THE HIGH COURT

JUDICIAL REVIEW

[Record No. 2018/169 JR]

BETWEEN

MAIRE SHEEHY

APPLICANT

AND

BOARD OF MANAGEMENT OF KILLALOE CONVENT PRIMARY SCHOOL

RESPONDENT

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 9th day of May, 2019

Nature of the case

1. This is a case in which the applicant seeks to quash decisions of the Board of Management of a primary school which resulted from her being demoted from her position as principal. She alleges that the process leading to the decision was flawed in multiple respects and that it was tainted by prejudgment and bias against her. The Board of Management made a finding following an oral hearing that she had "emotionally abused" a young child on two occasions by requiring the child, by way of punishment, to kneel on the floor in her office and to sit on the floor in a classroom respectively. The applicant had strenuously denied the allegations and said that she had neither sought to punish the child nor asked her to kneel on the floor. The Board of Management originally imposed a sanction of dismissal but, following an appeal to a Disciplinary Appeal Panel (a "DAP"), imposed a sanction of demotion from principal teacher to the position of ordinary teacher upon the recommendation of the DAP. The applicant maintains that there were multiple flaws in the Board's process and that fundamentally what happened was that a relatively minor allegation concerning her treatment of a child some years previously was raised in the context of a more general industrial relations problem concerning her behaviour towards staff and was escalated in a highly unfair, biased and unreasonable manner to the point where a flawed conclusion was reached that she had emotionally abused a child. A significant feature of the case is that no complaint is made about any aspect of the appeal before the Disciplinary Appeal Tribunal. Another is that the Board of Management accepted the recommendation of the DAP to reduce the sanction from dismissal to demotion.

Relevant Legal Materials

Circular 60/2009 of the Department of Education and Science

2. Circular 60/2009 contains the revised procedures for the suspension and dismissal of principals and is issued pursuant to s. 24(3) of the Education Act 1998. The opening section of the Circular sets out a number of general principles underpinning the procedures. These include the following, which reflect familiar principles of fair procedures, including the giving of adequate notice of allegations and the right to challenge evidence. It provides:-

> • "that there will be a presumption of innocence. No decision regarding disciplinary action can be made until a formal disciplinary meeting has been convened and the employee has been afforded the opportunity to respond to the allegations raised
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> • that the employee will be advised in writing in advance of a disciplinary meeting of the precise nature of the matters concerned and will be given copies of all relevant documentation. In the case of a complaint, this detail will include the source and text of the complaint as received. A complaint should be in writing
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> • that details of the allegations, complaints or issues of professional
>
> competence be put to the Principal concerned
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> • that the right of a Principal concerned to have access to and to view his/her personnel file (to include all records in relation to the Principal in hardcopy or electronic format, held by the school) will be fully respected
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> • that the Principal concerned be given the opportunity to respond fully to any such allegations, complaints or issues of professional competence
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> • that the Principal concerned is given the opportunity to avail of representation by a work colleague or trade union representative/s
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> • that the Principal concerned has the right to examine and challenge all evidence available and to call witnesses or persons providing such evidence for questioning
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> • that the Principal concerned has the right to a fair and impartial examination of the issues being investigated, taking into account the allegations or complaints themselves, the response of the Principal concerned to them, any representations made by or on behalf of the Principal concerned and any other relevant or appropriate evidence, factors or circumstances
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> • that the Board of Management, as employer, has a duty to act reasonably and fairly in all interactions with staff and to deal with issues relating to conduct or professional competence in a confidential manner which protects the dignity of the Principal
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> • that all matters relating to the disciplinary procedure are strictly confidential to the parties and their representatives
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> • that it will be considered a disciplinary offence for any person to intimidate
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> • that where a decision is taken to impose a disciplinary sanction, the sanction imposed will be in proportion to the nature of the conduct/behaviour/performance that has resulted in the sanction being imposed

• that these procedures are without prejudice to the right of a Principal to have recourse to the law to protect his/her employment".

3. A clear distinction is drawn in the document between issues relating to the professional competence of principal teachers, on the one hand, and disciplinary matters, on the other. The first part of the document deals with procedures relating to the former and sets out five stages consisting of an informal stage, the initiation of a formal process, an external review, a hearing, and an appeal. The second part of the document deals with disciplinary procedures and makes it clear that issues of professional competence as a teacher are outside the scope of this procedure and should be dealt with under the first part of the document. It also says that allegations in respect of child abuse as defined in the Child Protection Guidelines should be dealt with in the first instance under those Guidelines. It then goes on to set out a number of stages in the disciplinary procedure, including an informal stage, stage 1 (verbal warning), stage 2 (written warning), stage 3 (final written warning) and stage 4.

4. Regarding Stage 4, it says: -

> "If it is perceived that the poor work or conduct has continued after the final written warning has issued *or the work or conduct issue is of a serious nature* a comprehensive report on the facts of the case will be prepared by the Chairperson and forwarded to the Board of Management. A copy will be given to the Principal." (emphasis added)

It then says that the Board of Management will consider the matter and seek the views of the principal in writing. It shall afford the Principal an opportunity to make a formal presentation of his/her case. It provides for at least ten days' written notice of the meeting and that the purpose of the meeting should be stated as well as the specific nature of the complaint, and that any supporting documentation will be furnished to the principal. The principal is entitled to be accompanied by her Trade Union representative or a colleague. She is entitled to have an opportunity to respond and to state her case fully and challenge any evidence that is being relied upon for a decision and be given an opportunity to respond. It then sets out a range of sanctions which consist of the following: deferral of an increment, withdrawal of an increment or increments, demotion, other disciplinary action short of suspension or dismissal, suspension with pay, suspension without pay, and dismissal.

5. It says that the Board of Management will act reasonably in all cases when deciding on appropriate disciplinary action and that the nature of the disciplinary action should be proportionate to the nature of the issue of work or conduct issue that has resulted in the sanction being imposed. It goes on, under a heading of Gross Misconduct, to say that in the case of serious misconduct at work or a threat to health and safety of children or other personnel in the school, the stages outlined above do not normally apply and the Principal may be dismissed without recourse to the stages. It further sets out a list of gross misconduct offences in this regard which include matters such as theft, damage to school property, falsification of documents, violent and disruptive behaviour, and it includes serious breach of health and safety rules and "serious bullying, sexual harassment or harassment against an employee, student or other members of the school community". It goes on to say: -

> "For the purposes of this section gross misconduct may also relate to an act which took place or allegedly took place outside the school where such act, or alleged act, gives rise to a serious concern on the part of the Board of Management in relation to the health and safety of students and/or staff of the school."

6. Stage 5 provides for an appeal and, in the case of a sanction imposed under stage 4 of the procedure, an appeal is to a disciplinary panel appointed by the Board of Management.

7. Appendix A deals with the Disciplinary Appeal Panel and provides for matters such as the membership of the panel, the procedures and other such matters. I will refer to the Disciplinary Appeal Panel throughout this judgment as the "DAP". It may be noted that the grounds for what is called a "review of disciplinary proceedings" are as follows: -

> "i the provisions of the agreed procedures were not adhered to
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> ii all the relevant facts were not ascertained
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> iii all the relevant facts were not considered or not considered in a reasonable manner
>
> iv the Principal concerned was not afforded a reasonable opportunity to answer the allegation
>
> v the Principal concerned could not be reasonably be expected to have understood that the behaviour alleged would attract disciplinary action
>
> vi the sanction recommended is disproportionate to the underperformance
>
> or misconduct alleged."

