

**THE HIGH COURT
JUDICIAL REVIEW**

[2005 No. 189 JR]

BETWEEN

PHYLLIS BROWN

APPLICANT

AND

**THE BOARD OF MANAGEMENT OF RATHFARNHAM PARISH NATIONAL SCHOOL, THE MOST REVEREND DR. JOHN NEIL
AND THE MINISTER FOR EDUCATION AND SCIENCE**

RESPONDENTS

**AND
JOYCE PERDUE**

NOTICE PARTY

Judgment of the Honourable Mr. Justice Quirke delivered the 1st day of June 2006.

By order of the High Court (Hanna J.) dated the 28th February, 2005, the applicant was given leave to seek relief by way of judicial review including inter alia an order of certiorari quashing a decision of the first named respondent (hereafter "the Board") made on the 30th November, 2004, whereby the Board nominated the notice party for appointment to the post of Principal of Rathfarnham National School.

The applicant was also granted leave to seek additional declaratory and other ancillary reliefs.

Factual Background

1. The applicant graduated as a national school teacher in 1973 and was appointed as an assistant teacher in Rathfarnham National School.

In 1977, Ms. Myrtle Stanley was appointed Principal of the school and the applicant was appointed Deputy Principal. The applicant discharged the obligations and functions of Deputy Principal of the school (and sometimes as acting Principal) continuously for some 28 years after her appointment. Ill health has precluded her from discharging her obligations since early 2005.

2. On the 11th October, 2004, Ms. Stanley announced that she intended to retire. Consequently the Board advertised the post in the national newspapers on the 15th and 16th of October.

The advertisement provided *inter alia* as follows:

"Rathfarnham Parish N.S. requires an Administrative Principal from 1st February, 2005. Applications with references and C.V.'s and S.A.E. by November 1st to Chairperson, B.O.M., Rev. Ted Woods, Rathfarnham Rectory, Rathfarnham Road, Terenure, Dublin 6."

On the 1st November, 2004, at 5.15 pm, the applicant handed a completed application form into the Rectory as required by the advertisement.

3. On the 11th November, 2004, the applicant received a letter from the Chairman of the Board Rev Ted Woods acknowledging receipt of her application.

On the 18th November, 2004, she received a further letter from Rev Woods inviting her to attend at the Rathfarnham Rectory on the 30th of November, to be interviewed in respect of the post.

She attended at the Rectory on the 30th November, 2004, at 3.10 pm. She was interviewed by a Selection Board chaired by Rev Woods. That Board comprised Rev Woods and two independent assessors.

Shortly after 6.00 pm on the same day (that is the 30th November, 2004), the applicant was informed by Rev. Woods that she had been unsuccessful in her application. He told her that the notice party had been appointed to the position.

The applicant received a letter from Rev. Woods dated the 6th of December, confirming that her application had been unsuccessful.

4. On the 1st December, 2004, Rev. Woods wrote to the second named respondent (hereafter "the Archbishop") who was (and remains) the Patron of the School. In his letter he formally sought approval for the appointment of the notice party to the position. Neither the letter to the Archbishop nor his response has been adduced in evidence in these proceedings. However the Archbishop appears to have replied by letter of the same date granting approval.

In evidence in these proceedings the Rev. Woods averred that on the same date (that is the 1st December, 2004) he formally offered the notice party the post "to take effect from the 1st February, 2005."

By letter dated the 2nd December, 2004, the notice party wrote to Rev. Woods in the following terms:

"Thank you for your letter offering me the post of Principal of Rathfarnham Parish National School to take effect from 1st February, 2005."

"I am delighted to formally accept your offer and very much look forward to a long and happy association with the School and Parish. Thank you also for your kind wishes and support."

Shortly after the appointment of the notice party was announced, the applicant received information which caused her to contact Mr. Noel Ward who is the Legal and Industrial Relations Officer with the Irish National Teachers Organisation (hereafter "the I.N.T.O.").

Arising out of their conversation Mr. Ward wrote to the Archbishop by letter dated the 17th December, 2004. His letter was marked "Private and Confidential – Urgent – By Courier".

In his letter Mr. Ward asked the Archbishop to defer sanction of the appointment pending a full investigation of a number of matters

which he said included:

- *"The acceptance of late applications, after the latest date for receipt as stated in the advertisement;*
- *The failure to supply those called to interview with details of the established criteria for the post; and*
- *The fact that the Board of Management did not meet in order to consider the nomination of the Selection Board."*

Indicating that he had already advised the third named respondent (hereafter "the Minister") that he was seeking an investigation and asking the Minister to defer ratification, Mr. Ward contended:

"Any one of these alleged breaches would, on its own, constitute a serious ground for challenging the process. The aggregate of the three gives rise to the most serious concern."

