had previously conducted a validation exercise on the complainant). This validation exercise should precede the disciplinary inquiry, and the report thereon by the psychologist or psychiatrist retained by the plaintiff shall be the property of the plaintiff. This validation exercise, despite its risk to the complainant's health, presents a far lesser risk to the complainant than requiring her to attend for cross-examination at an inquiry."

7.13 Coincidentally, Dr. Caffrey was one of the expert witnesses which the defendant in this case had intended to call at the Inquiry as a general witness. His statement, classified as a general statement, was in the Book of Complaints. He did not interview any of the complainants. There is a controversy raised on the pleadings as to why he was not called as a witness at the Inquiry before its termination, to which I attach no significance. He was also a witness at the trial of the plaintiff in the Circuit Court.

7.14 In reaching a conclusion as to whether the Adjudicator's ruling in relation to the hearsay objection was correct, I consider that I must treat the process in which the parties had agreed to participate, the Inquiry, as being analogous to a *lis inter-partes*, as opposed to an inquisitorial process, because it is to be inferred from the Terms of Settlement that that is what the parties intended. It was a process the outcome of which would have had serious ramifications for the plaintiff if a finding had been made that he poses a threat to children, because he would have been contractually bound to resign forthwith. It was not merely implicit that he would be afforded fair procedures in the conduct of the Inquiry; it was expressly provided in para. 4 of Annex 1 that recognised principles of fair procedure would apply. Further, it was expressly provided in para. 11 that the Adjudicator would make his determination "in accordance with accepted evidential rules". That provision must be read in the light of the express provision in para. 9 that documents prepared by the Health Board, including any assessment or validation, would be admissible without proof subject to the proviso that at least one of the authors would be available to give evidence and for cross-examination.

7.15 Because the Inquiry was to be conducted by agreement of the parties and it was to be conducted in accordance with the agreed terms set out in Annex 1, it seems to me that it was *sui generis*. While the authorities to which I have referred give guidance as to what may or may not constitute fair procedures in a particular context, I have no doubt that, in accepting the video tape evidence and the accompanying expert evidence and in treating it in the manner in which he indicated in his ruling that he intended to treat it, the Adjudicator would have afforded the plaintiff fair procedures and would have approached the adjudication of the issues which the parties had, by agreement, submitted to his adjudication fairly and in accordance with accepted evidential rules. Therefore, as regards the video tape evidence and the accompanying expert evidence, I am satisfied that the manner in which the Adjudicator would have performed his functions under the Terms of Settlement would have fulfilled the plaintiff's entitlements thereunder for a number of reasons.

7.16 First, in the Terms of Settlement and, in particular, in Annex 1, the defendant and the plaintiff signed up to a process under which neither party was going to be in a position to compel the attendance of a witness at the Inquiry, nor was the Adjudicator. Further, neither party was going to be in a position to compel an assessment of the competence of the pupil complainants, nor was the Adjudicator. In the circumstances, in incorporating the standard of "accepted evidential rules" in Annex 1, the parties cannot have envisaged the application of a standard which required that assessment of the competence of a complainant, or the attendance of him or her as a witness, was a necessary component of that standard. The evidential standard which must have been envisaged by the parties, accordingly, must have been a standard which met the requirements of the authorities to which reference has been made, but without those two elements. In ruling that he would hear the video taped interviews and the accompanying expert evidence as he indicated he would, the Adjudicator made it clear that he would follow the requirements implicit in the decisions of the Supreme Court in *Southern Health Board v. C.H.* and *Eastern Health Board v. M.K.* In so indicating, in my view, the Adjudicator made it clear that the Inquiry would be conducted, and his findings made, "in accordance with accepted evidential rules". In other words, both parties were being assured that the conduct of the Inquiry would be in accordance with the Terms of Settlement.

7.17 As an aside, I would emphasise that that conclusion is based entirely on what I understand to have been the agreement of the parties in relation to the availability of witnesses. It has not been influenced by the authorities in relation to Tribunals of Inquiry under the Tribunal of Inquiries (Evidence) Act 1921 cited by counsel for the parties *(Goodman International v. Hamilton (No. 2)* [1993] 3 I.R. 307; and *O'Brien v. Moriarty (No. 3)* [2006] 2 I.R. 474).