8. The document also provides that the final decision in respect of the appeal panel recommendation rests with the Board of Management which shall set out in writing the basis for its decision. This is an interesting aspect of the procedures; the DAP does not have the final say despite the fact that it is the appellate body; it is the Board of Management which makes the final decision. This aspect of the procedures is relevant among other things to the question of when time may start to run for the purpose of Order 84, rule 21, an issue which was raised in this case.

Children First Guidelines

9. Under the Children First Guidelines, the definition of emotional abuse is as follows: -

> "Emotional abuse is normally to be found in the relationship between a parent/carer and child rather than a specific event or pattern of events. It occurs when a child's developmental need for affection, approval, consistency and security are not met. Unless other forms of abuse are present, it is rarely manifested in terms of physical signs or symptoms. Examples may include: -
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> > (i) the imposition of negative attributes on a child, expressed by persistent criticism, sarcasm, hostility or blaming;
> >
> > (ii) conditional parenting in which the level of care shown to a child is made contingent on his or her behaviours or actions;

(iii) emotional unavailability of the child's parent/carer;

(iv) unresponsiveness of the parent/carer and/or inconsistent or inappropriate expectations of the child;

(v) premature imposition of responsibility on the child;

(vi) unrealistic or inappropriate expectations of the child's capacity to understand something or to behave and control himself or herself in a certain way;

(vii) under- or over-protection of the child;

(viii) failure to show interest in, or provide age-appropriate opportunities for, the child's cognitive and emotional development;

(ix) *use of unreasonable or over-harsh disciplinary measures*;

(x) exposure to domestic violence;

(xi) exposure to inappropriate or abusive material through new technology." (emphasis added)

10. The above definition of emotional abuse is reproduced verbatim in the Child Protection Procedures for Primary and Post-Primary Schools at para 2.1.3. The Child Protection Procedures also set out how signs of emotional abuse can manifest or present in a child (para 2.1.3): -

> "Emotional abuse can be manifested in terms of the child's behavioural, cognitive, affective or physical functioning. Examples of these include insecure attachment, non-organic failure to thrive, unhappiness, low self-esteem, educational and developmental underachievement, and oppositional behaviour. The threshold of significant harm is reached when abusive interactions dominate and become typical of the relationship between the child and the parent/carer."

Chronology of Events

11. In September 2007, the applicant, Ms Sheehy, was appointed to the dual role of teacher and principal of Killaloe Convent Primary School. This is an all-girls national school made up of a total of six teachers (including the principal) and just over 100 students. Ms Sheehy avers that when she commenced working there, there was a strained and fractious atmosphere which seemed to be compounded by a history of industrial relations tensions and discontent. Shortly after she started working there, she said, difficulties arose, in particular in the working relationship between herself and the deputy principal, Ms Alison Varley.

Letter of complaint about the applicant of the 15th December, 2014

12. Some years went by before matters came to a point of official complaint. By letter dated 15th December, 2014, a number of members of staff wrote to the then chairperson of the Board, Mr Michael Drew. This letter said that while the staff had been experiencing difficulties within the school over a number of years, this had intensified in the last few months. They said that it had "resulted in a lack of trust, a lack of teamwork, and a lack of cohesion between staff members" and that "a fragmented atmosphere pervades the school and we are extremely stressed". The letter said that the conflict remained embedded and that they were unable to resolve the difficulties among themselves and were, therefore, requesting mediation so that the difficulties could be resolved. This letter was signed by six people: Alison Varley, Fiona Fitzgerald, Martina McLoughlin, Eamon Power, Aoife Lynch, and Claire O'Callaghan.

Mediation and Report dated 23rd June, 2015

13. A mediator, Mr. Tony Bates, was appointed and a mediation process was undertaken. Mr. Bates reported on 24th March, 2015 with recommendations and there was a review of his recommendations on 22nd June, 2015. Mr. Bates reported on 23rd June, 2015 that while most of the recommendations had been implemented, there was little, if any, improvement in the matter of trust between the principal and staff. He was of the view that there was an ongoing difficulty that had not been resolved through the mediation process.

Letter of 15th June, 2015

14. A letter of some importance to the present proceedings was written on 15th June, 2015 to the Board of Management. This letter was signed by Alison Varley, Deputy Principal, and contained number of complaints. The issues identified by Ms. Varley were set out in a bullet point format. I have followed the bullet point format and italicised the complaint which led to the events the subject of these judicial review proceedings.

> •"Ms. Sheehy addresses staff in a patronising, demeaning manner.
>
> • Ms. Sheehy continually undermines staff. For example, on one occasion she met with the parents of two pupils to discuss the pupils' educational needs. She did this without the knowledge or input of the class teacher. This meeting was not at request of the parents, but rather at Ms. Sheehy's personal whim.
>
> • Ms. Sheehy has demonstrated a refusal to trust her staff, particularly her in-school management team. For example, she recently changed the password to the school administrative computer, and refuses to grant me, the deputy principal, access. This means that I am unable to access or print school related information, and means that I am unable to completely perform my role as deputy. When Ms. Sheehy was recently absent due to illness, I was unable to access the computer, and was unable to open the filing cabinet containing pupil data and school policies, because she also denies me access to keys to the cabinet.
>
> • Ms. Sheehy smokes in the workplace on a daily basis. Pupils regularly complain to me about the smell of smoke in the boiler house.
>
> • *Ms. Sheehy has undertaken inappropriate methods of discipline with regard to a particular pupil in junior infants, where, as punishment, the child was instructed to kneel on the ground facing a wall on, at least, two different occasions. Senior members of staff brought this to her attention with no result. This is not an appropriate means to correct a child, nor*

can it be classed as reasonable.

•Following the disappearance of €1,300 of fundraised money in October 2014, Ms. Sheehy presided over a secretive, personal, unproductive investigation that resulted in no outcome whatsoever.

• In May 2013, Ms. Sheehy asked me what my intentions were regarding family planning for the coming year, so that she might better plan the following year's class allocations."

15. The letter went on to say that the teachers were exasperated at the attitude of the principal and that they were being demeaned, ridiculed, intimidated and bullied repeatedly. It is clear from the totality of the letter that the main concern was the interaction between the principal and the adult staff members, and that the only issue relating to a child in the school was the matter raised at the fifth bullet point above. Underneath the signature of the Deputy Principal to the main body of the letter described above, there was a separate note requesting an emergency board meeting before the summer holidays which was signed (although not dated) by Ms. Varley, Fiona Fitzgerald, Aoife Lynch, and Claire O'Callaghan.

16. In early July 2015, a Mr. Luke Murtagh was appointed as the new chairperson of the Board of Management. Following his appointment, Mr. Murtagh met with Ms. Sheehy for a discussion. Ms. Sheehy averred that there was, at most, an opaque reference to the letter of complaint at this stage.

17. By letters dated 28th July, 2015, Mr. Murtagh wrote to a number of people seeking further details in relation to the allegations made, including details of the alleged incident of the inappropriate disciplining of a child. At a meeting organised by Mr. Murtagh on 29th July, 2015, Ms. Sheehy was provided with a copy of the letter of complaint of 15th June, 2015 and asked to provide a response to the allegations made against her.

18. By letter dated 12th August, 2015, Ms. O'Callaghan replied to Mr. Murtagh's request for information, saying that she was on maternity when the alleged incident occurred. Ms. Varley replied by letter dated 1st September, 2015, Ms. Lynch by letter dated 11th September, 2015 and Ms. Fitzgerald by letter dated 23rd September, 2015, each outlining their recollections of the alleged incident. An emergency Board of Management meeting was held on 24th August, 2015. It appears that no details were provided by Mr. Murtagh to the Board members, simply that allegations had been made and that he would follow the appropriate procedures and update the board members accordingly.