6. By memorandum dated the 21st December, 2004, the Archbishop advised Rev. Woods *inter alia* that he had:

"received... your two emails, containing legal advice and a suggested letter to I.N.T.O."

He continued:

"I am not a lawyer and cannot advise the Board of Management with regard to legal advice that they have obtained. I have to work very precisely within the rules issued by the Minister and in which as Patron, I have a clearly defined role."

He continued:

"I promised I would convey to you my attitude as Patron with regard to the recent appointment of a Principal for Rathfarnham National School and you are at liberty to disclose this to the Board of Management. I must insist that I am aware that there was not any intention to act outside proper procedures, but that I also have a responsibility to ensure that now the procedures are fully implemented."

The procedures as set out in Appendix D have the force of law and, as Patron, I have circulated these in a convenient form to each Board of Management (again attached). I also append below extracts from the Constitution and Rules of Procedure and from the Education Acts which are important in this context, providing the basis of these procedures. The assessors on any Selection Board also have the guidelines. When I approve an appointment it is on the assumption that the Guidelines have been carefully followed."

As patron, I must therefore advise you that having taken advice myself I would wish the procedure to be re-commenced at the point at which it was at midnight on December (corrected to "November") 1st, 2004."

I realise that the Board of Management will seek their own legal advice, but as Patron, I must advise strictly in accordance with the guidelines (which include the statutory appendix) that I have issued to all schools under my patronage."

I note that my approval of the appointment of (the notice party) took due cognizance of your written assurance that the procedures had been followed. You have indicated to me that you are now aware and accept that there was at least one flaw in the procedure as laid down. In the light of this admission (and the possible decision of the Board of Management to maintain the appointment) it would be necessary for me to advise the D.E.S. that I am withdrawing my approval of the appointment due to the apparent invalidity of the procedure followed in the selection process. I will however await the result of the meeting of the Board of Management before contacting the Department of Education and Science so that my communication may accurately reflect the state of affairs."

7. By letter dated the 23rd December, 2004, Rev. Woods replied to the Archbishop indicating that the Board had met on the 22nd of December to consider Mr. Ward's letter to the Archbishop. Referring to the Archbishop's request that the procedure be recommenced *"at the point at which it was at midnight on November 1st, 2004"* the letter advised the Archbishop that

... "the legal advice available to the Board" indicated that "... the Chairman of the Board has a discretion to accept the applications and ... that discretion was quite properly and appropriately exercised in accepting (the notice party's) application on 2nd November, 2004."

Arguing that a recommencement would expose the Board to a legal action by the notice party and that the failure to furnish criteria to applicants was a "flaw" which affected all candidates equally, Rev. Woods urged the Archbishop not to advise the department that he was withdrawing his approval of the appointment of the notice party arguing that this would be "grossly prejudicial" to the Board which *"...had hoped that you, as their Patron would consult with and support them in this unfortunate situation."*

8. By letter dated the 22nd December, 2004, Ms. Anne McElduff, who was an Assistant General Secretary of the I.N.T.O., wrote to Rev. Woods on behalf of the notice party. In her letter she referred to the fact that:

"On the 17th December, 2004, ..(the notice party).. was shocked to receive a telephone call from you wherein you informed her that an objection to the appointment had been lodged by the I.N.T.O. on behalf of certain other persons."

Contending that the notice party had been appointed by the Board to the post the letter continued:

"Any attempt to interfere with.. (the notice party's).. contract or to prejudice her position in relation thereto in any manner would be most vigorously resisted ... (the notice party)... is treating her contract as subsisting and will be commencing her appointment ... on 1st February, 2005."

9. By letter dated the 28th January, 2005, the Archbishop wrote to Rev. Woods reminding him of the earlier correspondence. He continued:

"You informed me in writing on 23rd December, that the legal advice received by the Board was that the appointment of the (notice party) was valid in spite of certain irregularities in the procedure. I took no further action at this stage and

in the light of this communication,.

I was then given sight of a letter from the Assistant General Secretary of I.N.T.O., Ann McElduff taking the same line as your legal advice and fully supportive of (the notice party). Due to the seniority of Ms. McElduff I accepted this as the I.N.T.O. position."

