Neutral Citation Number [2010] IEHC 189

THE HIGH COURT

2006 890 JR

P.D.P.

Applicant

And

The Board of Management of a Secondary School

And

The Health Service Executive

Respondents

Judgment of O'Neill J. delivered on the 20th day of May, 2010.

1. Factual background

1.1 The applicant is a secondary school teacher. He taught at a secondary school ("the school") for in excess of thirty years.

2001

1.2 On the 23rd November, 2001, the South Western Area Health Board ("SWAHB"), a statutory agency that has since been replaced by the second named respondent, received a written compliant from the mother of a former pupil at the school ("J.K.") that her child ("R.K.") had been sexually abused by the applicant.

1.3 J.K. was known to the office of the SWAHB the complaint was made to as she was a former employee, having since left the jurisdiction. The applicant was also known to the SWAHB. Having separated from his wife in June of 1997, the applicant applied to the Circuit Court for access to his daughter. His wife alleged that the applicant had sexually abused this child. She then withheld her consent to have the child assessed. After a period of one year and nine months the Eastern Health Board, as it then was, concluded in a letter to the applicant of the 28th October, 1999, that the "*process of investigation did not lead to any substantiation of the allegation and the outcome is unconfirmed*" .

1.4 Unsuccessful efforts were made in late December 2001 and in early January 2002 to allocate the file concerning R.K. to a different office due to J.K.'s previous employment.

2002

1.5 On the 31st January, 2002, the SWAHB notified the gardaí of the name, address, age and nature of the suspected child abuse alleged by R.K.

1.6 On the 3rd June, 2002, a letter from Ms. M. K., R.K.'s personal counselor in the U.S., was sent to the SWAHB. It stated as follows:-

> *"Please accept this letter as validation that [R.K.] has made a verbal outcry of sexual abuse by [P.D.P.] while attending [the school]. If you require further information or assistance, please do not hesitate to contact me at the address listed below."*

2003

1.7 In February 2003, the social work file was allocated to J.O.D., a social worker. On the 5th February, 2003, J.O.D. wrote to J.K. informing her that she had been allocated R.K.'s case and that she was in the process of contacting M.K. to request the validated report of the disclosure. In a letter of the 5th February, 2003, J.O.D. requested M.K. to provide full details of the allegation made by R.K. and a police statement, if available, to assist her in making a social work assessment of risk and to undertake a garda investigation. She also requested M.K. to forward the validated report of the verbal outcry and sexual abuse. A report was forwarded by M.K. by cover letter dated the 6th March, 2003.

1.8 On the 15th May, 2003, J.K. emailed G.B., a social worker in another office and requested that he give her the email addresses of certain managers in the SWAHB.

1.9 On the 14th July, 2003, J.O.D. wrote to the applicant informing him that an allegation of him being "sexually inappropriate" with a child who attended the school had been made against him. A description of that inappropriate behaviour, relating to three separate incidents, was outlined in her letter. However, the identity of the child was not disclosed. J.O.D. invited the applicant to meet with her on the 21st July, 2003, at a specified location for the purpose of discussing the allegations and to determine if the SWAHB needed to inform any third parties, such as the second named respondent, family members or neighbours as to the nature of the allegations. J.O.D.'s letter was countersigned by her team leader, D.M.

1.10 The applicant replied by letter dated the 16th July, 2003, addressed to D.M. He denied the allegations completely. He also intimated that he would not be in attendance at the proposed meeting. He noted that he had only been given a few days in which to seek advice and/or to consider the serious allegations made against him. The applicant wrote to D.M. again on the 21st July, 2003, again refuting the substance of the allegations made against him. He set out nine matters he wished to be addressed:-

> *"1. Name of the student making the allegations?*
>
> *2. Date the allegations were first reported or made?*

3. To whom and to what agency?

4. Has the student signed a copy of the allegations that he has made?

5. May I please be provided with a full complete copy of the allegations i.e. an unedited photocopy of the original(s)

6. A full complete copy of the Child Protection Guidelines which the SWAHB currently uses to manage and assess allegations/reports of child abuse ….

7. Please confirm here at the outset whether or not I will receive a copy of the final report on the matter when it issues in due course – TO ME IN PERSON.

I am not legally represented and I request that you phrase your reply to this question based upon me retaining that status.

8. With reference to the address you used for the first letter to me, of 14th July … I am not raising any complaint in respect of same but I am curious and interested as to the origin of same. If it is a 'creation' of the complainant, then it might have some significance. Alternatively, if it is an innocent misspelling by a SWAHB official then that is understandable. Whatever the explanation, I request that I simply be informed as to the precise origin of same. Specifically, I request the name of the person who initially provided same to you for use on this occasion.

9. I request an explanation as to why this matter has emerged from SWAHB,… – by letter dated 14th July to me – and not from the SWAHB offices which deal with the town of …, where I both live and work. I wish you to be clear that I am not raising any issue or complaint as to same. I would not object to any format for the management of the case by the SWAHB, which I assume may well be for sound operational reasons. I just want to be fully INFORMED as to what is the basis or reason for same.

…"

In the same letter the applicant further advised that he would make no decision on attending the proposed meeting of the 21st July, 2003, until he was fully informed as to the intended process he would be subject to in its entirety. He stated that he wished to assist but would only do so if his rights were "*adequately provided for and protected*." He also requested that if third parties were to be contacted that he be informed immediately.

1.11 By letter dated the 23rd July, 2003, J.O.D. proposed another meeting date of the 29th August, 2003, at the same venue as initially proposed. The applicant then wrote to P.D., the C.E.O. of the SWAHB on the 22nd August, 2003, to complain that the content of the letters he had sent previously to D.M. had been ignored.

1.12 On the 8th October, 2003, J.O.D. wrote to M.K. asking for her professional opinion as to whether she considered R.K.'s disclosure as a validated account of sexual abuse. M.K. sent a letter of confirmation to the SWAHB that the account given by R.K. constituted a validated account of sexual abuse on the 9th October, 2003. That letter stated *inter alia*:-

"As a Licensed Master Social Worker working in the field of children and families and specializing in the emotional and behavioral impact of sexual abuse and assault on children and adolescents, I submit this letter as formal confirmation that I unreservedly determine that [R.K.'s] disclosure of sexual abuse by [P.D.P.], and all subsequent information discussed in our counseling sessions pertaining to said disclosure, constitute a validated account of sexual abuse."

1.13 On the 24th October, 2003, J.O.D. wrote an email to J.K. as follows:-

"…

there is some information i would like to share wuth [sic.] you following our recent meeting with our solicitor and Barrister. The Social work Dept are clear on our follow up to [R.K.'s] disclosure, and we have consulted with The Gardai Siochana re their investigation. They will require contact from yourself and or [R.K.] in order to proceed with an official complaint.

…"

J.K. replied:-

"I spoke with Superintendent [M.] this morning. He may be calling you. I will be sending him a written statement. Does the Health Board have responsibility for correcting their incorrect Gardai notification? I was under the impression that the health Board had to do this. What is the time line they have to make the notification after receiving the complaint. … "

1.14 On the 28th October, 2003, J.O.D. invited the applicant by letter of the same date to a rescheduled meeting to take place on the 5th November, 2003. In her letter she made the following statement:-

"The Health Board is a statutory authority charged specifically with the function of promoting the welfare of children, therefore if you decide not to attend the above scheduled meeting, the Health Board will have to determine, in your absence, if the Health Board need to inform any third parties, such as your employer, family members or neighbours as to the nature of these allegations."

1.15 The applicant wrote to M.L., the Regional Chief Executive of the Eastern Regional Health Authority, on the 3rd November, 2003, in which he, inter alia, expressed his objections to the procedure being adopted by the SWAHB, in particular, that J.O.D. contemplated deciding to inform third parties about the allegations in his absence. He also sought further information relating to the composition of the board members of the Eastern Regional Heath Authority and their contact details. The applicant's letter was acknowledged as received by M.L. on the 18th November, 2003.