19. The responses of Ms. Varley, Ms. Lynch and Ms. Fitzgerald should be noted here, because they essentially formed the basis of the case against Ms. Sheehy which was subsequently explored at the oral hearing. I would note that each of these responses was written some considerable time after the alleged events. Ms. Varley in her letter of 1st September, 2015 said as follows: -

> "On 6 November 2013, Ms Aoife Lynch, the then school secretary informed me that Ms Sheehy had brought [SH] into Ms Sheehy's office and instructed the pupil to kneel on the floor and face the wall. Ms. Aoife Lynch was at her desk in the principal's office at the time. Miss Fiona Fitzgerald entered the room during the incident, and observed [SH] kneeling on the floor, facing the wall. I discussed this incident with Ms Sheehy the following evening, at which time Ms Sheehy said that [SH] had been extremely difficult in class."

I would characterise this as a hearsay description of the allegation, followed by an encounter with Ms. Sheehy in which the latter said something which might possibly be construed as an admission of the allegation.

20. Ms. Lynch said as follows in her response: "On the morning of 6 November 2013, Ms Sheehy barged into my office with [SH] in tow and instructed [S] to kneel in front of the wall. Ms Sheehy told [S] that she would be staying here for 5 minutes and left the office. [S] started to cry and asked for her mother. I spoke to [S] to calm her down. Fiona Fitzgerald entered the office during this time and witnessed [S] kneeling in front of the wall. Ms Sheehy returned 15 minutes later. I was so shocked by the incident that I reported it to Miss Varley, the deputy principal that day". I would characterise this as direct evidence of a single incident which took place in the applicant's own office whereby the child was instructed by the applicant "to kneel in front of the wall".

21. Ms. Fitzgerald said as follows in her response: "On November 6th, 2013, I witnessed [SH] kneeling on the office floor and I asked the then secretary, Aoife Lynch, who was working in the office, what was going on. She informed me that Ms Sheehy had instructed the child to kneel on the floor and face the wall as punishment for poor conduct in class". I would characterise this as corroborative evidence of the allegation made by Ms. Lynch with the additional element that the child was instructed to do as she did as punishment ("for poor conduct in class"). She went on to describe a second incident as follows: "On a second occasion, on my return to my classroom after a trip to the local hotel for a music festival performance with 3rd class, [SH] was sitting on the floor of my classroom facing the storage unit. I asked Eamonn Power who was supervising my other two classes […] what was going on. He informed me that the child was instructed by her class teacher, Ms Sheehy, to go into my classroom, sit on the floor and face the storage unit; again as disciplinary action for poor conduct in class." I would characterise this as direct evidence of the child sitting in a particular place and position together with hearsay evidence as to how this had come about. She went on to describe a confrontation with Ms. Sheehy about it: "My initial reaction was to go straight away to Ms Sheehy and explain where I stood on the matter. I asked her if she had time to speak with me later on, and when we spoke, I expressed my disdain at the way in which the child had been treated and that such a lack of dignity and respect for the children in our care would not be tolerated by me. I made it clear how appalled I was over her actions and I said 'it is disgraceful treatment of any child'. I told her that if a teacher did that to a child of mine, 'I would have them in the High Court' and she responded by laughing. I then said 'I don't find this one bit funny' and finished by saying I wouldn't support her in this sort of archaic disciplining of children". I would characterise this as direct evidence of an encounter with Ms. Sheehy in which the latter did not deny the allegation of what had happened such that her reaction could arguably be construed as an admission.

22. It may be noted that Mr. Power was mentioned in one of the above accounts as being a witness to one of the incidents.

23. On 1st October, 2015, Mr. Murtagh made a phone call to Tusla where he spoke to a duty social worker, Mr. Stephen Molloy. In a memo recording the phone call, Mr. Murtagh said that he briefed Mr. Molloy on the incident involving Ms. Sheehy and SH. He said that he was asked if the person against whom the allegation was made was still working in the school and whether the child's parents had been notified. He said that he informed Mr. Molloy that Ms. Sheehy was still working in the school and that (to his knowledge) the parents had not yet been notified. The memo says that Mr. Molloy then directed Mr. Murtagh to inform the parents of the child and to follow the school's internal procedures before furnishing a report to the social work team leader once the investigation was completed.

24. It appears that sometime in October 2015, Mr. Murtagh met with Ms. Sheehy to keep her informed of the steps he was taking in relation to the investigation of the allegations made against her. Mr. Murtagh says that he requested that the stage 4 hearing be held

in Limerick, away from the school, due to the sensitive nature of the investigation and "in deference to Ms. Sheehy".

25. Further correspondence ensued in late September and October 2015 in which Mr. Murtagh sought further information from Ms. Varley, Ms. Fitzgerald and Ms. Lynch regarding the alleged incident of the inappropriate disciplining of a child.

26. It appears that Mr. Murtagh spoke with the parents of the child from January 2016. The extent of his interaction with them, and why he had delayed for a number of months after speaking with Tusla before he contacted them, was the subject of questioning at the subsequent oral hearing (discussed below). It seems that on 10th February, 2016, the parents of the child (SH) sent an email to Mr. Murtagh outlining that they did not appreciate being "chased" by him for a formal statement. I have not seen this email. I note that the parents had never made any complaint to school about Ms. Sheehy's treatment of their child or anything else, such as symptoms of distress or anything of that kind.

27. By letter dated 12th February, 2016, Mr. Murtagh wrote to Mr. David O'Sullivan, Ms. Sheehy's representative, informing him that he had elected to initiate Stage 4 of the disciplinary process in relation to the allegations concerning the mistreatment of a child.

28. Mr. Murtagh then wrote a letter to Ms. Sheehy on 24th October, 2016 in which he said that he had "increasing concerns" about Ms. Sheehy's performance of her statutory functions as principal. In the letter he referred to the "extraordinary range of issues with which the Board has had to grapple over the past few years" and went on to list the issues, including issues relating to the enrolment of students, the management of funds collected for a Fun Run and their subsequent loss, resignation of staff and major staff issues. He stated that he was convening a formal disciplinary meeting at Stage 1 of the disciplinary procedures in relation to those matters, which did not encompass the complaint as to her conduct regarding the child.

29. The stage 1 disciplinary meeting took place on 12th December, 2016. Ms. Sheehy complains in her affidavit that she was not offered the possibility of an informal process but of course no aspect of the Stage 1 procedure falls within this judicial review proceeding. Mr. Murtagh conducted the disciplinary meeting alone and made the decision to issue a verbal warning in respect of the matters complained of by letter dated 21st December, 2016. The outcome of the Stage 1 disciplinary hearing was appealed less than a month later by Ms. Sheehy by letter dated 17th January, 2017. Ms. Sheehy was informed by letter dated 24th February, 2017 that the nominee of the Board of Management who would be determining her appeal was Ms. Marie Brooks Power; however, Ms. Brooks Power was replaced by Ms. Anne McDonagh as nominee of the Board of Management some months later. Ms. Sheehy's appeal in this regard was not heard before the Stage 4 hearing in respect of the allegations about her treatment of a child, which took place in June 2017. By letter dated 29th November, 2017 (apparently only provided to her on 23rd January, 2018), Ms. Sheehy was informed of Ms. McDonagh's finding that her appeal was "without foundation". Regarding the delay between the date the verbal warning was appeal and the date of the determination, Mr. Murtagh said that the appeal "was not capable of being heard and determined earlier due to the fact that Ms Sheehy was on sick leave from her position and was not in a position to attend the first scheduled hearing." Ms. Sheehy disputed that this could be reason, but as I have said, this aspect of matters is under within the scope of this judicial review.

