

**THE HIGH COURT  
JUDICIAL REVIEW**

**2010 202 JR**

**BETWEEN:**

**PHIL COOKE**

**APPLICANT**

**AND**

**HEALTH SERVICE EXECUTIVE**

**RESPONDENT**

**Judgment of Mr. Justice O’Keeffe delivered on the 18th day of November, 2010.**

**Background**

1. In the within proceedings the Applicant seeks the following orders and reliefs:-

(i) An order of *certiorari* by way of an application for judicial review quashing the Respondent's undated final report which was forwarded to the Applicant by letter dated 2nd October 2009.

(ii) An order quashing the Respondent's decision to notify the Gardaí of a complaint against the Applicant without first properly or adequately assessing or investigating the reliability of the complaint.

(iii) A declaration that the Respondent acted unreasonably and irrationally in the manner in which the impugned final report was compiled.

(iv) A declaration that the Respondent breached fair procedures and natural justice by failing to afford the Applicant adequate opportunity to reply to the allegations made against her.

(v) A declaration that the Respondent breach fair procedures and natural justice by failing to inform the Applicant adequate (*sic*) what procedures were being followed by the Respondent in relation to the complaint made against her.

(vi) A declaration that the Respondent breach the Applicant's constitutional rights including her right to her good name and her right to earn a living pursuant to Article 40 and 43 of the Constitution by compiling a final report in relation the Applicant without first properly or adequately assessing or investigating the matter.

(vii) A declaration that the Respondent's final report was *ultra vires*.

(viii) A declaration that the Respondent's decision to inform the Garda Síochána of allegations against the Applicant in the manner in which it did was unreasonable and irrational in light of its failure to actually adequately assess or investigate the matter.

(ix) A declaration that the Respondent's decision to inform the Garda Síochána of allegations against the Applicant in the manner it did was a breach of the Applicant's constitutional right to her good name.

(x) A declaration that the Respondent's decision to inform the Garda Síochána of allegations against the Applicant in the manner in which it did and the time it did was disproportionate and unwarranted.

(xi) A declaration that the Applicant is an employee of the Respondent.

(xii) A declaration the procedures adopted by the Respondent were in breach of its statutory duty to promote and protect the welfare of children by failing to make any attempt to determine whether the correct person had been identified by the complainant.

2. The Applicant also claims damages, further and other relief and costs.

**Background**

3. The Applicant is an audiologist and at the time of applying for leave to bring this application asserted she was an employee of the Respondent. She worked in various areas of the country both as a teacher of the deaf and as an audiologist until 2008. She was employed by the Respondent and its predecessor. In 2008, she finished working for the Respondent. In the autumn of 2008 she was informed that a vacancy for one of the Respondent's audiologist was to arise in a certain part of the country due to the existing audiologist moving to a new appointment. She had discussion with a senior manager of the Respondent whom she claimed said that she would be the ideal candidate. In October 2008, she submitted to the Respondent a proposed worked schedule for the new post.

4. She proposed working eight days per month and her work would involve children awaiting initial assessment and those awaiting review. Some of these clinics would be for children under four years.

5. She was in receipt of training to use new equipment at this new location on 23rd October, 21st November and 8th and 10th December, 2008. She said she was to be paid for the training days. In December 2008, she was informed by the senior manager that her training would have to stop as the Respondent had now to obtain Garda Clearance for staff. She was subsequently told on 9th January, 2009 by a senior audiological scientist in the area that there was an allegation of abuse against her in a particular region.