1.16 D.M. informed the applicant by letter dated the 5th December, 2003, that the SWAHB had determined that the allegations made against the applicant would be shared with his employers after the 17th December, 2003, as he had not attended meetings offered by

the SWAHB to discuss the allegations. The applicant wrote to D.M., P.D. and to M.L. by letters dated the 15th December, 2003. In his letter to M.L. he objected to an unfair procedure and he also noted the lack of response to the issues raised by him in previous correspondence.

1.17 J.O.D. wrote to the principal of the school, S.M., by letter dated the 19th December, 2003, informing him that allegations of child sexual abuse had been made against the applicant by a pupil who had since left the school. It did not name the child in question but did state that the child's disclosure of the child sexual abuse had been validated. It advised that the inappropriate sexual activity related to three incidents between December 2000 and the early months of 2001, the incidents alleged to have occurred in the applicant's home.

1.18 The social work file was then transferred to another office on the 22nd December, 2003. On the same date C.F., Team Leader, and G.B., a social worker, met with S.M. and C. C., the chairperson of the board of management of the school, in person to share the nature of the allegations made. The name of the pupil was given to S.M. He averred in his affidavit sworn on the 6th October, 2006, that he was shocked to learn that the SWAHB had been in correspondence with the applicant for several months.

1.19 On the following day, the 23rd December, 2003, S.M. and C.C., met with the applicant. S.M., in his affidavit, outlined what took place at that meeting as follows:-

> *"11. The Applicant insisted from the outset at the meeting that the name of the student whom he allegedly assaulted, and any information which might identify him must not be disclosed to him by the school in any form. The Applicant said his position in this regard was 'for legal reasons'. The Applicant took the view that the SWAHB was trying to avoid its responsibility for furnishing information to him by passing it over to the school. He outlined the situation whereby he sought information in writing but the SWAHB had, instead, proposed that he attend meetings, which requests he was refusing because he was legally entitled to the material in writing in his view."*

2004

1.20 On the 5th January, 2004, G.B. emailed J.K. informing her that he and C.F. had met with the principal of the school. She replied later that day asking him what was happening. On the 8th January, 2004 he provided her with the following information in an email:-

> *"… The allegation was put to the perp. but he refused to meet with the social workers so the info. went to his employer.*
>
> *We met the Principal of the School on Christmas Eve and given the appropriate advice re: suitability so we are awaiting him getting back to us."*

1.21 J.K. responded asking what the next step was. G.B. intimated that the SWAHB had no power to do anything but would oversee the procedures followed by the school in assessing the suitability of the applicant as a person who has contact with children. He surmised that a case conference could be called depending on the outcome of the school investigation. J.K. replied to ask what S.M. said at the meeting. G.B. told her, in his view, that he was a bit shocked.

1.22 S.M., acting on advice from the Department of Education and the school solicitors, wrote to C.F., by letter dated the 8th January, 2004, expressing his concern that it had taken the SWAHB over five months from the time the applicant was notified of the allegations made against him to notify the school of those allegations; requesting the SWAHB to furnish the school with copies of all statements and reports regarding the allegations and calling on the SWAHB to give its direction regarding the applicant continuing as a teacher in the school.

1.23 On the 9th January, 2004, S.M.and C.C. met with Garda Superintendent M. S.M. described what occurred at that meeting at para.14 of his affidavit as follows:-

> *"14. …He [the Garda Superintendent] informed us that the Gardai had been aware of the allegation since 2002, at which we were astounded, in that it appeared that everybody but the school had been informed of the allegations and had been aware of them for some time. Superintendent [M.] indicated to us that the DPP had considered the form and nature of the complaint made by the alleged victim's mother, [J.K.] …and on the material available to the Gardai at the time, the DPP was not satisfied that he had sufficient to proceed to prosecution.*
>
> *15. We indicated the steps we had taken to date and that, on the advice received and material available to us at that time the school did not propose to take any action against the Applicant, albeit that we were in the process of seeking further information. Superintendent [M.] indicated his agreement in principle with the approach we were taking."*

1.24 The Garda Síochána notified the second named respondent by letter dated the 26th April, 2004, that R.K. had declined to be interviewed or to make a formal statement of complaint, that he wished to have the matter dropped and that the gardaí would not be taking any further action. At para.28 of the first affidavit of M.Q., a Local Health Manager for the second named respondent, sworn in January, 2006, she outlined the position of the gardaí:-

> *"28. … The Garda Siochana informed the South Western Area Health Board that they had sought directions from the DPP as to whether they could proceed to prosecute on the basis of statements from [M.K.] and the child's mother. The DPP's office stated there could be no prosecution in the absence of a statement from the child. The Garda Siochana indicated that they intended taking no further action in relation to the allegations at that point but that if a statement was made the matter could be re-considered and that they intended informing the First named Respondent of their decision in the matter."*

1.25 On the 4th May, 2004, Superintendent M. telephoned S.M. to inform him that the matter was now at an end as R.K. was declining to make a statement. S.M. attempted to communicate this information to the applicant verbally but he requested that it be put in writing. S.M. decided not to do this.

1.26 In an email of the 8th June, 2004, J.K. gave her written consent to the release of M.K.'s report to the first named respondent.

1.27 S.M. retired as principal of the school, with P.O.R. succeeding him on the 1st September, 2004.

2005

1.28 The social work file was unallocated between January 2005 and November 2005 due to a lack of resources.

1.29 On the 30th November, 2005, C.F. requested M.K.'s consent to the release of her reports and correspondence to the first named respondent by email. M.K. emailed back giving her consent. C.F. emailed M.K. again on the 12th December, 2005, seeking her consent to allow the applicant to read the reports and seeking further information about M.K.'s validation including whether she undertook validations of sexual abuse as part of her role and/or on behalf of a statutory child protection agency; the name of the relevant statutory child protection agency and whether any of her previous validations have been used in court cases.

1.30 C.F. wrote to the applicant on the 12th December, 2005, informing him of a proposed meeting on the 21st December, 2005, between her department and the first named respondent. R.K. was named in the letter. This was the first time his identity was formally disclosed to the applicant by the second named respondent. C.F. also informed the applicant that she had received written consent from the applicant's mother and counselor to release copies of the written reports to the school detailing the child's allegations and the professional assessment regarding their validity. She told the applicant that she was available to meet with him on the 20th December, 2005, if he wished to discuss the allegations or examine the written reports.

1.31 M.K. responded to C.F.'s last email of the 12th December, 2005, on the 21st December, 2005, stating that permission for the applicant to have access to her reports would have to be given by J.K.; requesting information as to the second named respondent's policy regarding alleged perpetrators having access to such information and indicating that her role as a child and adult counselor was solely to provide therapy and advocacy to clients and their families and that if an outcry of sexual abuse, physical abuse or neglect was made by a client that she was legally obliged to report that abuse or neglect to the Child Protective Services (CPS), part of her State's Department of Protective and Regulatory Services. That body then investigated the report to determine the validity of the outcry and any steps that needed to be taken to protect the child from further harm. The CPS would involve, she advised, the relevant Police Department Child Abuse Unit in cases involving criminal activity. Regarding the case of R.K., M.K. had the following to say:-

> *"HOWEVER, in [R.K.'s] case, due to the alleged sexual abuse occurring in Ireland and the outcry occurring in the United States, the Attorney General of … became involved as a result of being contacted by Interpol (I am not certain of the details but I know that Interpol was connected with the Attorney General's Office's involvement in the case; …. In March 2004, I met with Sergeant Investigator [M.] with the … Attorney General's Office … Sergeant [M.] had a statement ready for [R.K.] to sign in regards to the allegation and in relation to potential legal action in Ireland. However, at the time, [R.K.] was not in an emotionally secure place and was subsequently unwilling to sign the statement."*

1.32 An email from J.K. to C.F. dated the 13th December, 2005, headed "Impact Statement by [J.K.] regarding [R.K.]" commenced as follows:-

> *"First I would like to say how appalled I am to learn that [P.D.P.] continues to have contact with children. The school, the police and the health board have been aware of this vile, depraved and predatory behaviour or [sic.] more than 4 years. It is more than reckless and irresponsible that he is allowed to have any contact with children in any capacity and I sincerely hope that multiple, costly and expensive public litigations result from the failure of the parties to insure [sic.] the safety of children."*
>
> J.K. then described the nature of the alleged acts committed and went on to outline the effect of the alleged abuse on her, her son and family. She also stated that it would be irresponsible to permit the applicant to continue to have contact with children. C.F. replied to J.K. on the 15th December, 2005. She requested J.K.'s written consent to give to a copy of the impact statement to the school, should it be legal to do so. That written consent was given by J.K. in an email of the same date.