Indicating that he had taken independent legal advice the Archbishop stated:

"The strong and clear advice that I have been given is that a complaint by an unnamed person or persons should not be allowed to obstruct the appointment. Furthermore I have been advised that though there were make mistakes in the procedure, particularly in the fact that the criteria were not circulated, this affected all candidates in like manner. More significantly a properly constituted Selection Board, following interviews offered the position to a properly qualified preferred candidate.

I am therefore stating that the approval that I originally gave to the appointment...remains in place."

10. Ms. Josephine O'Connor, who is an assistant Principal Officer in the office of the Minister, averred that on the 1st February, 2005, the Minister sanctioned the payment of salary to the notice party. He did so in reliance upon a declaration from the Board certifying that *"the appropriate procedures had been complied"* with in relation to the appointment of the notice party.

On the 1st February, 2005, the Board and the Archbishop were aware and had acknowledged to one another that the appropriate procedures had not been complied with in relation to the appointment of the notice party. No evidence was adduced which would indicate that the Archbishop was aware that the Board had made the declaration dated the 1st February, 2005, upon which the Minister relied when he sanctioned the notice party's appointment.

In a letter dated the 7th February, 2005, Mr. Conor Mc Court, on behalf of the Minister, responded to a written complaint (made to the Minister by Mr Ward on behalf of the applicant), in the following terms:

"As you are aware Appendix D of the Constitution of Boards and Rules of Procedures sets out the Minister's requirements for the appointment process before the appointment may be sanctioned.

As you point out in your letter, at no stage has the Department sought to vary the procedures as set out in Appendix D. It remains the Department's view that the proceedings are mandatory; accordingly the Department expects that the procedures will be complied with in all cases. ... The Department views a departure from procedures as a serious matter; however the effects of any departure must be determined on a case-by-case basis, and in regard to the circumstances and the rights of all concerned.

It is the Department's view that, if they were any procedural flaws, they were not sufficient to warrant invalidating the entire appointment process given the Board's actions in this case ..."

11. Rev. Woods in evidence has averred that three applications for the post had been received on or before the 1st November, 2004. He stated that at 9.30 am on the morning of the 2nd of November, he received an application from the notice party which was delivered to him by hand outside his home. He stated that he accepted the application in good faith.

On the 17th November, 2004, the Selection Board met. No record was kept of what occurred at that meeting.

A form entitled *"Short Listing Criteria"* was completed. It was signed by Rev. Woods. It recorded the names of the Selection Board members and a decision of the Selection Board that three applicants (including the applicant) should be short listed. It contained a handwritten list of criteria for short listing. No other information was contained on that document.

The Selection Board met on the 30th November, 2004. There are no records or minutes of what occurred at that meeting. Arising out of the meeting a form was completed which was signed by the three members of the Selection Board. Addressed to the Board it recorded that the meeting had taken place. It simply recommended the appointment of the notice party to the *"vacant position"*. No other information was contained on the form. It was not circulated to the members of the Board.

12. Rev. Woods averred that he:

".....informed the other members of the Board of Management by telephone that the Selection Board had nominated a candidate and the identity of the candidate. No member of the Board of Management professed to have any difficulty with the nomination of the notice party for the post."

He further averred that on the 1st December, 2004, he wrote to the Archbishop seeking his approval, as Patron, for the appointment of the notice party. He averred that *"...by letter of the same date"* the Archbishop responded granting approval. He said that he formally offered the notice party the post on the same day and that she responded by letter dated the 2nd December, 2004, indicating her acceptance of the post.

13. Mr. Angus Buttanshaw is a member of the Board. The notice party is married to his wife's brother.

In evidence Mr Buttanshaw averred that on the 30th November, 2004, he was advised by Rev. Woods that the Selection Board had nominated the notice party for appointment to fill the position of Principal. He indicated to Dr. Woods that he was agreeable to the appointment.

He discussed the contents of the letter from Noel Ward dated the 17th December, 2004, with Rev. Woods shortly after it had been received. He advised that a meeting of the Board should be convened and attended that meeting on the 22nd of December.

At the commencement of the meeting he disclosed to the Board that he knew the notice party and the nature of his relationship with her.

He told the other members of the Board that he would *"...withdraw if any of the other members thought it appropriate.."*. He stated that *"...this was not considered necessary by the other members present..."*.