7.18 Secondly, as regards compelling a pupil complainant either to attend or to submit to a competence assessment, both the defendant and the plaintiff are in exactly the same position. To adopt the terminology used by Henchy J. in the *Kiely* case, it is not a case where "the scales of justice are tilted against one side". The investigation of the complaints of the pupil complainants in 1997 was conducted by the Health Board, the public body which, at the time, was statutorily charged with responsibility for the welfare of children. The interviews recorded on video tape were conducted by Health Board personnel. The documentation generated in relation to the complainants' complaints and the reports, including assessments and validations, which were made in relation to the complaints, were produced by Health Board personnel. While it is true that, in the case of nine of the ten complainants, the assessments made by the Health Board personnel are adverse to the plaintiff, in the course of the Inquiry the plaintiff would have been entitled to cross-examine the author of a report admitted in evidence. Further, the plaintiff would have been entitled to lead

evidence of experts on every aspect of the material admitted at the Inquiry. In my view, the application of the ruling of the Adjudicator would have afforded the plaintiff an inquiry the conduct of which would have been in accordance with generally recognised principles of fair procedure.

7.19 Thirdly, the reality of the situation in which the school and the plaintiff find themselves is that, in the type of situation which has arisen in this case, where there is an allegation of sexual abuse against a member of staff in a school for intellectually impaired children and an investigation by the Health Board intervenes, the issues which arise on the employment contract between the employer and the employee cannot be determined without regard being had to the outcome of that investigation. That reality is reflected in Annex 1 to the Terms of Settlement in which both parties expressly agreed that the Health Board documentation, including assessments, would be admissible subject only to the proviso that the author attend the Inquiry, with a view to being available for cross-examination. While the video tapes of the interviews of the pupil complainants are not mentioned in Annex 1, the video tapes contain the source material which formed the basis of the assessments and validations carried out by Health Board officials. It must be implicit in the agreement of the parties that they would be admissible. Otherwise, the plaintiff would have had a genuine grievance, because the Health Board personnel would be expressing opinions on available source material which neither the plaintiff nor his witnesses nor the Adjudicator would have seen.

7.20 In reaching the conclusion that the Adjudicator was correct in ruling that he intended to hear the evidence, including the video taped evidence and accompanying expert evidence, subject to the observations he had set out, I have not had regard to the argument made on behalf of the defendant that the second category of complaint against the plaintiff in relation to each complainant would, in any event, be unaffected by the hearsay challenge. The two pronged complaint approach adopted in the Book of Complaints, while it may have been intended to put some structure on the Inquiry, and I am doubtful whether it achieves that end, is unquestionably artificial as regards so much of the second category of complaint as relates to the "findings in the report of the [Health Board]" in respect of each complainant. The first step in the agreed task which the Adjudicator was required to perform, as set out in para. 11 of Annex 1, was to determine whether "the said allegations are well founded". The reference to "the said allegations" clearly means the allegations referred to earlier in para. 7 – "such allegations as are in [the Health Board's] possession which contain allegations of sexual abuse in respect of current or former pupils of St. Vincent's School concerning the [plaintiff]". The second step in the agreed task of the Adjudicator was to determine specifically whether the plaintiff posed or poses a threat to children. However, that determination was clearly intended to flow from his determination in relation to the allegations which were the subject of the Inquiry. I cannot see anything in the Terms of Settlement which would have entitled the Adjudicator to make a finding adverse to the plaintiff which extended beyond those two steps, which are intrinsically entwined with each other. In other words, any adverse finding of the Adjudicator based on the findings referred to in the second category would have to have been based on the first category complaints.

7.21 I have not overlooked the fact that the second category of complaint goes on to allege professional misconduct on the part of the plaintiff on the ground that he had not moved to set aside the findings of the Health Board. However, I have already alluded in para. 5.4 above to the fact that the *vires* of the Adjudicator to adjudicate on that part of the second category complaints was not raised at the hearing before the Adjudicator prior to its termination. I am acutely conscious of the fact that the final submission made by counsel for the defendant was that the issue was not raised. In the circumstances, it would be inappropriate to address this aspect of the matter further.