1.33 By letter dated the 15th December, 2005, C.F. informed the new principal of the school, P.O.R., that she had obtained written consent from the pupil's mother and his counsellor, M.K., to release the reports relating to the allegations and that she proposed to hold a meeting on the 21st December, 2005, to which the school was invited "*to review the information and reiterate our concerns in relation to [P.D.P.].*"

1.34 The applicant replied to C.F.'s letter to him on the 19th December, 2005. He informed C.F. that he was not in a position to attend the scheduled meeting by reason of having been denied the minimum information and copy documents to which he believed he was entitled. She replied on the 21st December, 2005, stating that the meeting had been postponed until the New Year and that in respect of the disclosure of the child's name, it was not released to the applicant before as it was hoped that he would attend at the scheduled appointments to discuss the allegations.

1.35 Also on the 19th December, 2005, C.F. wrote to Inspector L. informing him that J.K. believed that she and M.K. could make written statements on behalf of R.K., given that he was psychologically unable to make a statement himself, and that the gardaí could proceed with an investigation based on those statements. C.F. requested that the Inspector contact J.K. to clarify this issue.

1.36 C.F. emailed M.K. on the 29th December, 2005, advising her of the postponement of the meeting and requesting clarification of M.K.'s role regarding validation. As to whether an accused person must be given information she stated as follows:-

> *"In relation to the sharing of the report with the alleged perpretator (sic.), there was a judgement called the Barr judgement in the courts in Ireland which stated that the accused must have all the information in relation to allegations made against him in order to defend himself. In this instance, given that we are giving the report to the school, our legal advice is that we must share that information with the accused. In this instance, I am not happy to give him a copy of the report but I have offered him an opportunity to meet and share the contents of the report. I have spoken with [J.K.] and advised her regarding this."*

That M.K. did not personally validate allegations of abuse was confirmed by her in a further email to C.F. of the same date:-

> *"… As a counselor I do not validate outcries as this is done by Child Protective Services. Even if a child provides further details after his/her initially (sic.) outcry, I am obligated to report this additional information to CPS for them to confirm. …."*

1.37 C.F. informed J.K. by email on the 29th December, 2005, that following legal advice, her "impact statement" could not be shared by her with the school or with the applicant.

2006

1.38 On the 4th January, 2006, the applicant wrote again to C.F. setting forth information he required concerning the pupil who had made the allegations and his counselor, M.K.

1.39 C.F. emailed M.K. again on the 11th January, 2006, seeking verification of her qualifications and expressing concern regarding the issue of her validation:-

> *"… The concern I have is that [R.K.'s] disclosure is not validated by an agency that undertake this work. Nonetheless, you have stated in a previous letter dated October 2003 that you unreservedly determine that [R.K.'s] disclosure constitutes a validated account of CSA. Are you happy in your role as counselor to determine this view."*

M.K. replied the following day clarifying her role in validating R.K.'s disclosure as follows:-

> *"… I apologize for the confusion. In our recent correspondences, I viewed the word 'validate' to mean that I had investigated and legally determined [R.K's] outcry to be true. My recent e-mails to you were based on the fact that the investigation aspect of child sexual abuse cases is not in my role as counselor but rather falls to Child Protective Services and law enforcement officials.*
>
> *However, I did indeed write that I determined [R.K.'s] disclosure was a validated outcry of CSA. My determination is based in regards to the details of his outcry, the consistency of his reports, and the subsequent behavioral and emotional difficulties that he experienced after the reported CSA, all of which are consistent with my knowledge and experience of working with children who have been sexually abused. As a counselor, this determination (which again is based on my experience, not on investigation) of [R.K.'s] outcry remains the same.*
>
> *…"*

1.40 Details of M.K.'s credentials were sent by her manager on the 13th January, 2006, to C.F. A further email was sent by M.K. to C.F. on the 24th January, 2006, stating that the applicant "need only have access to [her] credentials.", in response to C.F. informing her by email that the applicant had requested information regarding her address, qualifications, clinical experience and role in relation to R.K. Meanwhile, the applicant sent a letter of complaint to the Chief Executive of the HSE, Professor Brendan Drumm on the 17th January, 2006, noting that he had not received any contact from the second named respondent for over two years. This letter was acknowledged as received by the second named respondent's Director of Customer Services, Information and Appeals on the 14th February, 2006.

1.41 At the request of the first named respondent, an inter-agency meeting took place on the 21st February, 2006. A meeting with the principal of the school had been sought by C.F. but the school sought a multi-disciplinary meeting, involving the school, its legal advisors, the second named respondent and the gardaí. There, the first named respondent saw, for the first time, the material held by the second named respondent regarding the allegations made against the applicant, including the report of M.K. The first named respondent requested that a social work report dealing with the risk be carried out, in accordance with the Department of Education and Science Child Protection Guidelines of March, 2001, which have since been replaced ("the Child Protection Guidelines") and that the second named respondent would write to it with a recommendation regarding the risk. Paragraph 4.3.4 of the Guidelines states as follows:-

> *"4.3.4 If, in the Chairperson's opinion, the nature of the allegation warrants immediate action, the Chairperson, on behalf of the Board of Management, should direct that the employee absent him/herself from the school with immediate effect. Where the Chairperson is unsure as to whether the nature of the allegations warrants the absence of the employee from the school while the matter is being investigated, s/he should consult with the Child Care Manager of the local health board and/or An Garda Siochana for advice as to the action that those authorities would consider necessary. Following those consultations, the Chairperson should have due regard for the advice offered."*

1.42 The second named respondent agreed to consider whether it should seek an expert opinion regarding the status of the opinion expressed by M.K. concerning the allegations made by the child. It subsequently appointed K.M., an independent child welfare consultant to conduct a review of the matter and to offer an expert opinion on the professional determination of M.K. and K.M. wrote to C.F. by letter dated the 22nd March, 2006, which stated *inter alia*:-

> *"…*
>
> *Given that there is no information available suggesting that RK has withdrawn his allegation or that it has been discredited by any independent evaluation I think that the HSE is wholly justified in taking this matter very seriously and accepting that [P.D.P.] … has a case to answer. He is clearly not cooperating with you. Therefore, that avenue is not one that holds out any potential at this time.*
>
> *In the absence of a Garda investigation, which is not likely to happen, the onus is on the HSE to use other means to address the obvious child protection risks that arise. …*
>
> *…*
>
> *It is unfortunate, that for various reasons this case has not been expedited more quickly. Likewise RK's refusal to make a Garda complaint makes the case more complicated. Those factors weaken the HSE's position. Nonetheless, regardless of the delays or RK's stance, I think you have no choice but to pursue this issue with vigour – as you are now doing – and that requires a reciprocal response from the Education authorities."*

1.43 On the 24th March, 2006, C.F. replied to the applicant's letter of the 4th January, 2006, in which she outlined the allegations made against the applicant and the qualifications and experience of M.K. She also indicated to the applicant that he could inspect M.K.'s report. The letter also expressed regret about the delay in following the matter up which had occurred, which was, according to C.F., due to a lack of resources.

1.44 A social work report dated the 27th March, 2006, was sent to the first named respondent. The report concluded that the applicant posed a serious risk to children. The relevant portion states as follows:-

"Since the beginning of the social work investigation of the matter, numerous attempts have been made to meet [P.D.P.] for the purpose of investigating the allegations made against him. [P.D.P.] has refused all his appointments to meet. He has however engaged with the department through written correspondence. He has categorically denied the allegations in this correspondence. It is impossible to undertake an assessment of [P.D.P.] through written correspondence …. [P.D.P.] poses a potential serious risk to children and in particular at the school in which he teaches."