At the meeting he gave the Board comprehensive legal advice in relation to the issues raised in Mr. Ward's letter. His advice was that the non-compliance by the Board with the Rules was not of sufficient gravity to invalidate the appointment of the notice party. The Board acted upon advice and he drafted the Board's written reply dated the 23rd December, 2004, to the letter which the Board had received from the Archbishop.

14. The notice party duly took up her appointment on the 1st February, 2005, as Principal.

On the 3rd March, 2005, the applicant was granted leave to seek the relief which has been sought herein.

Relevant Legislative and Regulatory Provisions

Order 84, rule 21(1) of the Rules of the Superior Courts, 1986, provides as follows:

"An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose, or six months where the relief sought is certiorari unless the court considers that there is good reason for extending the period within which the application shall be made."

Section 2(1) of the Education Act, 1998, ("the Act of 1998") provides *inter alia* that:

"board' means a board of management established under section 13...

and that:

'Principal' means a person appointed under section 23."

In these proceedings it is acknowledged that the Board is a "board of management" duly and lawfully established under s. 14 of the Act of 1998.

Section 8(1) of the Act of 1998 provides for the appointment and recognition of the Patron of a primary school. It is acknowledged that the Archbishop has at all times material to these proceedings been the lawful patron of Rathfarnham National School.

Section 15(1) of the Act of 1998 provides as follows:

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

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

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

Section 23 of the Act of 1998 provides *inter alia* as follows:

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

Pursuant to the provision of s. 23 of the Act of 1998, procedures regulating the appointment of persons as "Principals of recognised primary schools" have been agreed from time to time between the Minister, the Patron and the other bodies referred to in s. 23 of the Act.

The agreed procedures presently in force succeeded earlier, similar, Rules and procedures. They were published in November, 2003 and are contained in a document (hereafter "the Rules") entitled "...Boards of Management of National Schools - Constitution of Boards and Rules of Procedure."

It is a comprehensive document which records agreed procedures *inter alia* for (a) the constitution of Boards of Management, (b) the election and nomination of members of such boards, (c) the terms applicable to board members, (d) the appointment procedures for teachers, (e) the use of school premises, (f) the procedures for the nomination and election of Patrons and (g) other relevant matters.

Appendix D within the Rules regulates the procedures for the appointment of teachers and Principals.

It provides *inter alia* as follows:

"(i) All appointments of teachers in the school shall be made by the Board of Management in accordance with the Rules for National Schools and subject to the prior approval of the Patron.

...

(iii) The following procedures are to be followed in all cases of the appointment of teachers unless, in special circumstances, the Minister decides otherwise..."

2. Advertisements

(i) Vacancies... shall be advertised in at least one national daily newspaper...The advertisement shall invite applications ... to be submitted by a specified date to the Chairperson

(ii) The advertisement shall state.....

the latest date for receipt of completed applications, which shall not be earlier than two weeks after the last date of publication of the advertisement.

...

3. Selection Board

A. Principal Teachers

The Selection Board shall meet ... and shall establish criteria for the assessment of the applications, having regard to the Rules for National Schools and the requirements of the particular post. ...

(iii) A further meeting of the Selection Board is necessary after receipt of the application forms to determine those applicants to be called for interview. Each applicant called for interview shall be supplied with details of the established criteria for the post.

...

5. Interviews

...

(viii) Having interviewed such applicants as present themselves, the Selection Board shall submit a written report to the Board of Management, nominating the applicant whom it considers most suitable for appointment.

...

(x) The Board of Management shall appoint the teacher so nominated unless it has good and sufficient reason not to do so,...

(xi) The Chairperson shall seek the approval of the Patron for the appointment.

6. Notification of applicants

(i) Having received approval in accordance with 5 (xi), the Board shall notify the teacher of his/her appointment. The successful candidate should be advised that the offer is subject to the sanction of the Minister.

(ii) As soon as the Board of Management has received notification of the teacher's acceptance of the post, all unsuccessful candidates shall be notified. Both the successful candidate and the Chairperson shall complete the relevant form and If the post is warranted and the Chairperson of the Board certifies that the teacher has met the criteria and the appointment has been made in accordance with the procedures outlined in this appendix, the Minister for Education and Science will sanction the appointment."

Rule 15 of the Rules of Procedure read as follows:

15. Disclosure of interest/integrity of Board proceedings.

...