6. She was subsequently informed on 14th January, 2009 by the Respondent's manager, Ms. O'H. that the complaint was one of inappropriate contact. Ms. O'H. said that the Respondent would have to investigate the complaint to see if there was any substance to it. She said Ms. O'H. said she could not give details of the complaint or the identity by the complainant. She said if there was, a meeting would be arranged between the Applicant and the family of the child and that she would give her side of the story. The Applicant said that she had never done anything which warranted complaint and she was entirely innocent. She was not told the identity of the complainant.
7. On 27th January, 2009, the Applicant wrote to the manager seeking details of the complaint and other associated matters.
8. She again wrote a letter to the Respondent on 5th February, 2009 outlining her shock and upset and also referring a policy document known as "*Trust in Care*" which she claims sets out how complaints against staff are to be dealt with by the Respondent.
9. The "*Trust in Care*" document is a policy document entitled for health service employers on upholding the dignity and welfare patient/client and the procedure for managing allegations of abuse against staff members. It is dated May 2005.
10. On 4th February, 2009, the manager wrote to the Applicant stating that Ms. K., a Childcare Manager with the Respondent had been appointed to establish details of the complaint which related to inappropriate contact with a child within a specified area. The letter referred to the complaint which was being checked out by Ms. K. as part of the pre-screening process.
11. Further correspondence took place as a result of which it was agreed that a meeting would take place on 23rd February, 2009 to outline to the Applicant the details of the complaint made including when the alleged incident took place and further details of the nature of the alleged incident.
12. At the meeting she was told the name and age of the complainant and that it was alleged that she had sexually abused him whilst she was working as a visiting teacher for the deaf at his school. The incident related to events some fifteen years ago. She said that she vehemently denied the allegation.
13. The manager by letter dated 5th March, 2009, wrote to the Applicant attaching a copy of a report compiled by Ms. K. following her interviews with (A) the complainant and (B) his mother relating to allegations reported to the Respondent in December 2008. The letter stated that as the allegations related to a period during which the Applicant was in the employment as a visiting teacher for the deaf with the Department of Education and Science ("the Department") that a copy of the report was being forwarded to such department.
14. The Applicant claimed that upon reading the report that she was greatly upset, it was clear to her that contrary to the explanations previously given to her by Ms. K. who was to investigate the complaint, that Ms. K. was in fact completely accepting the complainant's allegation. She stated that the report, although drawn up following her meeting of 23rd February, 2009, did not record any denial made by her of the allegations and the report also contained factual errors, not put to her at the meeting
15. The report contains details of the nature of the allegations made by the complainant. The report stated Ms. K. the author had met with the complainant and his mother on two separate occasions and stated that it was "*established*" with the complainant and his mother that these incidents occurred when the Applicant was employed as a visiting teacher for the deaf. The report stated that it was the intention of the Respondent to meet with the Applicant to give her details of the allegations that the Respondent had received in respect of her and that the Respondent would formally advise the appropriate section of the Department as the Applicant had been employed by such department.
16. Following the receipt of this correspondence she thought the assistance of various persons who would be able to assist and support her in her defence of the allegations.
17. Through her solicitors, the Applicant wrote to the Department on 19th June and 1st and 2nd July, 2009 stating that she was absolutely denying the allegations and asking what procedures were to be followed in investigating the matter. A reply was received on 8th July, 2009. The Department replied on 8th July stating that the receipt of the report had been acknowledged and the contents noted and the Respondent's central role in the matter acknowledged.
18. On 1st July, 2009, the Applicant's through her solicitors wrote to the aforementioned manager of the Respondent asking for a copy of the procedure the Respondent was purporting to apply in relation to the investigation and the terms of the investigation and whether it was by way of written or oral submissions and questioning whether the allegations of "*abuse*" as provided by Ms. K. was not a comprehensive account of the various allegations that were put to the Applicant at the meeting of 23rd February, 2009.
19. On 25th August, 2009, the Respondent replied stating that the Respondent had a statutory (mandatory) function to investigate allegations of this nature, that the Applicant had been presented with a copy of the initial report/assessment of Ms. K. and stating that no other allegations had been put to the Applicant at the meeting of 23rd February, 2009. It stated that the Respondent was preparing a final report which was to be furnished to the Applicant and the Department.
20. In a letter of 9th September, 2009, the Applicant's solicitor stated in relation to the "*final report*" that it was unclear what the purpose of the report was and what procedures, if any, would be applied. Concern was expressed at the complete failure of the Respondent to allow the Applicant any input in the purported investigation. It was stated that the Applicant had rights to fair procedures and natural justice in how she was treated by the Respondent. It must include her right to be heard in advance of the Respondent drawing any conclusions whether in this apparent final report or otherwise.
21. By letter dated 10th September, 2009, the Respondent's solicitor indicated that he was unavailable until 21st September and it was unlikely that a response would be had by the Applicant prior to that date.
22. By letter dated 2nd October, 2009, the Respondent's solicitor sent a copy of the final, undated report completed by Ms. K. to the Applicant's solicitors.
23. The report states that the manager had been required by the Respondent to assess the information in relation to the allegations of abuse alleged to have occurred over a period of two years. The report stated that the author had advised the complainant's mother that her first concern was for the complainant and that she outlined to the mother various services that would be available. It sets out in details the allegations of the complainant as against the Applicant. The report stated that the author stated to the complainant and his mother that the Applicant had taken advantage of the situation and that the author had advised the complainant and it may be a good idea to discuss the matter independently with a counsellor. The report then described a meeting with the

Applicant on 23rd February 2008 stating that details of the allegation were forwarded to her (that is the Applicant in writing) and that she responded through her solicitor denying the allegation. It was stated that the Department was advised of the denial of the allegations.