1.45 On the 29th March, 2006, C.F emailed K.M. with the following query:-

"I have just one query and it is in relation to your opinion that [P.D.P.] should be suspended pending a fuller investigation. We are of the opinion that the investigation is concluded and there is nothing more that we can do to investigate it further. I am wondering what your thoughts are regarding this and what you think a fuller investigation would consist of."

1.46 On the same day C.F. emailed J.K. to inform her that the school was calling an emergency meeting of the Board of Management to discuss the reports that it had received. She indicated that they would be discussing the options regarding the applicant's employment. She promised to keep J.K. updated. On the 31st March, 2006, the solicitors for the school sent a copy of the social work report to Inspector L.

1.47 In a letter dated the 3rd April, 2006, to C.F., K.M. stated that he saw no reason to question the value of M.K.'s report and did not consider that the HSE needed to investigate these allegations. Three faxed letters were sent by the solicitors for the second named respondent to the first named respondent on the 3rd April, 2006. C.C., at para.16 of his affidavit sworn on the 12th October, 2006, summarised the content of that correspondence:-

"16. …The first letter noted inter alia that the School was relying on the [Child Protection] guidelines and indicated that the HSE's advice was that the Board should consider whether or not the Applicant should remain in his post, the second stated inter alia 'It appears to our client having considered the matter that the only way to guarantee the safety of the pupil is to ensure that the employee is absent from the school.' The third letter listed the limited options available to Board in these circumstances."

In addition, the first letter advised that the second named respondent was of the view that it would not be appropriate to allow the applicant to have a copy of the social work report, though he should be allowed to read it on the school premises or on the HSE premises.

1.48 The school, following a meeting, made a decision to place the applicant on administrative leave on the 4th April, 2006, with immediate effect as of 9am on the 5th April, 2006. The applicant was not invited to attend that meeting. The basis for the decision taken was set out in the letter to the applicant of the same date as being in light of all the information furnished and pursuant to advice received from the school. That advice, it stated, was to the effect that the absence of the applicant from the school was the only way to guarantee the safety of the pupils in the school. The letter informed the applicant that a meeting to consider his continued leave of absence had been arranged for the 19th April, 2006, and it invited the applicant to make submissions at that meeting and/or to furnish advance written submissions. The applicant was given the letter on the 5th April, 2006, in school by P.O.R. and by C.C.

1.49 J.K. emailed C.F. as follows on the 4th April, 2006:-

"…

Sorry for the slow response. I'm delighted that they're having a meeting. When?? Has [K.M.] come to any conclusions? Re: Inspector [L.] – I will call him sometime – I haven't yet because it's difficult for me – What do you know about what he's done.

How is everyone in …? Send my regards."

1.50 The applicant forwarded his written submissions to the first named respondent in advance of the meeting of the 19th April, 2006. He was also given an opportunity to make oral submissions at the meeting. A decision was taken by the first named respondent to continue the applicant's administrative leave and this was communicated to the applicant by letter dated the 20th April, 2006. The applicant wrote to the first named respondent on the 6th May, 2006, expressing his shock at the actions and decisions taken by the board; that the first named respondent denied him knowledge of the case being made against him and he reiterated that he denied the allegations made against him. The board replied by letter dated the 18th May, 2006, stating that the board had an open mind in relation to the allegations and that it rejected the suggestion that the applicant had been denied knowledge:-

"The Board of Management does not accept that it denied you 'actual knowledge of the case made against you as you claim in your said letter. We refer you to the Board of Management letter dated 4 April 2006. As stated therein you had been informed by the HSE of the nature of the allegations as well as the name of the complainant. The said letter also indicated that you could read the Social Work Report either on the school premises or on HSE premises. It is noted that you have not availed of the opportunity of reading the report on the school premises. When asked at the meeting on 19 April if you had been in touch with the HSE you indicated that you could not answer that question except on advisement.

Furthermore, as advised at the meeting on 19 April and as reiterated in our letter to you dated 20 April 2006 any questions which you wish to have addressed by the Board of Management should be put in writing. It is noted that you have not raised any questions in the said letter. The Board of Management confirms that it will address any relevant questions which you put to it in writing if it is within its power to do so."

The letter also invited a written response from the applicant. Once received, the board indicated that it would convene a meeting to consider the applicant's continued leave of absence.

1.51 On the 26th April, 2006, C.F. emailed J.K. as follows:-

"…

Well we have the report from [K.M.] which shares and endorses our view that the disclosure is credible and hence the teacher poses a risk.

The school had a meeting early in the month with the consequence that the teacher has been placed on administrative leave.

Insp [L.] cannot proceed any further with a criminal investigation without a statement from [R.K.], as the DPP made this recommendation.

maybe [R.K.] will feel better to know that he has been believed and that steps have now been taken."

1.52 K.M.'s report was sent to the first named respondent's solicitors on the 30th May, 2006. It was dated the 11th April, 2006. It reflected the terms of his letter to the second named respondent sent on the 3rd April, 2006 i.e. that he was satisfied that M.K. acted in an appropriately professional manner in this case and that he saw no reason to question the value of M.K.'s report and that he did not consider that the second named respondent needed to further investigate the allegations. In addition, however, he stated that rather than the second named respondent continuing to investigate the applicant that the school or some independent person or agency on their behalf should investigate the matter, placing the applicant on administrative leave, on full pay, pending such investigation.

1.53 The applicant had just engaged solicitors. They wrote on his behalf to the second named respondent by letter dated the 6th July, 2006, informing it that it was of the view that the procedures adopted by it and its statutory predecessor, which led to the decision to communicate the complaint made against the applicant as a validated complaint to the school and the pursuit of the complaint in subsequent communications with the school were "fundamentally flawed and unlawful". It warned that if there was a failure by it to take steps to remedy the effect of the unlawful and unfair procedures adopted by it and to restore the applicant to his former employment then it would issue proceedings immediately. Another warning letter was sent by the applicant's solicitors to the first named respondent demanding it to restore the applicant to his previous position or that it would issue proceedings within seven days and objecting to the procedures it adopted. It identified defects in how the first named respondent had dealt with the matter in the following manner:-

• *"You carried out no independent inquiry into the allegations communicated to you or into the basis of the HSE's/Health Board's opinion other than to attend a meeting with HSE officials about which our client was not informed and whose content had not been disclosed to our client;*

• *You have not furnished any key documents to our client but merely set out in your correspondence short excepts from the HSE's/Health Board's correspondence and a summary of their position;*

• *The initial decision to place our client on leave of absence was taken without affording him any opportunity to answer the allegations made against him;*

• *The invitation to attend the school's board of management for the purposes of considering his continued leave of absence was, without the minimal essential information and documentation required to defend himself, in all the circumstances an unfair procedure;*

• *You did not independently satisfy yourself that the opinion of the HSE and/or in its statutory predecessor, the Health Board, was based upon reasonable grounds or give any consideration to whether there were serious grounds for doubting the validity of that opinion;*

• *Finally, you ignored your own guidelines and rules in failing, despite being called upon by our client to do so, to have regard to the Garda investigation into the matter; in initially considering the matter at the board of management level without notifying our client; and in failing to furnish our client with written evidence or any record in support of the allegation and other related documentation."*

1.54 These judicial review proceedings were commenced on the 24th July, 2006. Leave was granted by this Court (Peart J.) on the same date to the applicant to seek *inter alia* orders of certiorari and declarations by way of judicial review pursuant to para. 4 of his statement of grounds as follows:-

(a) An order of *certiorari* quashing the decision of the first named respondent dated the 4th April, 2006, to place the applicant on administrative leave.

(b) An order of *certiorari* quashing the decision of the first named respondent dated the 19th April, 2006, to continue the applicant on administrative leave.

(c) An order of *certiorari* quashing the conclusion contained in the social work report of the second named respondent dated the 27th March, 2006, that the applicant poses a potential serious risk to children and in particular at the school where he teaches.