(b) A member of the Board who stands in a relationship to a person who is a candidate for appointment by the Board as teacher or other member of staff of the school, including the Principal, shall disclose to the Board the fact of the relationship and the nature thereof and shall take no part in any deliberation or decision of the Board concerning the appointment and the disclosure and the decision shall be recorded in the minutes of the Board. In this context Board members are required to make a disclosure not only in the case of a family relationship but in respect of any relationship which could be regarded as prejudicial to ensuring absolute impartiality in the selection process."

(c)

The Applicant's Claim

On behalf of the applicant it is claimed that the Board, in nominating the notice party for appointment, disregarded and flagrantly contravened the Rules which were made pursuant to the provisions of s. 23 of the Act of 1998 for the express purpose of regulating such nominations. It is contended the decision of the Board was, accordingly, unlawful and *ultra vires* and should be quashed.

Mr Horan. S.C. on behalf of the applicant says that the Rules must be construed as mandatory in application, having regard to their terms. He claims also that the Board's decision to appoint the notice party was unlawful and invalid because it was characterised by actual or perceived bias, contrary to the express provisions of the Rules and to the principles of natural and constitutional justice.

The Responses

On behalf of the Board and the Minister it is contended that the applicant did not seek leave to seek the relief which has been sought herein within the time limited by the provisions of Order 84, rule 21(1) of the Rules of the Superior Courts, (1986) and that, accordingly, this Court should not exercise its discretion to grant relief in the circumstances.

It is also contended on behalf of the Board that the decision of the Board to appoint the notice party is not amenable to relief by way of judicial review. Mr. Galligan, S. C. argues that, in making its decision, the Board was discharging a private law function which can be challenged only by invoking a "*private law*" remedy.

On behalf of the Archbishop it is contended that there is a "*doubt*" whether the decision of the Board or the approval of the Archbishop are amenable to relief by way of judicial review.

On behalf of all of the respondents it is contended that the Rules should not be interpreted by this Court as having a mandatory application. It is argued that the Rules are directory rather than mandatory in nature and that the acknowledged departure by the Board from the procedures laid down by the Rules does not invalidate the decision to appoint the notice party.

Finally it is argued on behalf of the Board that the decision to appoint the notice party was not characterised by either actual or perceived bias and that, in the performance of its functions, the Board was not, as a matter of law, required to act judicially.

Delay

The obligation upon the applicant pursuant to Order 84 rule 21(1) of the Rules of the Superior Courts was to apply for leave to seek the relief sought "*promptly and in any event within three months from the date when grounds for the application first arose, or six months where the relief sought is certiorari...*".

The decision sought to be impugned was made on the 30th November, 2004.

The nomination was made subject to the approval of the Archbishop and to the sanction of the Minister.

Having, on the 1st December, 2004, indicated his approval of the nomination, the Archbishop changed his mind. He wrote to the Board on the 21st December, 2004, stating that he wished the procedure to be "*re-commenced at the point at which it was at midnight on ... November 1st, 2004*" and that he believed that it would be "*..necessary for me to advise the D.E.S. that I am withdrawing my approval of the appointment due to the apparent invalidity of the procedure followed in the selection process.*"

That remained the position until the 28th January, 2005, when the Archbishop wrote to the Board stating that "*...the approval that I originally gave to the appointment ... remains in place...*".

The Board appears to have written to the Minister immediately and on the 1st of February the Minister sanctioned payment of salary to the notice party who took up her appointment on that date.

The relief sought in these proceedings is an order of *certiorari* together with declaratory and other relief.

I am satisfied on the evidence that the Archbishop's approval was suspended on or about the 21st December, 2004, (pending his enquiries into the Board's failure to apply the required procedures). His decision to leave his original approval in place was not made until the 28th January, 2005.

The Minister did not sanction the appointment until the 1st February, 2005. It follows that the grounds for the relief which has been sought on behalf of the applicant did not arise until the 28th January, 2005, or, possibly, the 1st February, 2005.

The applicant sought and was granted leave to seek the relief sought herein on the 3rd March, 2005.

In such circumstances I am quite satisfied that the applicant has acted "*promptly*" within the meaning ascribed to that word by the provisions of Order 84, rule (21)(1) of the Rules of the Superior Courts, 1986.

Although the decision of the Board was made on the 30th November, 2004, and the applicant believed that the decision was unlawful and invalid, she was nonetheless correct not to seek relief until she did so.

It would have been inappropriate for the applicant to seek relief at a time when the Archbishop as Patron of the school had expressly requested the Board to recommence the procedure for nominating a Principal.