24. In its conclusion, the report stated that in the opinion of the author, on interview, the complainant gave a credible account of being engaged in inappropriate contact by the Applicant in a number of occasions during a stated period. The nature of this contact consisted of an inappropriate and sexualised touching of the complainant by the Applicant which had been denied. It was stated that the complainant's account was consistent in detail from the initial details that he gave to his mother and to the author's meeting with him for the purpose of the report.

25. In conclusion the report contained four recommendations, one of which was for the Respondent to formally notify Gardaí.

26. By letter dated 16th October, 2009, the Applicant's solicitor wrote a lengthy letter challenging the factual matters and asserting that the Applicant wished to exercise her right to be heard in advance prior to the Respondent reaching any conclusions as had been advised previously to the Respondent. It was asserted that the purported "report" could not be permitted to stand and requested that it should be immediately withdrawn. The Applicant was willing to engage with the Respondent in its investigation consistent with fair procedures and natural justice. Judicial review proceedings were threatened.

27. In response, the Respondent's solicitors wrote on 9th November, 2009, stating, *inter alia*, that the Respondent had a statutory duty of care to promote and protect the welfare of children and to identify whether children are at risk of abuse when it receives information. He stated that the Respondent had to establish what the nature of the allegations were and that the Department was informed, as at the time the alleged incident took place, the Applicant was an employee of such department. It was also claimed that the Applicant was not an employee of the Respondent other than that she had indicated that she wished to be considered for part time employment. It stated that the Respondent as a public body is obliged to comply with the principles of natural and constitutional justice. It stated that in order to insure that the Respondent respects the rights to one's reputation and good name, the Applicant was met and her denial of the allegations was recorded and communicated to the Department. It stated that the Respondent did not undertake an investigation but having received information of a child protection nature such information was assessed and communicated to the person against whom the allegation was made and the appropriate statutory authorities were informed, that is An Garda Síochána and the Department.

28. A detailed letter dated the 11th December 2009 was written on behalf of the Applicant to the Respondent setting out the background of events and asserted that the report was an unjust attack on the Applicant's rights under the Constitution and interfered with her right to earn a livelihood and represented an unjust attack on her good name. The name called for the withdrawal of the account and indicated whilst the Applicant did not wish to institute proceedings she would do so if required.

29. A letter from the Respondent's solicitors dated 11th December 2009 indicated that a reply might be received prior to Christmas (2009).

30. This application for judicial review is dated 3rd March 2010.

31. Mr. William Moran a retired school principal swore an affidavit stating that he remembered the Applicant coming to the school on an *ad hoc* basis. No complaint was made to him by the complainant's mother.

32. Ms. K. on behalf of the Respondent swore on affidavit stating that she had interviewed the complainant's mother following a request from one of her colleagues. She met with the Applicant accompanied by Ms. O'H. on 14th January, 2009. Thereafter she met and interviewed the complainant arising out of that interview and from the earlier interview with the complainant's mother she prepared a report. She said that following her inquiries it was her opinion that the complainant gave a credible account of having been engaged in inappropriate contact by the Applicant on a number of occasions during the period 1992 to 1994. She was of the view the nature of this contact consisted of inappropriate and sexualised touching of the then infant complainant by the Applicant. She acknowledged that at all times, the Applicant had denied the allegations.

33. She said that the Respondent had acted properly at all times and that a complaint was received and the matter was investigated. The inquiries and investigations undertaken by her were at all material times child centred as was appropriate and was an exercise by the Respondent of its duties in relation to child protection.

34. She said that by reason of the complaint, the Respondent did not proceed with the discussions which were ongoing between it and the Applicant in relation to the provision of locum or sessional audiology services. This was a valid exercise by the Respondents of its obligations in relation to childcare, particularly in circumstances where the Applicant was not at the time in the employment of the Respondent although in the process of negotiating the provision of services on a sessional basis.