(d) An order of *certiorari* quashing the recommendation of the second named respondent, communicated to the first named respondent on or before the 4th April 2006, that the first named respondent ensure that the applicant be absent from the school premises of the first named respondent.

(e) An order of *certiorari* quashing the decision of the second named respondent dated the 19th December, 2003, to communicate to the first named respondent an allegation that the applicant had sexually abused a former pupil of the first named respondent.

(f) An order of *certiorari* quashing the conclusion contained in the letter of the second named respondent to the first named respondent dated the 19th December, 2003, that the allegations against the applicant had been validated.

(g) A declaration that the procedures adopted by the second named respondent in investigating an allegation that the applicant had sexually abused a former pupil of the first named respondent were carried out in breach of the applicant's entitlement to natural and constitutional justice.

(h) A declaration that the conclusions reached by the second named respondent in investigating an allegation that the applicant had sexually abused a former pupil of the first named respondent are null and void and of no legal

effect.

(i) A declaration that the procedures adopted by the first named respondent in responding to and investigating an allegation that the applicant had sexually abused a former pupil of the first named respondent were carried out in breach of the applicant's entitlement to natural and constitutional justice.

(j) A declaration that the conclusions reached by the first named respondent in investigating an allegation that the applicant had sexually abused a former pupil of the first named respondent are null and void and of no legal effect.

(k) Damages.

(l) Such further or other reliefs as may be necessary or appropriate including such directions as may be appropriate for ensuring that the allegations of sexual abuse at issue in these proceedings are expunged from the applicant's personnel file.

1.55 On the 28th July, 2006, the solicitors for the first named respondent wrote to the solicitors for the second named respondent requesting that their client provide the applicant with copies of the material he had requested in order for the first named respondent to progress the matter. The relevant section of that letter reads:-

> *"The Guidelines under which our Client operates require that the person in respect of whom allegations of this kind are made and in respect of whom decisions are to be made by the Board of Management following placement on administrative leave of absence, be furnished with copies of the allegations against him/her and the documentation underpinning same. Our client has already advised the Teacher that the release of this documentation is at first instance a matter for the HSE.*
>
> *The Board of Management, however, cannot proceed with its investigation and discharge its duties to the Teacher in terms of fair procedures, if the material is not furnished to him. In the circumstances we require that copies of all of the documentation (including the complaint and reports from the USA, the documentation hereinbefore referred to, and your letter dated 3rd April, 2006 wherein it states 'It appears to our client having considered the matter that the only way to guarantee the safety of the pupil is to ensure that the employee is absent from the school') be furnished by you to the Teacher's Solicitors, Messrs. Garrett Sheehan & Partners."*
>
> A follow-up letter was written by the first named respondent to the second named respondent on the 12th October, 2006, again requesting that the applicant be furnished with the relevant material.

1.56 On the 13th October, 2006, the first named respondent filed a statement of opposition together with three affidavits. The matter was listed for mention before Quirke J. on the 21st December, 2006. On that date counsel for the second named respondent intimated to the Court that it would be conceding two of the reliefs sought against it, contained at paragraphs (c) and (f) of the applicant's statement of grounds, as outlined in para.1.54 above.

1.57 In an email to J.K. of the 27th October, 2006, C.F. asked for R.K.'s address and also made the following statement:-

> *"…Regarding the judicial review, the School solicitors are requesting that all the reports are released to [P.D.P.], I am resisting this as I believe that this is a further abuse. I will keep you updated regarding this."*
>
> In her reply of the 30th October, 2006, J.K. questioned why the school needed the address and expressed concern that if they had it that the applicant's solicitors and the applicant himself would get it. She stated that she strongly objected to the address being given to the school as it put herself and R.K. at risk of harm.

1.58 On the 1st November, 2006, the solicitors for the first named respondent's solicitors wrote to the solicitors for the second named respondent outlining its position as follows:-

> *"Our client is not entitled to leave [P.D.P.] on administrative leave of absence indefinitely. Rather, our client is obliged to investigate whether [P.D.P.] has been guilty of misconduct.*
>
> *The disciplinary process is laid down by the provision of an agreement between the ASTI and the Joint Managerial Body of 1st September, 2000 and involves the Principal lodging a charge in writing with the Board of Management … and … if so inclined, appointing an investigating committee. This process is entirely distinct from the decision to place [P.D.P.] on administrative leave of absence and involves entirely different considerations. The existing Judicial Review proceedings are not relevant to the future process."*

The address of R.K. was sought by the school it was stated in the same letter, in order to ascertain whether he would engage with the envisaged disciplinary process. The solicitors for the second named respondent replied on the 7th November, 2006, indicating that they did not have a current address on file for R.K. but that their client was pursuing with the family whether it had permission to release the address. A subsequent letter of the 14th November, 2006, from the second named respondent's solicitors stated that the disciplinary process, as set out in the agreement, would not be obstructed by not having the address of R.K. and it listed the documents already in the first named respondent's possession. The solicitors for the first named respondent disputed that the address of R.K. was not required in a letter dated the 23rd November, 2006. It also called again for the second named respondent to release all the documents underpinning the allegation to the applicant.

2007

1.59 In its statement of opposition dated the 18th January, 2007, the second named respondent consented to orders of certiorari, in the terms of those paragraphs, as sought by the applicant, being made against it, that is, an order quashing the decision contained in the social work report of the 27th March, 2006, that the applicant poses a potential risk to children, in particular, the children at the first named respondent's school and an order quashing the conclusion reached in a letter dated the 19th December, 2003, from it to the first named respondent, that the allegations made against the applicant had been validated. The statement of opposition was accompanied by the first affidavit of M.Q., sworn in January 2006 which stated that the second named respondent intended to commence a new investigation into allegations made against the applicant. That affidavit set out a history of events but it did not exhibit any documents.

1.60 Following an emergency meeting of the first named respondent on the 26th January, 2007, a resolution was passed to revoke with immediate effect the decision to place the applicant on administrative leave on the 4th April, 2006. The letter the first named respondent sent to the applicant invited him to return to his teaching duties. The applicant's solicitors replied in a letter dated the 6th February, 2007, indicating that it was not reasonable to ask the applicant to return to work *"when your client continues to stand over the steps taken by it on foot of allegations which have been demonstrated to be unfounded."*

1.61 On the 15th February, 2007, the solicitors for the first named respondent made the following criticism of the second named respondent, in a letter to its solicitors:-

> *"The content of the documentation which has been filed by your client is astounding. It appears that the fundamental infirmities of the HSE's position in relation to this matter, which have now caused it to consent to orders quashing its recommendations, were known to the HSE in December of 2005. They were known* ***before*** *the HSE re-activated the investigation and initiated the process leading to the teacher being placed on administrative leave of absence. No explanation whatever is given for this sequence of events from the institution of these proceedings to date. If the HSE had come forward with this material in July 2006, which it was clearly in a position to do, the Applicant would have been reinstated with the minimum of delay."*

1.62 In a letter to the applicant's solicitors of the same date the solicitors for the first named respondent stated:-

> *"While our client takes the view that it acted appropriately and in accordance with the prevailing guidelines, in circumstances where the HSE is no longer standing over any of its recommendations, or the material underpinning same, it is clear that our client cannot do so either."*

1.63 In a later letter of the 30th March, 2007, the solicitors for the first named respondent set out its position to the applicant's solicitors with regard to the reliefs sought:-

> *"We concur that, our client having conceded the relief sought in paragraph (a) and the HSE having consented to the relief sought in paragraphs (c) and (f), the further relief sought at paragraphs (b), (d), (e) and (h) in effect automatically follows. In the premises our client is willing to consent to relief in terms of paragraphs (b), being the only one of the said items addressed to our client."*

1.64 The solicitors for the second named respondent disclosed to the solicitors for the first named respondent on the 3rd April, 2007, that their client did not have an address or contact number for R.K.

1.65 By notice of motion dated the 27th June, 2007, the applicant applied to strike out the first affidavit of M.Q. on the grounds that parts of it were scandalous/oppressive; to obtain orders from the Court directing the second named respondent to plead its case and to disclose information to the applicant in accordance with its lawful obligations in the proceedings; to amend its statement of grounds and to obtain directions from the Court.