The Murtagh report

30. Mr Murtagh wrote a report in February 2016 which I will refer to as "the Mutagh report". This report apparently was furnished Gardaí and stayed with them for a year before they ultimately decided to take the matter no further in terms of criminal proceedings. I am not surprised at this decision, given the nature of the allegations. The final report of Mr. Murtagh in March 2017 contained only one additional paragraph describing the involvement of the Gardai but was otherwise the same as his report of one year before. In the course of the proceedings before me, the applicant's legal team heavily criticised the Murtagh report, although the report itself was never challenged by way of judicial review. In the report, Mr. Murtagh referred to the various complaints against the principal and said that he wrote to each staff member advising them of procedures regarding grievances and allegations of bullying. He then said that there were two other allegations "which were a cause of serious concern to me" and that he had written to the staff members requesting more detail in relation to the allegations made. He described the two incidents of alleged mistreatment of the child, calling them incident A and incident B. The report then comments "This information has come as a major shock to me as chairperson. I am very concerned that if my concerns are substantiated, and these incidents occurred, I fear that they amount to highly inappropriate actions on the principal's part which represents an over-harsh method of punishing a very young child. Given the seriousness of the matters, I have no option other than to initiate the disciplinary procedures at stage 4 of the disciplinary procedures…". He described the steps taken by him to investigate the allegations and the information provided. Among the criticisms of his report were that he had inaccurately summarised the allegations, although I note that he attached the letters of response from each of the teachers he had contacted containing the precise information furnished by that teacher. Another criticism was that Another criticism was of the language used, as described above. I do not agree that these represent a pre-judgment of the issues; he was simply saying that if the allegations were substantiated, he would have concerns, and that if they were substantiated he would consider them to be serious. I do not consider that to be overstepping the mark. Further, there was no judicial review challenge to his decision to proceed to Stage 4 of the procedures. The oral hearing was conducted over two days in June 2017.

Ms. Sheehy's letter/submission of 16th June, 2017

31. Shortly before the oral hearing, the applicant set out her detailed position in writing. By letter dated 16th June, 2017, Ms. Sheehy dealt with her general history and other matters and then dealt with the first alleged incident in the following manner: -

> "Given the passage of time, to the best of my recollection [S] accidentally spilled a container of water at some time over the course of the morning during art. This resulted in water spilling over a number of the other people's paintings, although [S's] painting remained dry. These pupils became upset with [S], which resulted in [S] herself becoming upset although she did not start crying at this point. In order to calm the situation, I need to organise the pupils to redo their paintings as quickly as possible but I was also conscious that [S] needed and attention and support because though she was not crying, it was clear to me that she was upset and needed one to one attention. Therefore, I brought her to Aoife Lynch (SNA) in the office across the corridor so that she could take care of S. for a few minutes whilst I dealt with the situation in my classroom. I entered the office with [S] and asked Aoife to take care of her for five minutes. I believed that I also said to [S] to stay with Aoife and that I would come back for her in a few minutes. *I wish to reiterate that I did not instruct [S] to kneel on the floor and face the wall in the office as is alleged…*" (emphasis added)

32. As regards the second alleged incident, she said as follows: -

> "On this occasion, [S's] behaviour in class a little giddy and was unsettling other pupils so I placed her in the care of her SEN teacher, Mr. Power, who was covering Ms. Fitzgerald's class in her absence. *This was not a disciplinary action* nor did I consider [S's] conduct to be poor on this occasion as is alleged. *It was simply a time-out for [S] and I categorically refute that I instructed her to sit on the floor and face the storage unit*." (emphasis added)

33. She then describes a conversation with Ms. Fitzgerald the next day in which Ms. Fitzgerald expressed her concern that she returned to her classroom and found S sitting on the floor facing a cabinet and that she did not want pupils going home with a report that there was humiliating and inappropriate discipline. She said that she was conscious that the conversation was happening in front of the pupils and suggested that they continue the conversation and have the benefit of Mr. Power's input at a more suitable time, given that he had been supervising the class on the previous day. Due to subsequent events, they never completed the conversation as was intended. She says that her own belief at the time was that S. was "following her predilection for kneeling while under Mr. Power's care and this is a habit had long exhibited". She says that she was uncomfortable that the conversation was taking place in front of pupils and moved to postpone it and she denies categorically that she laughed and that Ms. Fitzgerald said things such as it was disgraceful treatment, that it was archaic disciplining of children, or that she would have someone in the High Court if they treated her child like this.

34. Thus, the applicant was denying a number of separate things. She was denying (a) that she had ever instructed the child to kneel on the floor and face the wall; (b) that whatever she had asked or told the child to do in question was done as a punishment; and/or (c) that she had ever admitted to anyone that she had done what was alleged.

The first oral hearing on the 19th June, 2017

35. I should perhaps state that my primary objective in reading the transcript of the oral hearings was to review the manner in which the hearing proceeded and to review it for fairness rather than to engage in a minute analysis of the evidence. This was in accordance with what I perceive to be the appropriate approach of a judge conducting a judicial review proceeding.

36. The oral hearing was conducted over two dates and there are transcripts of both hearings. The first hearing was conducted on the 19th June, 2017. A Ms. Joan Needham was the Chairperson and there were four other persons on the Board of Inquiry. Ms. Sheehy was represented by a Mr. David O'Sullivan and Ms. Niamh Cooper, both of the Irish National Teachers' Organisation. Evidence was heard from three witnesses on this occasion: Mr. Murtagh, Ms. Lynch and Mr. O'Sullivan. It is always difficult to get a precise sense of a hearing from a transcript, but my impression is of a somewhat tense atmosphere. In particular, there were what appeared to be testy exchanges between the INTO representative, Mr. O'Sullivan, and the Chairperson, Ms. Needham, in particular at the beginning of the hearing and in connection with the evidence of the first witness, Mr. Murtagh.

37. *Opening objections by Mr. O'Sullivan on behalf of the applicant*; In view of the fact that one of the main submissions of the respondent in the proceedings before me was that the applicant had waived her right to raise the issue of recusal, I think it is necessary to examine some of the opening exchanges in the course of which certain objections were made on behalf of Ms. Sheehy. After some preliminary introductory matters, and before Mr. Murtagh was called as the first witness, Mr. O'Sullivan asked for clarification as to the connection, if any, between the proceedings and the other Stage 1 disciplinary process. In the course of this request for clarification, he asserted that she had been denied fair procedures in the course of the other process insofar as the appeal had been greatly delayed, and that the person who was dealing with the appeal was also a member of the Board of Inquiry dealing with the Stage 4 process. He said that his client had no confidence that she would get a fair and impartial hearing in those circumstances. The Chairperson responded: "That will be noted and taken into consideration", to which Mr. O'Sullivan responded, "Thank you". However, Mr. O'Sullivan went on to complain about the "negative disposition and bias and lack of impartiality" of Mr. Murtagh and referred to a letter written during the course of the Stage 1 procedure. The chairperson initially stated that this was "not relevant" and then called a recess to take legal advice, following which she said: "Everything you have to say will be taken into account". The chairperson expressed her wish to start hearing evidence from the witnesses. Mr. O'Sullivan at this stage said he wished to make a point about the "negative disposition and bias and lack of impartiality" in the Murtagh report, to which the chairperson responded that he could "take that up with Mr. Murtagh when he has finished giving his evidence". Mr. O'Sullivan went on to refer to "negative disposition and bias and lack of impartiality by Board members including yourself". He said that his client informed him that the chairperson had "accused her of lying" at a Board meeting on the 7th December 2016 and again on the 15th March 2017. The chairperson said "I'm not going to answer that...I have no report in front of me of anybody lying here tonight. What we are here to discuss is the hearing for the issues that have arisen and Mr. Murtagh's report. What you say will be taken into account".