35. She said it was not appropriate or feasible to quash her report or the decision to refer same to An Garda Síochána. She said neither herself nor the Respondent was in any sense a criminal complainant to An Garda Síochána such as would trigger prosecution. She said that it was incumbent upon the Respondent in discharge of its child protection obligations to inform the Gardaí of the receipt of the allegation.

36. The letter to the Gardaí is dated 20th August, 2009 and is written by Ms. K. It refers to the complaint and stated that the family had been advised the Respondent must notify the Gardaí. The family had accepted this. She said that she would appreciate if the nominated garda would contact her prior to contact being made with the family.

37. In a further affidavit on behalf of the Respondent, Ms. O'H. stated that at the meeting between the Applicant, Ms. K. and herself on 14th January, 2009, it was explained to the Applicant that a complaint had been received and that the procedure that is to be undertaken was a pre-screening exercise to establish details of the allegation. She said that the Applicant was not an employee of the Respondent at that time.

38. She said that the Respondent in conducting inquiries was complying with the statutory duties of care to promote and protect the welfare of children. It was incumbent on it to identify whether children were at risk of abuse. In such end, the Respondent must coordinate the information from all sources and make an assessment of the situation. The Applicant was advised of this and the Respondent had to establish the nature of the allegations made. She believed that the Respondent fully complied with its obligations.

39. She believed that the Respondent acted in accordance with its obligations including the Applicant's right to natural justice in that she got an opportunity to speak with her and Ms. K. and her denials were recorded and communicated to the Department.

40. In a replying affidavit, Ms. O'H. on behalf of the Respondent said it was not the Respondent's role to convict or indeed, vindicate the Applicant when a complaint was made. It was the Respondent's role to conduct an initial investigation of that inquiry to ascertain only whether it was credible, that is to say to ensure that it was not frivolous or vexatious, and on making such a finding to report same to the appropriate authorities, in this case the Department being the Applicant's then employer and the An Garda Síochána.

41. In a further affidavit, Ms. K. stated that this case was looked at in May 2009, in the context of an internal review following which it was decided that the Respondent would notify An Garda Síochána. As the complainant's family were on holidays in August 2009, she subsequently met with the complainant's mother and explained that upon being notified, the Gardai would normally advise the Respondent of the name of an individual member An Garda Síochána who would be dealing with the matter. It was for that reason and at the request of the complainant's mother, the family asked to be informed of the identity of the particular garda.

### **Statement of Opposition**

42. In its statement of opposition the Respondent said that the Applicant was guilty of unreasonable delay in not making the application promptly or within the timeframe of the Rules of the Superior Courts. It was contended that the Respondent was obliged having received a complaint to conduct inquiries into the complaint and further was entitled having completed those inquiries to make decisions, including the decision that the matter should be reported to An Garda Síochána and to the Applicant's employer at the time of the complaint, that is the Department.

43. It was contended that there was no requirement in law or otherwise requiring the Respondent to set out or inform the subject of an investigation as to the methodology to be adopted in such an investigation and the conducting of an investigation following a complaint of potential child abuse did not warrant the application of the full panoply of natural justice rights.

44. The decision of the Respondent to inform An Garda Síochána of the allegations against the Applicant in the manner in which it did was not unreasonable or irrational.

45. It was contended that the Applicant was not an employee of the Respondent and was not at any time material to the proceedings an employee of the Respondent.

46. It was contended that the Applicant had an obligation pursuant to the Childcare Act 1991 (as amended) to promote the welfare of children and the same provides that the Respondent is entitled to and obliged to conduct inquiries into any complaints of child abuse that are made to it and to report its findings to the appropriate authorities.

47. It was contended that the Respondent having conducted inquiries was entitled to come to the conclusion that the complainant gave a credible account of being engaged in inappropriate contact by the Applicant on a number of occasions during 1992/1994 and the Respondent was further entitled to come to the conclusion that the nature of this contact consisted of inappropriate and sexualised touching of the complainant by the Applicant and the Respondent was further entitled to and did record in its final report that these matters had been denied by the Applicant.

48. It was pleaded by the Respondent that there was no difference in law and nothing turns on whether or not an investigation is categorised as such or as an inquiry or as an assessment in circumstances where the Respondent in discharge of its duties was obliged to ascertain whether or not the complaint was credible and if on making such a finding determined to whom that finding should be reported.