1.66 On the 23rd July, 2007, two social workers, who were not previously involved in the investigation, and a solicitor for the second named respondent met with R.K. and J.K. at a location outside of this jurisdiction. An arrangement to meet with R.K. to take a statement was made. The social workers met again with R.K. on the 27th July, 2007. He reiterated the allegations of abuse against the applicant. Notes of the interview of the 27th July, 2007, are exhibited in the affidavit of C.O.C., social worker, sworn on the 19th September, 2007. Those notes were sent to R.K. by email who, in turn, approved their content via email.

1.67 The applicant's pay ceased in August 2007. In his affidavits there is no evidence given as to whether it is his intention to return to teaching.

2008

1.68 The applicant brought a further notice of motion dated the 24th January, 2008, to amend his original statement of grounds to include reliefs directed towards preventing a new investigation being commenced into the allegations made against him. An order was made by this Court on the 20th February, 2008, permitting the applicant to file an amended statement of grounds. The applicant was permitted to add the following reliefs to para. 4 of his statement of grounds:-

> (n) A declaration that the second named respondent is not in possession of any or any *bona fide* report or material alleging child abuse or any other form of abuse as between the applicant and [R.K.] such as would justify or require any further investigation of the applicant.
>
> (o) An order of prohibition restraining the second named respondent from carrying out any further investigation of the applicant based upon the purported statement of [R.K.] made in London on the 27th July, 2007.
>
> (p) An order of prohibition restraining the second named respondent from carrying out any further investigation of the applicant in respect of the specific complaint received by the said respondent in or about November 2001 alleging that the applicant had abused a former pupil of the first named respondent.

1.69 On the 4th February, 2008, the solicitors for the second named respondent wrote to the applicant's solicitors advising them that their client intended to notify the gardaí of the material provided by R.K. at the meeting with the two social workers. It also stated that it was not the second named respondent who employed the applicant and that it was the first named respondent who made decisions regarding the applicant's contract of employment.

1.70 In an amended statement of opposition the second named respondent, delivered on the 26th February, 2008, the second named respondent stated *inter alia* that it held material in respect of the applicant which it was required to investigate. The applicant's motion for disclosure or discovery, of the 27th June, 2007, was listed for the 23rd October, 2008. Following discussions an agreement was reached to the making of orders of discovery in the terms set out in the order made by the Court (Peart J.) with such discovery to be furnished within four weeks.

1.71 The solicitors for the first named respondent wrote to J.K. and to R.K. in similar terms in separate letters dated the 12th November, 2008, informing them of the discovery order that had been made and explaining that R.K.'s school file would be furnished to the applicant and the second named respondent on foot of that order. They advised that they could come to Court to make submissions or could apply to vary the order for discovery. A letter was sent back by R.K. and J.K.'s former landlord with possible

contact details.

1.72 An affidavit of discovery on the part of the first named respondent was sworn by Mr. Matthews, the first named respondent's solicitor, on the 14th November, 2008. A further explanatory affidavit was sworn by him on the 23rd March, 2009. An affidavit of discovery for the second named respondent was sworn on the 25th February, 2009. A further order in respect of the second named respondent's discovery was made on the 15th July, 2009. The applicant, unsatisfied with the discovery of the second named respondent, applied to adjourn the hearing of these proceedings to allow for further and better discovery. However, this was refused.

1.73 At the hearing of these proceedings in November 2009 the applicant applied again to amend his statement of grounds to include particulars in respect of a damages claim. I determined that the public law issues that arise in this case would be adjudicated upon first and then, in the light of the judgment delivered, the issue of damages could then be considered. The issue of whether the proposed amended grounds exceed that for which leave was granted is also a matter that may have to be dealt with by this Court at a later stage.

2. The Issues

2.1 Due to the agreement of the respondents to the quashing of the decisions that have adversely affected the applicant it could, at first glance, be questioned why the applicant is continuing with these proceedings. The second named respondent's stated intention, to continue their investigation into the allegations made by R.K. against the applicant has reinvigorated the proceedings as reflected in the amended statement of grounds. Therefore, the central issue that arises is whether or not the second named respondent has a power to continue the investigation into the allegations made against the applicant in circumstances where the alleged victim is over eighteen years of age and resides in a different jurisdiction. If there is such a power, given the history of events, it is necessary to establish the features of natural justice that would have to apply and whether these can be assured to the applicant.

3. Does the HSE have a power to continue to investigate the allegations?

Counsels' Submissions

3.1 Mr. Fitzgerald S.C., for the applicant, challenged the vires of the second named respondent to further investigate the applicant in circumstances where the alleged victim is now an adult and where there are no identified or identifiable children not receiving adequate care and protection by or from the applicant. He submitted that the judgment of Barr J. in *M.Q. v. Gleeson & Others* [1998] 4 I.R. 85, upon which the second named respondent relied, should not be followed by reason of the fact that a proper analysis and construction of s.3 of the Childcare Act 1991 ("the Act of 1991") was not undertaken in that case because it did not concern a case of historic abuse, that is, a person who alleges that he was abused and is no longer a child. Where a person who made allegations was an adult, the matter required investigation by An Garda Síochána but did not concern the second named respondent. Section 3 of the Act of 1991, in his submission, related to circumstances where there is a present concern and where there is an identified or identifiable child or children who are not receiving adequate care and protection. He argued that s.3 of the Act of 1991 did not empower the second named respondent to commence an investigation of a complaint made by an adult that he was abused as a child.

3.2 Mr. Fitzgerald also referred to s.18 of the Child Care Act 2001 ("the Act of 2001") which provides for the making of a care order by the District Court. The Court's jurisdiction under s.18 of the Act of 2001, he submitted, was retrospective and not prospective i.e. it could not be invoked for apprehended risks in the future. He also relied on the judgment of McCracken J. in *The North Western Health Board v. H.W. and C.W.* [2001] 3 I.R. 622 concerning the necessity to interpret the Act of 1991 in light of its primary purpose, that is, the care/supervision order in respect of a particular child. He contrasted s.47 of the Act of 1991, which was interpreted by McGuinness J. in *Western Health Board v. K.M.* [2002] 2 I.R. 493 with s.3 of the Act of 1991. He submitted that s.47 could not be phrased more broadly but that McGuinness J. had held that the District Court was not at large when making orders under that section.

3.3 It was also argued that there must be an express statutory power to carry out an investigation in circumstances where the outcome of that investigation could damage the applicant's reputation. Mr. Fitzgerald drew a parallel with *Maguire v. Ardagh* [2002] 1 I.R. 385 where it was held that if a citizen was to be held accountable for carrying out acts which by their nature would constitute grave criminal offences, then the power of the body to make the finding must be set down in a statute.

3.4 He further submitted that to continue with the investigation at this juncture would be oppressive and unfair. He described the material that was obtained at the meeting with R.K. on the 27th July, 2007, as being unsigned, obtained outside the jurisdiction, unreliable and as not constituting a valid complaint. He noted that R.K. had never signed a complaint. In his submission the second named respondent had deprived itself of jurisdiction to make any or new findings in respect of the applicant arising from the complaint it received in 2001. He pointed to the failure on the part of the second named respondent to adhere to fair procedures and cited numerous examples in this regard. He also alluded to the excessive delay in carrying out its investigation. The failures of the second named respondent in the past, he contended, would affect its capacity to act fairly in the future.

3.5 Mr. McDonagh S.C., for the first named respondent, did not make submissions as to the entitlement of the second named respondent to continue its investigation. He submitted that his client had complied appropriately with Chapter 4 of the Child Protection Guidelines in the context of the complaints made against the applicant, as it was statutorily required to do. He contended that the decision taken by the first named respondent on the 4th April, 2006, to place the applicant on administrative leave was not one that required the applicant to have a hearing as it concerned ensuring the safety of children and was not a determination of the guilt or innocence of the applicant. He noted that in *M.Q. v. Gleeson & Others* [1998] 4 I.R. 85 Barr J. commented that where the HSE gives advice to a board of management it was not for a school to conduct an investigation. In the alternative he submitted that the decision to place the applicant on administrative leave was moot as it had since been revoked. The efforts to set up a disciplinary hearing on the part of his client were frustrated by the second named respondent, he submitted.