38. Mr. O'Sullivan then made a clear application for recusal, saying: "But you are the Chair this evening. You should recuse yourself on that basis". The chairperson responded: "Well I will take legal advice on that but I note your concerns and for the moment I am going to progress". After a further exchange to similar effect, Mr. O'Sullivan then said that another member of the Board of Inquiry, Ms. Tina McLoughlin, had accused his client of "lying and telling alternative truths" at a Board meeting, to which the chairperson responded that the hearing would go ahead and "if you want to make those points at the end of the meeting do so". Mr. O'Sullivan then referred to another Board member, Ms. Orla Seymour, having made an adverse comment about his client in an email on the 28th June in which she said that an incident "demonstrated a total lack of communication and support from the Principal Ms. Sheehy to her Vice Principal Ms. Varley on issues relating to the enrolments of children with special needs". Again, the chairperson responded by saying that this was not relevant to the hearing and that she was going to proceed. She then retired to take legal advice and thereafter said: "So as I have previously said, we don't have any written complaints of those allegations. So if you want to make those allegations that you are stating there, Ms. Sheehy will have to call out the correct procedure to do so". She indicated that she was going to proceed.

39. Mr. O'Sullivan then raised an issue as to disclosure of documentation to his client and said that she had been "stymied in making her defence". The only specific documentation referred to at this point as not having been furnished consisted of minutes of certain Board meetings. To this, the Chairperson again responded: "I'll note your concerns. They will be taken into consideration". Mr. O'Sullivan then objected that there had been no presumption of innocence and that the report had been presented as fact. The chairperson responded that the whole point of the hearing was that they would get the information, that they were there "to investigate, to discuss and all your concerns will be taken into consideration". Mr. O'Sullivan again said that he had asked for three people to recuse themselves, to which the chairperson again responded: "Okay, that will be taken into account". She then said: "I'm going to stop you there. Excuse me, I am the Chair of this meeting…and your concerns have been taken into note and they will be considered. Now, I am going to go ahead and call Mr. Murtagh".

40. As regards the recusal application described above, the exchanges come across as somewhat bizarre to a person familiar with courtroom trials, which of course this was not. The normal course would be that a recusal application is ruled upon, one way or another, not that it is postponed or that it will be "taken into account" at some later stage. The whole point of a recusal application is that it is an objection to the composition of the decision-making body. It makes no sense to continue with a hearing without ruling on the recusal application definitively one way or another. Either there is a ruling to refuse the application and the hearing continues; or there is a ruling to accede to the application, and alternative membership has to be arranged, with an adjournment to facilitate this if necessary. If a body fails to rule on a recusal application but proceeds to the hearing, it must be taken to have refused the application even if it does not explicitly say so. I would therefore take the view that the Board implicitly rejected the recusal application at this stage.

41. However, what is noteworthy is that that immediately after the above, Mr. O'Sullivan then said (apparently in public, because it is recorded on the transcript): "On that basis Ms. Sheehy, are you prepared to participate without prejudice to the concerns and objections which we have made?". Ms. Sheehy responded: "Yes, I am happy to have the opportunity to have the hearing tonight". I note the words "without prejudice" in Mr. O'Sullivan's question; this suggests to me that he was seeking to reserve the right to make this point at a later stage. However, it was not in fact ever returned to, either in the closing submissions or the appeal to the DAP, as will be seen below. The question therefore arises as to whether a "without prejudice" position was maintained, or whether the subsequent participation without complaint on this issue by the applicant should be taken to be an abandonment of the point.

42. *The evidence of Mr. Murtagh* -Mr. Murtagh was then called and in effect described what he did by way of investigation and spoke to his report. There was then a cross-examination of Mr. Murtagh, with repeated and testy exchanges between Mr. O'Sullivan, the INTO representative on behalf of Ms. Sheehy, and the chairperson, Ms. Needham. I can understand why it became so. It appears that the main purpose of the cross-examination was to establish that Mr. Murtagh's investigation had not been impartial and that he had reached unfair conclusions on incomplete evidence. To a legal eye, it might also be said that the questioner was seeking to lay the groundwork so that he could align Mr. Murtagh's report with the report that had been condemned in the decision in *Joyce v. Board of Management of Coláiste Iognáid* [2015] IEHC 809. However, the Chairperson considered that the relevance of the Murtagh report was limited because the witnesses to the alleged incidents were going to be giving evidence at the hearing. This set the scene for numerous exchanges between Mr. O'Sullivan and Ms. Needham, because she could not see the relevance of what he was doing and considered that they should move on to the other witnesses. On numerous occasions, the chairperson complained that the cross-examination was repetitious and that she could not see the relevance of it. At one point she complained that Mr. O'Sullivan was "harping on" at the witness, at another she said "Can I just note that we are not actually in Court", at another point she complained about "hearsay evidence", and later she said he was "badgering" the witness. She also repeatedly used the phrase "I've noted your concerns and they will be taken into consideration", to the point where it comes across as something of a formula which she had been advised to use to get the questioner to move on. It is only fair to record that she was a lay member of the Board of Management who had been asked to engage in the role of Chairperson, and it would be inappropriate to hold her to the standards of a legally trained adjudicator. Also, having read the transcript, any lawyer probably would consider some of the questioning by Mr. O'Sullivan to be indeed rather repetitious, and that there was some eliding of the distinction between what should be put to a witness by way of question and what should (later) be put to a decision-maker by way of submission. My overall sense of this part of the hearing is that there was, on Ms. Needham's part, an impatience to get on with the hearing as quickly as possible because everyone, including witnesses, had been assembled for the hearing, while there was, on Mr. O'Sullivan's part, a dogged persistence in pursuing his points about the perceived deficiencies in Mr. Murtagh's report. I have no doubt that he did ultimately succeed in getting his points across.

43. Ms. Needham's (or perhaps the Board's) sense of impatience with his repeated applications can be clearly seen in an (evidence-neutral) context when, at 10.30pm, Mr. O'Sullivan made an application to adjourn the hearing on the basis that it was late and his client was tired and would be teaching the next day. It was only after considerable persistence on his part that this application was acceded to. This was an aspect of the hearing which I found to be rather unreasonable on the Board's part.

44. I note also that Mr. Murtagh was cross-examined, among other things about his interactions prior to the hearing with Mr. Eamon Power, one of the potential witnesses to one of the incidents. Ms. Fitzgerald's had mentioned him as a potential eye-witness to the second alleged incident. When Mr. Murtagh was asked why he did not write to Mr. Power for information just as he had written to Ms. Fitzgerald, he gave a number of different responses. His initial response was to say that it was "hearsay evidence"; his next response was that "I don't know why not but I didn't ask Eamon Power"; and finally he said that it was because "Mr. Power didn't sign the letter" (referring to the original letter of complaint against the applicant). There was then complaint from Mr. O'Sullivan that his client had not received adequate notice of either Mr. Power's attendance at the hearing or of his proposed evidence. The failure of Mr. Murtagh to seek information from Mr. Power during his investigation and his failure to contact Mr. Power until shortly before the hearing was a central theme in the submissions of the applicant (at the original hearing as well as in the hearing before me), and was used to support the submission that Mr. Murtagh was not interested in potentially exculpatory evidence and was therefore not impartial. I note also that in Mr. Murtagh's affidavit in the proceedings before me, he swore that had contacted Mr. Power at an early stage but that he had not wanted to become involved. This was a somewhat different explanation to that offered at the hearing itself.