49. The Respondent pleaded that it was engaged in an investigation/inquiry/assessment where there was no requirement on it to involve the Applicant beyond the level at which she was involved in circumstances where the exercise by the Respondents of its duty did not result in the imposition of any penalty or sanction upon the Applicant.

### **Applicant's Submissions**

50. Ms. Marguerite Bolger, S.C., on behalf of the Applicant submitted that the Applicant was entitled to fair procedures and relied on the decisions of *In re Haughey* [1971] I.R. 217 and *Maguire v. Ardagh* [2000] 1 I.R. 433. She submitted that whilst the Respondent's investigation was not a criminal trial, it did have serious consequences for the Applicant which the Applicant had sought to engage with it but was prevented from doing so by lack of information. She submitted that a status of the Applicant with the Respondent was one of an employee. She submitted that the appellant's reputation and good name were constitutionally protected rights.

51. She submitted that the reaction of the Respondent was in all the circumstances disproportionate in that it had a necessarily detrimental impact on the investigation by virtue of the manner in which it was completed. It was submitted it was not necessary for the constitutional rights of the Applicant to be sacrificed.

52. She relied extensively on the decision of Barr J. in *M.Q. v. Robert Gleeson & Ors* [1998] 4 I.R. 85, a case which it is referred to at length later in this judgment.

53. She submitted that the Applicant had a right to be treated fairly by the Respondent whether deemed to be an employee or not. She also relied on the decision of Hedigan J. in the High Court (5th May, 2010) in *I. v. Health Service Executive*, which adopted the principles set out by Barr J. in *M.Q.* case.

### **Respondent's Submissions**

54. Mr. Feichin McDonagh, S.C., on behalf of the Respondent submitted the Applicant had not moved with all reasonable haste as required in particular where the notification to the Gardai which she sought to quash occurred on or about 20th August, 2009. He submitted that neither the view or an opinion of a childcare manager of the Respondent nor a decision to notify the Gardai was a capable of being quashed. It was wholly a matter for the Gardai and the prosecution authorities to decide whether or not to investigate the matter.

55. He submitted that the Applicant was not at the material time in the employment of the Respondent and had no entitlement to have the matters investigated pursuant to the Respondent's internal procedures.

56. He submitted that the right to fair procedures was not universally applicable nor was it an absolute right existing in all interactions between parties. He instanced the manner in which Gardai could investigate a complaint. He submitted that an employer about to recruit an employee is under no obligation to exercise principles of fair procedure or natural justice in any inquiry he may make about the suitability of that potential employee.

57. He referred to the case of *M.Q.* and submitted that the facts were distinguishable from the facts in this case. In the *M.Q.*, the court he submitted, recognised that the Applicant was entitled to fair procedures in respect of his dealings with the VEC. In the present case, he submitted no direction had been given by the Respondent to any third party to take any action and in particular what is sought to be attacked in these proceedings was the mere notification to An Garda Síochána. It was submitted that there was no requirement on the Respondent (or any person) to comply with principles of natural justice prior to making a report to An Garda Síochána concerning a potential criminal act. He submitted that the decision of O'Neill J. (High Court, 20th May, 2010) in *P.D.P. v. Board of Management of a Secondary School & HSE* was based on different facts and in that case of *HSE* made "findings" that the particular Applicant "posed a serious threat to children". No such finding was made in the instant case, it was contended.

## Decision

58. The relevant legislation is Section. 3 of the Childcare Act 1991, as amended. Section 3 reads:-

*"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."*

59. The judgment of Barr J in *M.Q. v. Gleeson* [1998] 4 I.R. 85 has been opened to me by both sides. I consider a number of extracts to be relevant to the issues that arise in this case. At pp. 99-100:-

*"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 proper 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 of 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 a 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."*