8. Acquittal objection

8.1 This Court's only factual source of what happened at the criminal trial of the plaintiff on foot of the allegations made by D.M. and K.W. is the transcripts of the hearing of the Inquiry on 7th and 8th December, 2009, that is to say, what the Adjudicator was informed by counsel. The Adjudicator, in his ruling, recorded that both complainants attended the trial in November 2002, gave evidence and were cross-examined. The plaintiff also gave evidence. As I have already noted, Dr. Caffrey was also a witness at the trial in the Circuit Court, although there is a certain lack of clarity as to his precise role as a witness for the prosecution. The trial was lengthy and comprehensive in relation to the issues of abuse that were alleged.

8.2 In relation to K.W., the Adjudicator stated that the allegations and issues arising were manifestly the same at the Inquiry as at the trial. While, as regards D.M., he did not make any similar statement, I consider that it is reasonable to infer that the allegations and issues which arose in respect of D.M. on the first category of complaint were the same at the Inquiry as at the trial. I am proceeding on that assumption, subject to the qualification expressed later. While, on the first day of the hearing, the Adjudicator asked to be furnished with a copy of the indictment in the criminal proceedings, it would appear that it had not been furnished prior to the termination of the hearing. It is not possible to discern from the transcripts the precise offences with which the plaintiff was charged on the basis of the allegations made by D.M. and K.W.

8.3 The first category complaint in relation to D.M., which the Adjudicator ruled he would hear if D.M. appeared at the hearing, alleges that on divers dates unknown, but since around September 1994 and prior to 4th March, 1997, the plaintiff physically and sexually abused D.M. The particulars given state the locations at which the abuse is alleged to have occurred, being the school and the plaintiff's house. The particulars of the one allegation of sexual assault allege that the plaintiff, at his house, sexually assaulted D.M. by touching his penis.

8.4 The authorities which were cited in argument before the Adjudicator, which were also cited in this Court, were three decisions of the Supreme Court, namely:

(a) *McGrath v. Commissioner of An Garda Síochána* [1991] 1 I.R. 69;

(b) *Mooney v. An Post* [1998] 4 I.R. 288; and

(c) *Garvey v. Minister for Justice* [2006] 1 I.R. 548.

8.5 In the *McGrath* case, the applicant, a member of An Garda Síochána, had been acquitted by a jury on a trial before the Circuit Court on three charges of embezzlement of three sums of money received by him by virtue of his employment contrary to the Larceny Act 1916. Following his acquittal he was notified that he was to be charged with breaches of Garda discipline, including three charges of corrupt or improper practice, the particulars alleged being his failure to account for the three sums of money received by him in the course of his duty which had been the subject of the criminal charges. He applied by way of judicial review for an order prohibiting the holding of the inquiry into the alleged breaches of discipline. At first instance an order of prohibition was granted in relation to certain alleged breaches of discipline. The decision of the High Court (Lynch J.) is reported at [1989] I.R. 241. It was held that it was not open to the inquiry to investigate three charges of corrupt or improper practice, insofar as such charges alleged corruption or dishonesty on the part of the applicant and thereby contradicted the findings and verdict of a jury on charges arising from the same matters. However, it was held that the respondent was entitled to cause an inquiry to be held into the remaining three charges

dealing with the applicant's failure to account for sums of money received in the course of his duty, provided that the breach of discipline alleged was confined to a charge of merely improper, rather than corrupt or improper, practice. An appeal to the Supreme Court against that decision was dismissed.

8.6 The plaintiff in the *Mooney* case was a postman employed by An Post. He was acquitted by a jury of criminal charges arising out of complaints in relation to mistreatment of postal packets. The judgment does not disclose the offences with which he had been charged. Following his acquittal, after protracted correspondence between the plaintiff's solicitors and the solicitors for An Post, the plaintiff was dismissed. An issue which arose in the plenary proceedings in the High Court was whether the plaintiff was entitled to rely upon his acquittal in the criminal case to defeat the civil complaint against him. He was not successful on that point either in the High Court or in the Supreme Court.