45. I also note that Mr. Murtagh was cross-examined in some detail about his interactions with the parent of the child in question.

46. *The evidence of Ms. Lynch and Ms. Varley*: The hearing then moved on to the evidence of the witnesses to the alleged incidents. Ms. Lynch gave evidence of what she had seen and of conversations had after it, and was cross-examined. This included cross-examination as to the details of her allegation and her motivation in making the allegations, together with the circumstances in which the allegation had come about (namely the letter of 15th June, 2015). The same can be said of the examination and cross-examination of Ms. Varley. However, one piece of Ms. Varley's cross-examination became the subject of very considerable controversy at the hearing before me, and I therefore wish to set it out in full.

The Varley 'accusation'

47. The following is the passage in which Ms. Varley was cross-examined and subjected to what came to be described as an accusation. I will therefore refer to it as the Varley 'accusation' although I am dubious as to whether it can fairly be characterised as an accusation. In the following passage, the questioner at first is Mr. O'Sullivan on behalf of the applicant, but he then appears to invite Ms. Sheehy herself to engage in questioning, and it is her particular portion of the questioning which later caused the trouble. I set it out in full for appropriate context:

"[Mr. O'Sullivan] Q. You state on at least two different occasions that she made her face and kneel the wall?

A. I beg your pardon?

Q. For punishment the child was instructed to kneel on the ground facing the wall on at least two different occasions. You were very definitive, definite in your letter of the 15th June 2015?

A. Yes.

Q. So why is there a change?

A. I haven't changed at all.

Q. But you were saying on two different occasions?

A. Yes, there were two different occasions.

Q. No, that's not correct?

A. There was an incident in the office for the first occasion and there was an incident in a classroom on the second occasion.

Q. You are saying kneeling on both occasions?

A. Well it was obviously said to me at the time about the kneeling.

Q. So it's hearsay?

A. It was said to me that the child was instructed to kneel on the ground facing the wall. That was said to me. That's fact.

Q. And the second occasion?

A. Yes, it was said to me by the member, the teacher who came into the classroom and she said she was going to the Principal herself regarding the matter.

Q. Okay and you didn't go as Deputy Principal?

A. No, I did not.

Q. Ms. Sheehy have you --

MS. SHEEHY: *Yes, I have just a question. Alison, did you see [SH] kneeling, sitting on the ground on many occasions at Assembly with nobody having instructed her, just by her own choice?*

A. I can't recall.

MS. SHEEHY: Can't recall. Last, sorry, not last February 2017, *February 2016 when [SH] began to have difficulty coming into the room in the morning and you would have brought her over to your room, did she sit on the back of the room, in your room, facing the back wall on the floor?*

A. Sorry, are you asking me did I put a child on a chair facing the back wall?

MS. SHEEHY: Not on the chair, on the floor, in 2016, in February, when you brought her over to your room?

A. I can one hundred percent state --

CHAIRPERSON: We are not --

MS. SHEEHY: *No, what I'm trying to establish is, is [SH's] inclination to kneel down on the floor.*

A. Absolutely not.

MS. SHEEHY: It's very important to me and it was just last year, 2016 Alison. Now I am not in any way suggesting --

CHAIRPERSON: The alleged incident is that you instructed the child to kneel down on the floor. It's not that she knelt down on the floor of her own accord. So I don't that pertains to this hearing?

MS. SHEEHY: It is alleged that I instructed her. *So what I'm trying to establish is that for those of you who are not in school and over those two years, I am trying to establish if Alison frequently saw [SH] kneeling on the ground or sitting on the ground when other children were standing in a line and also just last year, 2016, in Alison's room, happily at the back of the room on the floor and I am assuming Alison didn't instruct her, I am assuming it wasn't punishment*.

CHAIRPERSON: But the allegation is that she was instructed to kneel?

MS. SHEEHY: Absolutely and that's an allegation which I absolutely have to prove did not happen. That I did not give and I am trying to establish that [SH] frequently sat on the floor, knelt on the floor of her own volition, of her own choice.

CHAIRPERSON: But that's not alleged, is she knelt down on the floor of her own choice. It has been alleged that she was instructed. So that's what we need to clarify here tonight.

MS. COOPER: I think maybe the point is that if the child was kneeling or sitting that there is a credible explanation other than that she was instructed.

MS. SHEEHY: Absolutely, and that is very important.

A. I have absolutely no recollection that that child in 2016 had been over in my class room kneeling on the ground facing the wall.

MS. SHEEHY: Well I can tell you definitively that I have and clearly it registered with me because of what I was being accused of.

A. Did you bring it to my attention?

MS. SHEEHY: Absolutely not because I knew she was happily on the ground.

CHAIRPERSON: The meeting tonight is whether the allegations on the 6th November and in October 2014 happened. It was not that if somebody was happy kneeling on the floor. It was somebody that was instructed on the floor and that's what we have to investigate tonight.

MS. SHEEHY: Absolutely.

CHAIRPERSON: Have you anything that you would like to add, is there any further questions?

MR. O'SULLIVAN: No."

(emphasis added)

48. Ms. Varley took great offence at this portion of the cross-examination and two days later, she wrote a letter to Ms. Needham saying:

> "I have written to Ms. Maura Sheehy requesting her to unreservedly withdrawn in writing the spurious, vexatious and false allegations she made against me at the disciplinary hearing on 20/06/2017. I have requested that she does so in writing as chairperson of the Disciplinary Hearing Board. I respectfully submit that evidence be required of her to substantiate her allegations. I take this matter seriously as it impugns my integrity and undermines my professionalism as a teacher. I would appreciate a brief opportunity to correct the said allegations, orally to the disciplinary board in her presence. I vehemently deny her allegations."

49. By letter dated 27th June, 2017, Ms. Needham, chairperson, wrote to Mr. O'Sullivan, saying as follows: -

> "In respect of the stage 4 hearing last week, a most concerning issue arose during the course of that stage 4 hearing which must be raised with both you and your member. *As you know, Ms. Sheehy, Principal, made a very serious allegation as against Ms. Alison Varley, Deputy Principal, during the course of Ms. Varley's presentation to the Board under the stage 4 hearing*. I trust that you will appreciate my concern at this allegation being made by Ms. Sheehy against the Deputy Principal on a number of grounds; firstly, the forum in which this allegation was made; secondly, the nature of this allegation itself. I note that you did not intervene at the hearing after this allegation had been made. *I trust that you have since advised Ms. Sheehy that this particular matter (and indeed, any similar matter) should be raised in accordance with the appropriate procedures and that you will intervene at this evening's reconvened meeting to prevent any such matter being raised."* (emphasis added)

The second oral hearing

50. The above letter of Ms. Needham was written and given or sent to Ms. Sheehy on the same day as that of the resumed oral hearing of the Board of Inquiry. Strong, indeed hyperbolic, criticism was made of this by counsel on behalf of the applicant, on the basis that the timing as well as the content of the letter was highly distressing to his client, because she was preparing herself for the second part of the oral hearing when she received the letter. Mr. O'Sullivan raised the issue of the letter and said that he was "disputing and denying that an allegation was made and we will refer you to page 81 in that regard". He then quoted from the transcript of the first hearing. He also complained that the complaint of Ms. Varley had been "upheld…without affording Ms. Sheehy an opportunity to respond". The chairperson then said that she was merely "forwarding the complaint…as a matter of courtesy", and that she had not made a decision on it but had advised Ms. Varley to go down the correct complaints procedure. Mr. O'Sullivan again raised the issue of bias and impartiality to which the chairperson responded with the usual refrain: "We note your concerns". Mr. O'Sullivan persisted, and she repeated the mantra several times before eventually saying that she was anxious to get on with the hearing, at which point Mr. O'Sullivan again said to his client (apparently in public because it is again on the transcript): "Are you happy to participate without prejudice on that basis, Ms. Sheehy?", to which she replied "Yes".