60. At p. 101, he said:-

*"Arising out of its obligation to investigate allegations of child abuse made to it or of which it becomes aware, a health board is entitled to keep records of such allegations, whether substantiated or not, and, indeed, has an obligation so to do in the interest of professional competence. (The only exception which I perceive in that regard would be where on investigation an allegation is found to be positively false. In such circumstances it would be unfair to record the identity of the innocent alleged abuser, although the fact that the complainant had made a false allegation might itself have subsequent relevance in regard to that person. In such circumstances, the record should not identify the alleged abuser and should specify in terms that the allegation has been found to be false). The health board's records in each case should include factors favourable to the alleged abuser. The board's assessment of the weight it attaches to each such allegation should be stated and should be objectively based. The purpose should be to create a fair, reasonable assessment of each complaint or finding about an alleged wrongdoer. This also necessarily entails reasonable investigation of each such complaint by the health board. In the ordinary course in serious cases the complaint should be put to the alleged abuser in the course of the investigation and he/she should be given an opportunity of responding to it. However, an exception in that regard may arise where the board official concerned has a reasonable concern that to do so might put the child in question in further jeopardy as, for example, where the abused child is the complainant. An obligation to offer an alleged abuser an opportunity to answer complaints made against him/her would arise in circumstances where the board contemplates making active use of the particular information against the interest of the alleged wrongdoer - such as publication to a third party, as in the present case, or embarking on proceedings to have a child or children taken into care.*

*The right of a health board to disseminate information about alleged child abuse by a particular person raises the question of the duty owed by the board to the alleged abuser. There are two cardinal rules of natural justice (or constitutional justice as it is referred to by Walsh J. in *McDonald v. Bord na gCon* [1965] I.R. 217) which are crucial to the duty owed by the fourth Respondent to the Applicant. First, a person charged with wrongdoing should be informed of what is being alleged against him and, secondly, he should be given a reasonable opportunity to make his defence, see judgments of Butler J. and of the Supreme Court in *The State (Gleeson) v. Minister for Defence* [1976] I.R. 280 and the judgment of the Supreme Court in *Beirne v. Commissioner of An Garda Síochána* [1993] I.L.R.M. 1. Furthermore, in view of the gravity of the allegations made by the board, the seriousness of the consequences for the Applicant if removed from the social studies course as sought by the fourth Respondent and the harm done to him by publication of its*

complaints to the second Respondent, the fourth Respondent also had a duty of fairness to the Applicant as to the reliability of the information it furnished to the second Respondent. A health board ought always to remember that such complaints, if unfounded, have of their nature a potential for great injustice and harm, not only to the person complained of but perhaps also to the particular child or children sought to be protected and others in the family in question. A false complaint of child abuse, if incorrectly interpreted by a health board, could involve the destruction of a family as a unit by wrongfully having the children it comprises taken into care. It may also destroy or seriously damage a good relationship between husband and wife or long-standing partners. In the instant case, I am satisfied that before raising the issue of the Applicant's course of education with the second Respondent, the fourth Respondent had a duty to take all reasonable steps to interview the Applicant; to furnish him before interview with notice of the allegations against him in short form; to give him a reasonable opportunity to make his defence and to carry out such further investigations as might appear appropriate in the light of information furnished by him in response to the complaints. No opinion as to the weight to be attached to each complaint should have been formed until the foregoing investigations relating to the Applicant had been made and information derived therefrom had been carefully assessed."

61. At pp.100-101, he said:-

*"I accept counsel for the fourth Respondent's submission that a health board has a child protection function which differs fundamentally from that of the prosecutorial function of the police and the Director of Public Prosecutions. In the former the emphasis is on protection of vulnerable children. In the latter, the objective is the detection and conviction of child abusers. There are many circumstances which may indicate that a particular person is likely to be (or to have been) a child abuser, but there is insufficient evidence to establish such abuse in accordance with the standards of proof required in a criminal or civil trial. For example, the abused child through fear, family pressure, age or mental capacity may be unable to testify against the abuser or, in the case of repeated physical injuries sustained by a child, there may not be sufficient evidence to rule out accidents and to establish proof of abuse in law by a particular suspect. However, there may be evidence sufficient to create, after reasonable investigation, a significant doubt in the minds of competent, experienced health board or related professional personnel that there has been abuse by a particular person. If such a doubt has been established then it follows that a health board cannot stand idly by but has an obligation to take appropriate action in circumstances where a person who the board reasonably suspects has indulged in child abuse is in a situation, or is planning to take up a position, which may expose any other child to abuse by him/her."*

Finally, at pp. 102-103:-

*"If a health board takes all reasonable steps to investigate the likely veracity of a complaint of child abuse, including its obligation to the accused as stipulated herein, and it forms a considered opinion that the complaint may be well-founded, then it has an obligation to take appropriate action which may include a report to the police and/or, as in the instant case, a report to the second Respondent that the alleged abuser may not be suitable for a particular course of education which leads to employment as a child-care worker."*

## **Conclusions**

62. In relation to the Respondent's claim that the application for judicial review was not brought promptly, it is clear there was continuing correspondence between the parties with the Applicant anxious to resolve the matter by agreement. As late as 11th December, 2009, a lengthy letter was sent on behalf of the Applicant in response to which the Respondent's adviser's replied that they hoped to be in a position to reply before Christmas. No reply appears to have been received to this letter. It was not unreasonable to expect a reply sometime in January 2010. The application commenced on 3rd March, 2010. In all the circumstances, I reject the submission that the application was not brought promptly.