3.6 Mr. McEnroy S.C., for the second named respondent, submitted that his client had a continuing statutory duty to investigate the complaint made against the applicant in accordance with s. 3(1) of the Act of 1991. Relying on the judgment of Barr J. in *M.Q. v. Gleeson* [1998] 4 I.R. 85, he submitted that the duty on his client under s.3 of the Act of 1991 related to children who are not receiving adequate care and protection and included children, whether identifiable or not, who might be at risk in the future from a prospective danger, the nature of which was presently known to, or reasonably suspected by them. He characterised the interpretation given by Barr J. to s.3 of the Act of 1991, as extensive. He referred to the Canadian case of *Ombudsman of Ontario and the Queen in Right of Ontario* (1979) 103 D.L.R. (3d) 117 (High Court) and 117 D.L.R. (3d) 613 (Court of Appeal) where the Canadian courts held that the existence of a statutory duty to investigate included an entitlement to re-investigate a matter and did not hinge on the applicant going back to teaching. In his submission the matter should be remitted to the second named respondent

for investigation.

3.7 It was further submitted that the applicant had not been denied fair procedures. There was merely an attempt by the second named respondent to control the manner in which the information would be accessed. The requirements of natural justice that would have to be followed in any continuing investigation, he submitted, would fall below the criminal standard and would not necessitate R.K. being made available for cross-examination.

4. Section 3 of the Child Care Act 1991

4.1 Section 3 of the Child Care Act 1991 states:-

> *"3. - (1) It shall be a function of every health board to promote the welfare of children in its area who are not receiving adequate care and protection.*
>
> *(2) In the performance of this function, a health board shall—*
>
> *(a) take such steps as it considers requisite to identify children who are not receiving adequate care and protection and co-ordinate information from all relevant sources relating to children in its area;*
>
> *(b) having regard to the rights and duties of parents, whether under the Constitution or otherwise—*
>
> *(i) regard the welfare of the child as the first and paramount consideration, and*
>
> *(ii) in so far as is practicable, give due consideration, having regard to his age and understanding, to the wishes of the child; and*
>
> *(c) have regard to the principle that it is generally in the best interests of a child to be brought up in his own family.*
>
> *(3) A health board shall, in addition to any other function assigned to it under this Act or any other enactment, provide child care and family support services, and may provide and maintain premises and make such other provision as it considers necessary or desirable for such purposes, subject to any general directions given by the Minister under section 69.*
>
> *…."*

5. Decision

5.1 In *M.Q. v. Gleeson* [1998] 4 I.R. 85 Barr J. considered the nature and extent of the obligation placed on health boards under s.3 of the Act of 1991. He stated as follows at pp.99-100:-

> *"The specific statutory obligation placed on every health board 'to promote the welfare of children in its area who are not receiving adequate care and protection' is, inter alia, directed towards identifying the categories of children to which a health board owes a duty of care under the Act. That duty is not owed to all children in its area but only to those who are not receiving adequate care and protection. The categories thus identified include children who by reason of a potential situation in the future are liable to require protection at that time from a prospective danger the nature of which is presently known to or reasonably suspected by a health board. It is present knowledge or reasonable suspicion of potential harm which is the essence of the health board's obligation to children.*
>
> *In my opinion once a situation comes to the knowledge of a health board relating to children being put at risk, there is no real distinction between present and future risk. In terms of the instant case the perceived harm which might be done to children if, after qualification, the applicant obtains employment in the area of child care, is essentially no different from perceived harm which might be done now if he were already so employed. Furthermore, the concern about the applicant expressed by the fourth respondent also had an immediate aspect, i.e., his removal from that part of the social studies course which involved work experience with children. The fourth respondent perceived that the children with whom he was working as part of his course of instruction were at risk from him and required its protection.*
>
> *I have no doubt that in the exercise of their statutory function to promote the welfare of children, health boards are not confined to acting in the interest of specific identified or identifiable children who are already at risk of abuse and require immediate care and protection, but that their duty extends also to children not yet identifiable who may be at risk in the future by reason of a specific potential hazard to them which a board reasonably suspects may come about in the future. Subject to the exercise of its functions in the matter of complaints about child abuse and its duty to afford the applicant the benefit of fair procedures, I have no doubt that in the instant case, on the premise that it had taken appropriate steps to inform itself, the fourth respondent would have been entitled to form an opinion that the applicant was unfit for child care work and would have had an obligation under s. 3(1) of the Act of 1991 to communicate its opinion to the second respondent with a view to having the applicant removed from the social studies course on which he was engaged. The fourth respondent was not obliged to wait until a child or children had been actually abused by the applicant after he had taken up child care employment. On the contrary, on becoming aware that he proposed to embark on a career in child care and that he was attending an educational course to qualify for such work, the fourth respondent had an obligation to protect children who in its considered opinion would be at risk of abuse by the applicant should he carry out his stated intention of embarking on a career in that area. Such an obligation would require the communication by the fourth respondent of its opinion to the second respondent coupled with a request to remove him from the course in question* [emphasis added]."

5.2 In that case the Eastern Health Board received a number of complaints concerning the applicant over a number of years including allegations of physical and sexual abuse against his partner and children. The applicant had never been informed of those complaints. However, upon learning that the applicant was enrolled in a Vocational Education Committee ("VEC") course, it formed the view that the applicant was not a suitable person to undertake such a course and that it had a statutory duty to inform the VEC of this opinion and to recommend that the applicant should be removed from the course. The VEC withdrew the applicant from the course, upon receipt of this information and details of the complaints made. The applicant challenged that decision of the VEC. Although on the

facts of that case, the decision of the VEC was quashed, from the above extract it is clear that Barr J. construed the duty of a health board under s.3(1) of the Act of 1991 as relating also to children, whether identifiable or not, who might be at risk in the future from a prospective danger.

5.3 Speaking of the approach that should be adopted on the construction of the Act of 1991, McGuinness J., in Western Health Board v. K.M. [2002] 2 I.R. 493 at 510 stated as follows at p.510:-

> *"I would therefore accept the submission of the respondent that the construction of the Act of 1991, as a whole, should be approached in a purposive manner and that the Act, as stated by Walsh J. [in Bank of Ireland v. Purcell [1989] I.R. 327 interpreting the Family Home Protection Act 1976], should be construed as widely and liberally as fairly can be done."*

5.4 Having regard to the purposive approach that must be taken to the interpretation of s.3(1) of the Act of 1991, I agree with the formulation of Barr J. of the duty under that section of the second named respondent, as extending to children who may be at risk in the future whether identifiable or not, based on present knowledge or a reasonable suspicion of potential harm to children.

5.5 It is accepted by Mr. McElroy that under s.3 of the Act of 1991 a child care consideration or objective is required. It is clear that R.K. was never the child whose care was the objective of the investigation which took place as, at all times since the investigation commenced, he has lived outside Ireland. Whilst the applicant's professional status, that is, as a teacher in a secondary school, having contact with children, clearly gave rise to a particular, easily identified, child care consideration, the power to intervene and investigate under s.3(1) should not be confined to those situations where the person suspected as being a danger to children has a particular access or relationship which identified or identifiable children. Persons who have a tendency to abuse children in this way can and do develop many varied and often insidious means of access to children. It would be contrary to the obvious purpose and objective of s.3(1) of the Act of 1991 to confine the power given in s.3(1) of the Act of 1991 to those situations in which the person suspected had already an established access to a child or children. Thus, I am satisfied that the power given in s.3(1) of the Act of 1991 is activated when a credible complaint of child sex abuse is received by the second named respondent, as it then was, or currently the Health Service Executive. If the allegation is found to be established after appropriate investigation, it is then a matter for the statutory authority in whom s.3(1) powers are vested to select the appropriate means to protect any children it finds to be at risk from the predatory behaviour of the abuser in question. Needless to say the statutory authority must in its investigation observe the norms of natural justice and fair procedures.