When the Archbishop decided otherwise the applicant sought relief with expedition and efficiency.

It follows that I am satisfied that the applicant has complied with the provisions of Order 84, rule 21(1) and has not been guilty of delay in seeking relief.

Justiciability

Mr. Galligan S.C. on behalf of the Board submits that, in making its decision, the Board was performing a function which was not ordinarily seen as coming within the public domain.

He argues that, insofar as the Board, in making its decision, was exercising a power, it was not exercising a power involving an adjudication which affected any right or liability vested in the applicant.

He says that a decision by the Board as an employer to employ a Principal teacher is a decision which is seen to come within the private domain. He says that the applicant chose to apply for the position and to undergo a selection process and that she acquired no specific right or rights by agreeing to undergo that process.

Accordingly, he says no legally enforceable contractual or other right has been created by the applicant's agreement to submit herself to the selection process and she has no legal remedy if she is unsuccessful in her application.

In *Beirne v. Commissioner of An Garda Síochána* [1993] I.L.R.M. 1 the Supreme Court (Finlay C.J.) discussed the ambit of judicial review and observed (at p.2) that:

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

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

The decision to nominate the notice party for appointment as a Principal teacher can not reasonably be described as a decision which is "solely and exclusively derived from an individual contract made in private law".

The decision was made pursuant to the exercise of a power conferred upon the Board pursuant to the provisions of s. 23 of the Act of 1998. It was made subject to terms and conditions determined by the Minister with the consent of the Minister for Finance. It was made expressly in accordance with rules and procedures which had been agreed between the Board and the Minister and the Archbishop as Patron of the school and with other trade unions and staff association.

The decision was made subject to the approval by the Archbishop as Patron and to the sanction of the Minister.

Factors which are relevant when the question of the availability of judicial review is raised were identified by the Supreme Court (Denham J.) in *Geoghegan v. Institute of Chartered Accountants in Ireland* [1995] 3 I.R. 86 and by the High Court (Kelly J.) in *Rafferty v. Bus Éireann* [1997] 2 I.R. 484. I do not propose to recite those factors herein but I am satisfied that many have an application to the facts of these proceedings. In particular:

1. This case relates to a major profession, important in the community which is responsible for the provision of primary education for children within the State pursuant to policies implemented by successive governments with the sanction of the Oireachtas.
2. The original source of the power to appoint the Principal teacher of a national school is the Act of 1998 and in particular s. 23 thereof. The power is conferred upon the Board and may only be exercised "... subject to such terms and conditions as may be determined from time to time by the Minister with the consent of the Minister for Finance" and "in accordance with procedures agreed from time to time between the Minister, the Patron ... etc."
3. The functions of the Board have a statutory genesis. The decision sought to be impugned was made by the Board in exercise of a power conferred upon the Board by the provisions of s. 23 of the Act of 1998. Those facts strongly inter alia suggest that the decision can be said to come within the public domain.
4. The method by which the contractual relationship between the Board and the notice party was created is expressly regulated by a statutory regime.

Mr. Galligan S.C. relies upon the decision of the High Court (Peart J.) in *Becker v. St. Dominic's Secondary School Cabra* (Unreported, High Court, 14th April, 2005) and in particular upon the distinction identified by Peart J.:

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

That case was concerned with disputes between the applicant and the chairperson of the Board of Management of a secondary school. Peart J. noted that there was "... no agreed procedure to resolve inter-teacher disputes in the school ...". The applicant sought to impugn a decision to give her a written warning as part of a disciplinary procedure adopted privately by the school.

I am satisfied that the facts of that case can be readily distinguished from the facts of the instant case which concern the application of Rules and procedures which have a statutory derivation and which have been imposed pursuant to a public policy sanctioned by the Oireachtas.

Mr. Galligan argues that, in making its decision, the Board is not required to act judicially because its decision will not affect any right or liability which is vested in the applicant. I do not accept that contention.

He contends that the Rules were intended to accommodate the administrative convenience of the Board and not to confer any rights upon candidates for appointment.

It is important to consider the terms of the Rules which have been invoked on behalf of the applicant.

Rule 15(b) requires that any member of the Board:

"... who stands in a relationship to a person who is a candidate for appointment by the Board as teacher or other member of staff of the school, including the Principal, shall disclose to the Board the fact of the relationship and the nature thereof and shall take no part in any deliberation or decision of the Board concerning the appointment and the disclosure..."