51. Mr. Eamon Power was then called as a witness and there was examination in chief and cross-examination. It was a theme in his evidence that he did not recollect certain matters because of the lapse of time since the events complained of. One of the matters raised was when Mr. Murtagh had asked him for information. He said he had written his statement (of intended evidence) a few days before the hearing. He said he got a request from Mr. Murtagh to attend and that was "the only conversation I had with him about anything in terms of what happened".

52. Ms. Fitzgerald gave evidence of what she had seen and conversations had, and was cross-examined not only on matters of detail and consistency of her account but also as to her motivation in making the allegations and the circumstances in which they arose.

53. The child's parents were called to give evidence. They indicated that they had first been told about the allegations in January 2016 and said that Mr. Murtagh had advised them of the different procedures they could invoke. They were questioned about an email in which they had stated to Mr. Murtagh that they "do not appreciate being chased" and Mrs. Hall said that she was not under pressure from him for a statement but that she was "being a bit flippant in terms of upset, I guess". They were cross-examined not only by Ms. Sheehy's representative but also by Ms. Sheehy herself about her relationship with the child and the child's behaviour before and after the alleged events.

54. After a short recess, Ms. Sheehy herself gave evidence. The transcript records that she requested to read her statement and was given permission to do so. She was then questioned by the chairperson and other members of the Board. This questioning takes up 52 pages of the transcript. Without wishing to enter too much upon the details of the questioning, I do note certain questions or comments by Ms. Needham which appear to suggest that she did not grasp the relevance of Ms. Sheehy's evidence that SH had a propensity for kneeling without being instructed to do so. At one point, she said that was "completely different" and that it was one thing to have a child sitting on the ground talking with friends and another sitting on the ground at the top of the class with fifteen other children looking at her. She also requested an explanation of the phrase in Ms. Sheehy's statement where she said that SH had a "predilection for kneeling"; this was almost at the conclusion of a two-day hearing, after witnesses had been cross-examined on behalf of Ms. Sheehy, and after the whole Varley accusation incident. It is rather surprising to see her requesting such clarification at such a late stage. I note also that at a certain point she suggested that Ms. Sheehy's responses seemed to seek to shift blame on SH's parents for certain matters. I note also that Ms. Sheehy was questioned by Ms. Brookes Power inter alia about the other teachers' possible motivation in making the allegations.

55. *Closing submission on behalf of Ms. Sheehy*: At the conclusion of the evidence, Mr. O'Sullivan made an oral submission to the

Board. He said that wanted to "go back over some of the issues and concerns that we have raised at the outset in relation to Ms. Sheehy getting a fair and impartial hearing from the Board of Management which I put on the record on the 19th June 2017…" and said that he would "restate them". He then raised; (1) an unfairness because she did not get an outcome from the other disciplinary process; (2) a negative disposition, bias and lack of impartiality from the Board members "that I have outlined"; (3) the same in relation to Mr. Murtagh; (4) No presumption of innocence; (5) the motivation of the witnesses; (6) the failure of Mr. Murtagh to have sought out Mr. Power's evidence; (6) Mr. Murtagh's alleged inconsistent and contradictory evidence in relation to his contact with the parents of the child; (7) inconsistencies in and between the evidence of the witnesses; (8) the industrial relations context to the complaints; and (9) the length of time between the allegations made and the alleged incidents. So, while the word "recusal" was not used at this stage, and could not realistically have been any form of recusal application because the Board had by now already heard the evidence, he did refer back to the concerns they had raised at the outset. However, the only concerns of negative disposition that he particularised related to Mr. Murtagh and the witnesses and he made no further reference to the Board of Inquiry members and the suggestion that some of them had previously accused Ms. Sheehy of telling lies, as he had done at the outset of the first hearing date.

Closing Letter/Submission of Ms. Sheehy post-hearing, dated the 4th September, 2017

56. I have referred earlier to the detailed written statement submitted by Ms. Sheehy to the Board, dated the 16th June, 2017. Following the oral hearings, she submitted a further detailed document dated the 4th September, 2017. There was much duplication of what was in the original document, but there was additional material arising out of what had been said at the hearing. She pointed out various aspects of, and inconsistencies in, the evidence of the witnesses, and strongly advocated her own position. She did not, however, refer to the recusal issue at all.

The decision of the Board of Management communicated by letter dated the 8th September, 2017

57. By letter dated 8th September, 2017, from Ms. Needham to Ms. Sheehy, the board's decision was communicated. This is one of the decisions in respect of which *certiorari* is sought in these proceedings. This letter indicated that the Board had concluded that the allegations were supported by the evidence and had been substantiated. The relevant portion of the letter is as follows: -

> "The Board has given very careful consideration to everything that was said by you and on your behalf in response to the allegations made against you over the course of the two disciplinary hearings. The Board has had the benefit of transcripts of the hearings. The Board has also given very careful consideration to the evidence of the witnesses who gave evidence at the hearings. The Board has also taken into consideration the submission received from the INTO on your behalf. Having considered all of the evidence available to it (both oral and written), the Board has concluded that the allegations against you, described as incident A and incident B in the comprehensive report submitted to the Board of Management, are supported by the evidence and have been substantiated. The Board finds that your behaviour as described in two incidents amounted to emotional abuse of the child and as such it constituted serious misconduct on your part. Having found that the allegations against you were substantiated and that they amounted to serious misconduct on your part, the Board of Management had to decide on the appropriate disciplinary sanction."

58. The letter went on to say that because of the seriousness of the misconduct, her position as principal was untenable. It said, "the Board finds that the emotional abuse of a child in the care of the school amounts to such serious misconduct on your part as to justify your dismissal". She was then given three months' notice and told that she was not required to work through the notice period and that her dismissal would take effect in December 2017. The letter also advised her of the appeal procedures in the event that she wished to appeal.

Administrative Leave

59. By letter dated 24th October, 2017, Mr. Albert Kelly of the Department of Education and Skills wrote to Mr. Murtagh and the school regarding the placing of Ms. Sheehy on administrative leave. The letter explained that administrative leave is a temporary leave of absence, with pay, which may only be granted in limited situations where the continued presence of a teacher has the potential to present an on-going risk in situations concerning child protection. In that regard, the letter requested that "the Teaching Council be provided with information regarding the person who has been put on administrative leave". The letter further set out that Ms. Sheehy was being granted administrative leave "as requested" with effect from 11th September, 2017 until 11th December, 2017 and that any request for extension must be accompanied by a detailed report regarding the progress of the case and reasons as to the failure to finalise. It should be noted that Ms. Sheehy was not placed on administrative leave during the investigation but rather after the decision of the Board of Management of 8th September, 2017 was issued. Mr. Murtagh explained that this was "due to a desire by the Board to complete the investigation process" and his own view that it would not have been appropriate to place Ms. Sheehy on administrative leave until "the allegations had been substantiated".

The appeal to the DAP

60. By email dated the 12th September 2017, Ms. Sheehy brought an appeal to the Disciplinary Appeals Panel (the "DAP"), and her representatives gave formal notice by letter of the same date. She submitted a document which was 12 pages in length and had 33 appendices, including correspondence between the parties and the hearing transcripts. Her 12-page document set out a general background, a chronology of events, her complaints about the fairness of the procedure, and then gave details of each of the following grounds of appeal: (i) that the provisions of the agreed procedure were not followed; (ii) and (iii) that all the relevant facts were not ascertained or considered in a reasonable manner; (iv) that she was not afforded a reasonable opportunity to answer the allegation; (v) that she could not reasonably be expected to have understood that the behaviour alleged would attract disciplinary sanction; and (vi) that the sanction was disproportionate to the misconduct alleged. The applicant did not in her appeal raise the issue of recusal although she did continue to allege that Mr. Murtagh and the Board members were biased against her.