5.6 As detailed above, the applicant was placed on administrative leave on the 4th April, 2006. This was later revoked on the 26th January, 2007 and he was invited by the first named respondent to resume his teaching duties at the school. He has declined to do so. He did not invoke ill health for not so doing. His contract of employment is at an end now. There is no evidence contained in the applicant's affidavits as to his future intentions. If he expressed a future interest to teach again would that be sufficient to establish a child care consideration? I am satisfied, having regard to the terms of s.3 of the Act of 1991 and the objectives of that Act that it would.

5.7 To consider the future conduct of the investigation that the second named respondent proposes to carry out, it is necessary to review what occurred in the past. The evidence in this case discloses a litany of failures on the part of the second named respondent to adhere to the requirements of fair procedures in its conduct of its investigation into the allegations made against the applicant. Those failures commenced with the first bare demand made of the applicant, that is, that he attend at a meeting to discuss the allegations. The second named respondent refused to give any details or documentation to the applicant in advance of that meeting. I am satisfied that the insistence on the applicant's attending the proposed meetings without knowing any details of the allegations made or sight of relevant documents placed him in grave jeopardy. I am in no doubt that the procedure proposed for that first meeting with the applicant which the second named respondent wholly disregarded the extraordinary jeopardy in which the applicant was being placed and his constitutional right to fair procedures.

5.8 Moving on to the demand made by the applicant in his letter of the 21st July, 2003, in respect of nine matters, this request, in general, was a reasonable one, though perhaps some of the items of information requested may have been unnecessary and excessive. However, as someone who was the subject of a previous investigation by the Eastern Health Board, which was found to be unsubstantiated, he was entitled to be cautious.

5.9 A stalemate was reached following the refusal on the part of the second named respondent to furnish the applicant with the information he requested. The second named respondent viewed the applicant as uncooperative and took the decision to inform the school of the allegations made against the applicant without consulting the applicant.

5.10 In the meantime, representatives of the second named respondent were dealing with J.K. A relationship developed between those persons conducting the second named respondent's investigation and J.K. that was, in my judgement, entirely inappropriate. This is evident from the content and tone of the correspondence between those persons and J.K. Demands for confidentiality were conceded, which should not have been having regard to the second named respondent's role as impartial investigator of the allegations made and the consequent natural justice and fair procedures obligations imposed on the second named respondent. It would appear that J.K. was treated as if a client type relationship existed between her and the second named respondent, which required the second named respondent to act on behalf of J.K and R.K. A level of uncontrolled access was permitted that was at odds with the second named respondent's role as an investigative adjudicator.

5.11 In addition, the evidence in this case demonstrates that those persons charged with investigating the allegations on the part of the second named respondent impermissibly delegated their adjudicative role in determining the validity of the abuse claims to somebody else i.e. the applicant's personal counsellor, M.K., in circumstances when it must have, or should have been clear to them that the validation of R.K's claims could not be carried out by such a person, in the manner in which it was purported to be done. Manifestly, there was a wholly impermissible conflict of interest between M.K.'s role as the complainant's personal counsellor and the role of validation of R.K's claims. To compound matters the SWAHB then misrepresented to the school the fact that the abuse claims had been validated in the letter dated the 19th December, 2003.

5.12 A gross delay of almost two years of near total inactivity then arose. Following that the SWAHB reactivated the investigation and persisted in and compounded its previous errors. Having replied to the applicant on the 26th March, 2006, disclosing the identity of the complainant, instead of giving him an opportunity to be heard, they simultaneously move ahead without affording the applicant any opportunity to be heard and in a social work report dated the 27th March, 2006, concluded, treating the allegations made as well founded, that the applicant posed a serious risk to children. This report was sent to the school. The conduct of the second named respondent in this regard was an extraordinary disregard of the applicant's right to natural justice and fair procedures.

5.13 The applicant was placed on administrative leave on the 4th April, 2006. The first named respondent was bound to follow the Child Protection Guidelines. In my view, it appears to have followed those guidelines faithfully. It complains that they were misled by the second named respondent, to which they were obliged to consult for advice. The applicant made the case that the first named respondent was aware of the natural justice deficiencies in the conduct of the investigation by the second named respondent but, nonetheless, proceeded to place him on administrative leave. It is clear that the first named respondent had no option but go ahead to determine whether the applicant should be removed from the school or not, having regard to the terms of the guidelines. In addition, I note that the first named respondent attempted many times to put the applicant on notice of relevant information. For example, it offered to reveal the identity of the complainant to the applicant, but he declined and it also offered him sight of the material they received from the second named respondent but he also refused that.

5.14 The question arises as to whether the first named respondent should have given the applicant an opportunity to be heard on the 4th April, 2006? It is to be observed that it did, soon afterwards, give him such an opportunity at the subsequent meeting of the 19th April, 2006, to determine whether the administrative leave should be continued. They also considered the written submissions forwarded by him in advance of that meeting. Insofar as there could be said to be a breach of fair procedures on the 4th April, 2006, this was cured by giving the applicant an ample opportunity to be heard shortly afterwards.

5.15 The first named respondent also moved quickly to revoke the decision to place the applicant on administrative leave once the second named respondent filed its statement of opposition conceding two reliefs. In my judgement, no fault can be attached to the school for the refusal on the part of the applicant to return to his teaching career.

5.16 As said earlier, the investigation carried out by the second named respondent previously, was, I am satisfied, utterly wanting in the norms of natural justice. If a new investigation was to commence in light of the prospect or possibility of the applicant's return to teaching, then, in my view, at this stage, the investigation could not progress in any meaningful way respecting the norms of natural justice, without affording the applicant an opportunity to confront his accuser R.K. in cross-examination. As the complainant is now twenty two years old, I am satisfied that there is no good reason why he should not be made available for cross-examination in respect of the complaint that has been attributed to him. In addition, the applicant is entitled to have made available to him all of the material assembled by the second named respondent in its investigation into the allegations made against him that is relevant to those allegations. He is also entitled to be heard in his own defence and to have the testimony of such persons who can give testimony on his behalf, relevant to the allegations in issue, heard and considered by the second named respondent. In my judgement, having regard to the very serious and criminal nature of the allegations made against the applicant, the foregoing provisions are the minimum necessary to vindicate the applicant's right to fair procedures if this investigation is to continue.

5.17 It is the applicant's contention that there should be a signed statement setting out the complaint made available to him. That, in my view, would not be necessary. The complainant has, by email, acknowledged a record of a conversation between him and a social worker in which he made allegations against the applicant as being true. That record is sufficient. It constitutes an acknowledgment that these are his allegations.

5.18 It is only through the institution of the instant proceedings has the applicant had revealed to him all of the written material that forms the basis of the complaint made against him. Because that material was revealed the through the process of disclosure in these proceedings it could be said not to have been available to him in an unfettered way. In any future investigation all material on which the complaint is based would have to be released to him unequivocally for the purposes of the investigation.

5.19 In conclusion, I am satisfied that the second named respondent has the power to conduct an investigation into the allegations made against the applicant. It could very well be said that the continuation of this investigation is oppressive of the applicant, in the light of the gross breaches of the applicant's right to natural justice and fair procedures as set out above and in the light of the very serious and culpable delay on the part of the second named respondent in progressing the investigation. A balance must be struck between the applicant's rights in that regard and the very serious public interest in having the second named respondent properly discharge its statutory duty under s. 3(1) of the Act of 1991. Notwithstanding its past failures in this investigation, this Court cannot assume that the future conduct of this investigation will involve any breaches of the applicant's right to fair procedures. On the contrary, the Court must assume that the second named respondent will comply with the provisions set out above to ensure respect for the applicant's rights. On that basis, I am satisfied that the correct balance between the vindication of the applicant's rights and the public interest in the discharge by the second named respondent of its statutory duty lies in favour of permitting the second named respondent to continue the investigation.

5.20 Accordingly, I will make the orders of certiorari and declarations as conceded by both respondents but I refuse an order of prohibition in respect of the future conduct of the investigation in issue.