The purpose of that Rule is evident from its express terms which provide that it is intended to ensure "... absolute impartiality in the selection process".

Its intention, therefore, is not to accommodate the administrative convenience of the Board but to provide a fair selection process for prospective and duly qualified candidates for appointment.

Other rules invoked on behalf of the applicant include those contained in Appendix D (which regulates the procedures for the appointment of teachers and Principal). The relevant rules are as follows:

1. A rule which requires the advertisement for applications to state on its face the latest date for receipt of completed applications (Rule 2),

2. A rule which required that each applicant called for interview "shall" be supplied with details of the established criteria for the post (Rule 3)

3. A rule which required the Selection Board to submit a written report to the Board nominating "*the applicant who it considers most suitable for appointment*" (Rule 5 (vii)).

Again it is to be noted that those rules do not suggest an intention to accommodate the administrative convenience of the Board. Rather they suggest an intention to provide prospective candidates with fair procedures.

It should not be overlooked that the Rules are derived from s. 23(1) of the Act of 1998 which requires the Board to appoint a Principal " ... *in accordance with procedures agreed from time to time between the Minister, the Patron, recognised school management organisations and any recognised trade union or staff association representing teachers* ...".

The statutory framework from which the Rules have emanated expressly recognise the interests of trade unions and staff associations representing teachers. The applicant is a member of a trade union which comes within the category recognised within the section.

The rules relied upon by the applicant were rules with a statutory derivation which were intended *inter alia* to provide candidates for appointment as a Principal teacher with specific fair and impartial procedures.

The Board was and remains statutorily bound to perform its functions in the manner described in s. 15 of the Act of 1998 and to apply the procedures required by s. 23 of that Act.

The procedures required by s. 23 of the Act in turn required the application of specific fair procedures in the appointment of Principal teachers. It follows that, in applying those procedures, the Board was required to exercise its functions judicially. For that reason and for the reasons outlined earlier herein I am satisfied also that the Board's decision is amenable to review by this Court.

Mandatory or Directory?

On behalf of the applicant it is contended that the Rules must be construed as having a mandatory application.

Mr. Horan points (a) to the continuous use of the word "*shall*" throughout the Rules, (b) to the absence of any discretionary powers granted to the Board, to the Patron or to the Minister and (c) to the written acknowledgements made on behalf of the Minister (and initially by the Archbishop) that the Rules must be construed as having a mandatory effect.

It is of importance to note at the outset that the Rules do not themselves form part of a statute or statutory instrument and cannot be construed as such. That fact, by itself, however does not deprive the Rules of legal force or effect. Since they comprise rules of procedure authorised by statute and agreed by and between parties identified within the statute they can be said to form part of a statutory regime.

Conflicting argument has been advanced on behalf of the parties as to whether or not the Rules are "*mandatory*" or "*directory*" in nature.

Whether particular statutory provisions, regulations and procedures should be construed as "*mandatory*" or "*directory*" has been the subject of discussion repeatedly within this and other jurisdictions.

In that connection the learned authors of De Smith, Woolf and Jowell, *Judicial Review of Administrative Action*, 5th ed., Sweet & Maxwell (1995), observe *inter alia* as follows:

"Para. 5-058:

"The law relating to the effect of failure to comply with statutory requirements thus resembles an inextricable tangle of loose ends and judges have often stressed the impracticability of specifying exact rules for the assignment of a provision to the appropriate category..."

Para. 5-060:

"A second reason for the tangle in this area is the use of the terms 'mandatory' and 'directory'; the latter term is especially misleading. All statutory requirements are prima facie mandatory. However, in some situations the violation of a provision will, in the context of the statute as a whole and the circumstances of the particular decision, not violate the objects and purpose of the statute. Condoning such a breach does not, however, render the statutory provision directory or discretionary. The breach of the particular provision is treated in the circumstances as not involving a breach of the statute taken as a whole..."

Para. 5-061:

"In order to decide whether a presumption that a provision is mandatory is in fact rebutted, the whole scope and purpose of the enactment must be considered, and one must assess 'the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act. (See Howard v. Bodington (1877) 2 P.D. 203, 211) It is necessary to assess the importance of the provision, particular regard being given to its significance as a protection of individual rights, the relative value that is normally attached to the rights that may be adversely affected by the decision, and the importance of the procedural requirement in the overall administrative scheme established by the statute".