8.7 In the *Garvey* case, the applicant, a prison officer, was acquitted at trial by the jury on charges of offences under the Non-Fatal Offences against the Person Act 1997 relating to an alleged assault on a prisoner by kicking him in the face. Despite the acquittal, his suspension, which had pre-dated the criminal charges, was not lifted. The Governor of the prison pursued an internal disciplinary inquiry into whether he had breached the disciplinary code for prison officers. The particulars of each alleged breach of discipline were identical and consisted of the set of facts alleged on foot of which the applicant had been tried and acquitted. His application for an order of prohibition in relation to the disciplinary proceedings was refused at first instance but was granted on appeal. In the Supreme Court, Geoghegan J., in his judgment, with which the other judges concurred, was faced with the problem of attempting to reconcile the decisions of the Supreme Court in the *McGrath* case and the *Mooney* case. Indeed he commented (at para. 13) that it was almost impossible fully to reconcile them. He summarised his view of the decision in the *McGrath* case as follows (at para. 18):

"In summary, my view is that *McGrath v. Commissioner of An Garda Síochána* … is authority for the proposition that it may, in any given circumstances, be unfair and oppressive to conduct a disciplinary inquiry into the same issues in respect of which there has been an acquittal on the merits at a criminal trial but this will depend on the particular surrounding circumstances and in particular their cumulative effect. There is no necessary preclusion per se of such a double process."

8.8 In attempting to reconcile the *McGrath* decision and the *Mooney* decision, Geoghegan J. stated (at para. 19):

> "Fundamentally, the two cases were different in my view. In *Mooney v. An Post*, the employer, An Post, had obtained some confidential information about the applicant from a person who could not be called at the trial. Effectively, An Post laid a trap for the applicant which in its belief he had fallen into and the criminal charges were based on that. They were not based on the original complaint. In those circumstances, the acquittal necessarily gave rise to a reasonable requirement on the part of the employer that the employee answer certain questions. There was a simple issue of whether he was suitable to be retained as a postman. It was an obvious example, in my opinion, of where an acquittal could not *per se* prevent further inquiries. I take the view, however, that this particular case is much closer to *McGrath* … than it is to *Mooney* …. There was a simple issue of credibility in this case, namely, whether the applicant had kicked the prisoner in the face and inflicted the injuries. Whilst the issue was simple, its resolution was clearly anything but simple. As already mentioned, the trial lasted five weeks and the jury took sixteen hours to deliberate. The jury then found in favour of the applicant. It is true, of course, that it is possible that a jury merely had a reasonable doubt but I do not think that that speculative possibility, by itself, justifies a rejection of the contention by the applicant that, given the nature of the criminal trial he faced, the issues involved and the fact that essentially it is all a matter of internal dispute between prison officers, it would be oppressive and an unfair procedure now to unravel the verdict of the jury by way of disciplinary inquiry."

The last sentence in that quotation, in my view, contains the *ratio decidendi*. It follows that, in a particular case, in determining whether a disciplinary inquiry should be pursued following an acquittal, the core issue is whether it would be oppressive and an unfair procedure to pursue the disciplinary inquiry.

8.9 Certainly, a factor which influenced the manner in which the Supreme Court determined the *Garvey* case was that there was an internal dispute between prison officers involved. Later (at para. 20) Geoghegan J. stated:

> "By now every aspect of the case must have been discussed within the prison service whether at Governor level or prison officer level. It is impossible to imagine that such a lengthy trial leading to an acquittal did not give rise to a flow of arguments and opinions throughout the prison. In this claustrophobic atmosphere, I believe that, to use the expression of Finlay C.J. in *McGrath* …, it would be a 'basically unfair procedure' to conduct a disciplinary inquiry on what in effect are identical allegations to criminal charges based on essentially the same evidence and the same witnesses."

As I read the judgment, the determining factors were that in the two fora (the criminal trial and the disciplinary inquiry) the allegations were identical, the factual bases of the allegations were the same, and the evidence would be proffered by the same witnesses.