63. This Court is not in a position from the affidavits to resolve the issue as to whether the Applicant was at the time of the investigation an employee of the Respondent. The Applicant has not discharged that onus and the "Trust in Care" document does not apply. However, it is clear that in the context of the Applicant becoming an employee on a sessional basis that the Respondent commenced investigating the allegations concerning the applicant.

64. It is unclear from the report of 26th February, 2009, whether there was a further meeting with the appellant held having regard to what was stated in the report. This may be a reference to the meeting that had already taken place or an additional meeting which was to take place in the future but which appears not to have taken place. The report of 26th February does not contain the Applicant's response. In her affidavit, Ms. O'H. said that at the meeting of 23rd February, 2009, the Applicant having listened to details of the allegations stated that the allegations were a total fabrication. This meeting took place as part of the pre-screening exercise to establish details of the allegation. No details were communicated by the respondent as to how the pre-screening exercise/investigation was to take place.

65. The Respondent correctly as was stated in his letter of 25th August, 2009, stated it had a statutory (mandatory) function to investigate allegations of such a nature. Such a letter referred to the initial report prepared by Ms. K. and the final report which was being prepared which was to be furnished to the Applicant and the Department. In response to this letter, the Applicant's letter of 9th September requested the right to be heard in advance of the Respondent drawing conclusions. This letter drew a response that the Respondent's adviser was away until 21st September and no response would be made until then. No response appears to have been made to this letter. On 5th October, 2009, a copy of the final report was received by the Applicant.

66. In my judgment, the initial report was a one sided presentation of the facts. For the purposes of preparing the final report, the Respondent, in my opinion, ought to have engaged fully with the Applicant as she had requested to protect her good name and as part of the investigation process.

67. By writing to the Department in the manner she did, the Applicant was not electing to look to the Department for redress. Indeed, the letters show her anxiety that proper procedures should be applied to her and this was re-emphasised by the Applicant in subsequent correspondence with the Respondent and its advisers to which I have referred in seeking the application of fair procedures before any final report was concluded.

68. In my judgment, having regard to the status of the Applicant (not because she was an employee of the Respondent at the time) but that she was subject of a pre-screening process prior to employment the principles set out by Barr J. in the *M.Q.* case are applicable. The Respondent had a duty before the interview to furnish the Applicant with notice of allegations and to give her a reasonable opportunity to carry out such further investigations as might appear appropriate in the light of information furnished by the

Applicant in response to the complaints.

69. I conclude that she was not afforded fair procedures. She is also entitled to have her right to her good name and right to earn a livelihood protected.

70. An Garda Síochána were notified. The letter was dated 20th August, 2009. The final report was received by letter dated 2nd October, 2009. The supplemental affidavit of Ms. K. indicates that following the publication of the Ryan Report the matter was addressed internally by the Respondent and it was noted at that time that the Gardaí had not in fact been notified by the Respondent of the complaint. It appears that it was following this decision to notify the Gardaí and also to inform the complainant's family of such notification that the letter to An Garda Síochána was sent. It is likely that it was written pursuant to this review rather than ultimately as part of the recommendation of the final report, that the letter was written.

71. This Court has not been informed of any statutory or other basis upon which this Court can prevent the Respondent from informing An Garda Síochána of the complaint. In the course of the hearing considerable objection was taken to the fact that such a letter indicated that Ms. K. be contacted by a nominated garda prior to making contact with the family. There is no statutory or other basis for striking down the letter on the basis of such a statement.

72. I am prepared to grant an order of *certiorari* of the Respondent's undated final report. I am not prepared to make an order of *certiorari* quashing the Respondent's decision to notify the Gardaí of the complaint. I will hear counsel in relation to the other reliefs which should be granted in order to implement my decision.