That analysis is consistent with the following extract from the decision of the Supreme Court (Henchy J.) in *The State (Elm Developments Limited) v. An Bord Pleanála* [1981] I.L.R.M 108 at p. 110:

"Whether a provision in a statute or statutory instrument, which on the face of it is obligatory (for example, by the use of the word 'shall'), shall be treated by the courts as truly mandatory or merely directory depends on the statutory scheme as a whole and on the part played in that scheme by the provision in question. If the requirement which has not been observed may fairly be said to be an integral and indispensable part of the statutory intendment, the courts will hold it to be truly mandatory, and will not excuse a departure from it. But if, on the other hand, what is apparently a

requirement is in essence merely a direction which is not of the substance of the aim and the scheme of the statute, non-compliance may be excused."

In *Irish Refining plc v. Commission of Evaluation* [1990] 1 I.R. 568, the Supreme Court (Finlay C.J) observed at p. 557:

"It is quite clear as a matter of general principle, that time limits contained in statutory provisions may be either mandatory and/or directory and that the court in reaching a conclusion into which category any individual provisions falls must seek to interpret the meaning, intention and objective of the legislation concerned."

The general principle can be identified readily. In seeking to determine the effect and consequences of non-compliance with statutory provisions and requirements the courts should have regard to the statutory scheme as a whole and seek to interpret the meaning, intention and objective of the legislation concerned.

In the instant case the cornerstone of the statutory scheme is the Act of 1998. In its Preamble it is declared to be an:

"Act to make provision in the interests of the common good for the education of every person in the State..... to provide generally for primary, post-primary, adult and continuing education... to ensure that the education system is accountable... and is conducted in a spirit of partnership between schools, patrons, students, parents, teachers and other school staff, the community served by the school and the State..... to provide for the recognition and funding of schools and their management through Boards of management;... to provide for the role and responsibilities of principals and teachers... and to provide for related matters."

Section 23 of the Act has given effect *inter alia* to the "*spirit of partnership between schools, patrons, students, parents, teachers and other school staff, the community served by the school and the State*" by providing for the appointment by the Board of Principal teachers "in accordance with procedures agreed" between the company Board and the various other interested parties.

The statutory requirement imposed by s. 23 of the Act is that the Board shall apply agreed procedures to the appointments of Principal teachers. It is a mandatory requirement. Procedures have been duly agreed between the interested parties pursuant to the provisions of the section.

The Board nominated the notice party for appointment as Principal teacher of Rathfarnham National School. It did not do so in accordance with the procedures which had been agreed. In particular:

- (1) Contrary to the provisions of Rule 3 of Appendix D of the Rules, the applicants who were called for interview were not supplied with details of the established criteria for the post and,
- (2) Contrary to the provisions of Rule 5(viii) of Appendix D of the Rules, the Board did not receive a written report from the Selection Board and did not consider the contents of such a report and,
- (3) The application of the notice party was not been submitted to the Chairperson of the Board by the date specified in the advertisement as required by rule 3 of Appendix D of the Rules (and the Board did not consider any application on the part of the notice party to submit a late application and did not make enquiry as to the reasons of the late application), and,
- (4) Contrary to the provisions of Rule 15 of the Rules, a member of the Board who occupied a proximate relationship with the notice party participated in the deliberations and decisions of the Board concerning the appointment and had a direct influence upon the deliberations and decisions of the Board concerning that appointment.

The evidence adduced in these proceedings suggests that the Board was under the impression that the Rules comprised rough guidelines which, at the discretion of the Board, could be applied in an *ad hoc* manner. That is not the case. The application of the procedures is not a matter which is within the discretion of the Board. Their application by the Board is mandatory.

Non-compliance with the minute detail of the agreed procedures will not invariably invalidate affected decisions. The procedures may be described as largely directory in nature. However they may not be ignored. They must be applied by the Board in substance. That is clear, having regard to the principles identified earlier herein.

The provisions of Rule 15 of the Rules, in particular, are clear and unambiguous. In substance they may not be departed from by the Board..

By permitting Mr. Buttanshaw (a) to participate in the initial decision to nominate the notice party and (b) to participate in the Board's deliberations and decisions on the 17th December, 2004, and at its meeting on the 22nd December, 2004, concerning the notice party's appointment, the Board acted unlawfully and *ultra vires*.

By failing to have any regard whatever for the provisions of Rules 3 and 5 (viii) of Appendix D of the Rules (to which reference has earlier been made) the Board also acted unlawfully and *ultra vires*.

It follows from the foregoing that the applicant is entitled to the relief which she seeks.