8.10 The approach adopted by the High Court (Ó Caoimh J.) in *A.A. v. The Medical Council* [2002] 3 I.R. 1, where the inquiry was to be conducted not in an employment context but by an independent statutory body which regulates registration of medical practitioners, is also instructive. The applicant on that application for judicial review was a qualified doctor who had been charged and acquitted on two counts of having sexually assaulted two female patients. He sought to be re-registered with the respondent, as his registration had lapsed through the passage of time. The Fitness to Practise Committee of the respondent determined to conduct an inquiry pursuant to s. 45(3) of the Medical Practitioners Act 1978, in which it proposed to inquire into allegations of professional misconduct, which were particularised as ten allegations, the first two being assault and/or indecent assault and sexual assault.

Ó Caoimh J. limited the parameters of the inquiry stating (at p. 33):

> "I am satisfied that the issue is whether it would be manifestly unfair to permit the proposed inquiry or any part of it to proceed in the light of the acquittal of the applicant on the charges preferred against him and tried by the Circuit Criminal Court. In conclusion, I am of the opinion that there is no reason why the Fitness to Practise Committee should not hear the proposed evidence and consider it in relation to the conduct of the applicant. I am of the opinion nevertheless that it would be essentially unfair were the respondent to enter upon a hearing to determine that the applicant was guilty of an assault of which he has been acquitted by the Circuit Criminal Court. This is not to say that the committee should not hear all the evidence proposed to be given in assessment of whether the conduct alleged against the applicant is conduct which it considers to have been established and to determine whether in the light of this fact he is a person who may have been guilty of inappropriate behaviour in the context of the complaints set out at paragraphs 3 to 10 inclusive in relation to each of the complainants who were allegedly examined by him when in hospital."

Later, Ó Caoimh J. stated that, while he was satisfied that the principle of double jeopardy and *res judicata* did not apply to the facts of the case, he was opinion that principles of fairness suggested that the proposed inquiry should be limited to the complaints at items 3 to 10 inclusive, which, in effect, excluded the first two allegations.

8.11 The basis on which the Adjudicator rationalised his decision to proceed to hear the complaints in relation to D.M., but not to hear the complaints in relation to K.W., was that D.M. would probably be available for cross-examination, whereas K.W. would not. That does not, in my view, address the core point, which, in accordance with the jurisprudence of the Supreme Court fell to be considered, which was whether it would have been oppressive and an unfair procedure at the Inquiry to try, to use the terminology used by Geoghegan J. in the *Garvey* case, "to unravel the verdict of the jury by way of disciplinary inquiry". On the assumption I have made that the allegations and their factual bases arising in respect of D.M. at the Inquiry were the same as had arisen at the trial, in my view, the Adjudicator was incorrect in ruling that the complaints in relation to D.M. should be inquired into, given that the task of the Adjudicator under Annex 1 was to determine whether the allegations were well founded. In other words, if D.M. appeared at the Inquiry, the Adjudicator was going to determine the very issue which had been determined by the jury in acquitting the plaintiff, albeit by reference to a different standard of proof. On the authorities, to subject the plaintiff to a further civil inquiry, in my view, would have been oppressive and an unfair procedure.

8.12 It is necessary to qualify the assumption on the basis of which I have reached that conclusion. The complaints in the Book of Complaints in relation to K.W. in the first category comprise two separate allegations of sexual assault, the first of which is particularised as including actions which would constitute physical assault and intimidation. In contrast, there are six distinct allegations made in relation to D.M. in the first category of complaints, only one of which, to which I have referred earlier, is in the nature of a sexual assault. Therefore, to the extent that the complaints in relation to D.M. are the same as the allegation or allegations which formed the basis of the charge or charges on which he was acquitted in the Circuit Court, I am satisfied that the ruling of the Adjudicator to proceed with the Inquiry in relation to those complaints was incorrect.

9. Prematurity

9.1 Counsel for the defendant submitted that the response of the plaintiff to the Adjudicator's ruling in withdrawing from the Inquiry was premature. The point was made that, even if the Adjudicator was incorrect in deciding to hear the complaints in relation to D.M., the plaintiff might not have suffered any prejudice because D.M. might not have turned up at the Inquiry, in which case the plaintiff would have no grounds for complaint. Counsel for the defendant also made the point that, in effect, these proceedings constitute an interlocutory appeal against the ruling of the Adjudicator and that this is not permissible.

9.2 In support of his contention that the plaintiff was wrong in withdrawing from the Inquiry when he did and in seeking to pursue these proceedings, counsel for the defendant referred the Court to the decision of the Supreme Court in *Superwood Holding plc. v. Sun Alliance plc.* [1999] 4 I.R. 531, on the basis that the situation which prevails here, proceedings in the High Court to have the Inquiry declared to have been conducted in an unfair and an unlawful manner on the basis that the ruling of the Adjudicator was incorrect, is analogous to a situation in which an appellant appeals from a decision of a High Court Judge to the Supreme Court during the pendency of the High Court proceedings. In the *Superwood* case, Hamilton C.J. referred to the fact that on many occasions the Supreme Court had indicated its disapproval of appeals to it against orders made by a trial judge during the course of hearing an action. He quoted a passage from the judgment of the Supreme Court in *Condon v. Minister for Labour* [1981] I.R. 62 in which the "strongest indication of such disapproval is to be found" (p. 538). Later, Hamilton C.J. (at p. 541) reiterated that appeals should not be made to the Supreme Court against orders or rulings made by a trial judge during the course of an action being tried by him or her.

9.3 I do not think that the analogy drawn between the situation which prevails here and an appeal from the High Court to the Supreme Court is a true analogy. While the rationale of the disapproval of the Supreme Court of appeals during the course of the hearing of an action is not set out in either the *Superwood* case or the *Condon* case, I assume that it is founded on common sense and a desire to regulate the business of the Superior Courts at both levels in the most time and cost efficient manner. In this case, the involvement of the Adjudicator in the Inquiry is founded on the agreement of the parties to have an issue arising out of their contractual relationship as employer and employee determined. The proceedings in this Court to date have had the semblance of a judicial review on the Adjudicator's ruling, but that is only because the issues raised on behalf of the defendant are of a type usually encountered in judicial review proceedings. The true position is that the underlying relationship between the defendant and the plaintiff is that of employer and employee and is based on contract, save insofar as the relationship is regulated by statute. In order to resolve the dispute which has arisen out of that relationship the parties agreed, in the Terms of Settlement, to utilise the dispute resolution mechanism embodied in the Terms of Settlement. Accordingly, the consequences of the plaintiff withdrawing from the Inquiry when he did fall to be determined in accordance with the law of contract and its application to the agreement embodied in the Terms of Settlement.

10. Consequences

10.1 In summary, my conclusions in relation to the issues outlined at (a), (b) and (c) in para. 6.7 above are as follows:

> (a) Subject to the conclusion in relation to the issue at (b), I am satisfied that the Adjudicator was correct in deciding to proceed with the Inquiry on the basis of receiving the video tape evidence and the accompanying expert evidence.
>
> (b) I consider that the Adjudicator was incorrect in ruling that the complaints in relation to D.M., insofar as they are the same as the allegations which formed the basis of the charges on which he was acquitted, should proceed at the Inquiry.
>
> (c) The withdrawal of the plaintiff from the Inquiry and the initiation of these proceedings is not analogous to an appeal from the High Court to the Supreme Court against a decision made by a judge during the course of the hearing of an action and a finding cannot be made that the plaintiff acted prematurely on that basis. The consequences of the plaintiff's withdrawal from the Inquiry in the light of the findings made at (a) and (b) above fall to be determined in accordance with the law of contract.

10.2 The Adjudicator, following the exchanges with counsel for the plaintiff which I have recorded earlier, understandably treated the Inquiry as having been terminated and his role as being *functus officio*. No submissions were made to the Court as to the consequences of the plaintiff having precipitated that state of affairs under the law of contract. It is not possible to pronounce on such consequences in the light of the findings I have made, in the absence of such submissions.

10.3 However, I consider that one comment is apposite. During the hearing, the conduct of the plaintiff in withdrawing from the Inquiry was characterised by counsel for the defendant as self-induced or voluntary frustration of the Inquiry. Such conduct, even if it was not justified, would not give rise to what at common law is regarded as frustration of a contract, either frustration of the Terms of Settlement, or of the plaintiff's underlying contract of employment.

10.4 I will hear both sides as to how the proceedings are to be progressed to conclusion.