The DAP hearing and decision

61. A hearing of the Disciplinary Appeal Panel (DAP) took place on 10th November, 2017. The members of the panel were an independent chairperson together with a management body representative and a union nominee. Ms. Sheehy was represented again by Mr. O'Sullivan and Ms Niamh Cooper of INTO. Present were Mr. Murtagh, Ms. Needham, lawyers for the school, and the parents of the child.

62. By letter of 21st November 2017, the DAP wrote to Ms. Sheehy, rejecting her appeal. It said that it had found that the agreed procedures were adhered to; that all the relevant facts had been ascertained; that the facts had been considered in a reasonable manner; and that Ms. Sheehy was afforded a reasonable opportunity to answer the allegations. It also found that it was

inconceivable that Ms. Sheehy, as principal of the school with responsibility to ensure the creation and maintenance of a safe environment for staff and pupils, would have been unaware of the seriousness of the allegations and their possible sanction. However, by a majority decision, it found that the proposed sanction of dismissal was disproportionate to the misconduct alleged and it recommended that a lesser sanction of demotion to the role of class teacher be imposed with immediate effect.

The Board of Management's decision following the DAP recommendation

63. By letter dated 5th December, 2017, Mr. Murtagh informed Ms. Sheehy that the Board of Management had considered the report of the DAP and had accepted its recommendation that a lesser sanction be applied. It also indicated that because of concerns on the board as to the nature of the incidents, certain measures would be taken so as to reduce the likelihood of any recurrence and to promote student welfare. These consisted of support in accordance with a Department of Education Circular and guidelines as well as training to avoid the recurrence of similar incidents. It may be noted that this case is therefore different from *Kelly v. Board of Management of St. Joseph's National School, Valleymount, County Wicklow* [2013] IEHC 392 insofar as the Board of Management accepted the DAP's recommended reduction of sanction.

Notification to the Teaching Council

64. By letter dated 4th January, 2018, Mr. Murtagh, on behalf of the Board of Management, wrote to the Teaching Council to update it on the outcome of the disciplinary action taken by the school against Ms. Sheehy. The letter sought guidance from the Teaching Council as to the question of "whether the Council has any role in investigating whether Ms. Sheehy's conduct (for which she has already received a disciplinary action) constitutes a breach of the Code of Professional Conduct for Teachers". Mr. Murtagh again wrote to the Teaching Council again by letter dated 10th January, 2018. Ms. Sheehy was not made aware of this letter until she received a letter from the Teaching Council dated 23rd May, 2018. She complains that Mr. Murtagh is in effect seeking to have her dismissed from teaching by another method notwithstanding the DAP recommendation that she not be dismissed. This aspect of matters is not within the scope of the judicial review proceedings.

Whether the applicant's judicial review proceedings are out of time

65. A significant legal issue arises at the outset as to whether the applicant's proceedings are out of time. The time limit is one of three months "from the date when grounds for the application first arose" (Order 84 rule 21 of the Rules of the Superior Courts as amended by S.I. No. 691 of the Rules of the Superior Courts (Judicial Review) 2011). The Court may extend the period under subsection (3) if it is satisfied that (a) there is good and sufficient reason for doing so, and (b) the circumstances that resulted in the failure to make the application for leave within the period mentioned in sub-rule (1) either – (i) were outside the control of, or (ii) could not reasonably have been anticipated by the applicant for such extension. A procedural requirement in respect of any application for an extension of time is set out in subsection (5), which provides that any such application "shall be grounded upon an affidavit sworn by or on behalf of the applicant which shall set out the reasons for the applicant's failure to make the application for leave within the period prescribed by sub-rule (1) and shall verify any facts relied on in support of those reasons". I note the discussion by the Supreme Court in *O'S v. Residential Institutions Redress Board* [2018] IESC 61 on the proper approach to extensions of time.

66. Counsel informed me that at the time of the application for leave in these proceedings, the Court (Noonan J.) raised the issue of whether the application had been brought within time. He allowed the Statement of Grounds to be amended to allow the applicant to seek an order, if necessary, extending the time within which to bring the application. No affidavit was ever sworn on behalf of the applicant setting out any factual basis for the application.

Submissions

67. The applicant's main contention on the time limit issue was that the relevant date from which time started to run was the date of the decision of the Board of Management on the 5th December 2017 i.e. the second decision of the Board which accepted the DAP's recommendation that the penalty should be one of demotion rather than dismissal. It was submitted that the Court should view the entire process (the hearings by the Board followed by the DAP appeal followed by the final Board decision) as a unitary process, and that it did not terminate until the final decision of the Board of Management. Counsel pointed to paragraph 18 of Appendix A to the Circular which provides that "The final decision in respect of the appeal panel recommendation rests with the board of management which shall set out in writing the basis for its decision". Counsel also drew an analogy with criminal trials and submitted that the Court looks unfavourably on applications by way of judicial review while the trial process is underway, suggesting that the Board-DAP process was a unitary process. Counsel relied upon the decision of O'Malley J. in *Kelly v. Board of Management of St. Joseph's National School, Valleymount, County Wicklow* [2013] IEHC 392. In the alternative, it was submitted, the Court should grant an extension of time if necessary. Although it was accepted that no motion or affidavit had been filed seeking an extension of time, it was submitted that this was unnecessary because the reason for any extension of time required was manifest (being based upon the erroneous view, if it be erroneous, set out in their primary submission that time only ran from date of the final decision of the Board) and this obvious reason did not require to be averred to by way of affidavit.

68. It was submitted on behalf of the respondent that the proceedings were manifestly out of time because all of the grounds of challenge in this judicial review concerned the process of the Board and no complaint had been made about the conduct of the appeal by the DAP. It was submitted that the only logical inference from the facts available was that, at the time of the conclusion of the Board's process, the applicant had made a tactical decision to appeal to the DAP rather than challenge the Board's process in the High Court by way of judicial review. Having done so, she was now out of time for challenging the Board's process. It was further submitted that the Court should or could not entertain any application for an extension of time in circumstances where there was no affidavit had been sworn despite the issue having been flagged to the applicant at the earliest stage of the judicial review process by Noonan J, as described above. It was submitted that while the Supreme Court decision in *O'S v. Residential Institutions Redress Board* [2018] IESC 61 had clarified that the evidential burden for an applicant to obtain an extension of time under the amended Order 84, Rule 21(3)(a) was perhaps not as difficult to overcome as might have been previously thought, in the present case the applicant had provided no evidential basis whatsoever for seeking an extension of time. It was a long-established principle that in order to obtain an extension of time, there must be evidence grounding the application (*Solan v Director of Public Prosecutions* [1989] ILRM 491).

Discussion and Conclusions

69. There has been judicial consideration of the time-limit issue in the precise context of the process in issue in this case, that is to say, the "stage 4" disciplinary process in respect of a principal which involves a phase before a Board of Management followed by an appeal to DAP and thereafter a final decision by the Board. This discussion arose in K*elly v. Board of Management of St. Joseph's National School, Valleymount, County Wicklow,* [2013] IEHC 392. In that case, the applicant, a school principal, brought judicial review proceedings after a Board of Management rejected the recommendation made by a DAP as to the appropriate sanction to be

imposed upon her. In this particular aspect, the case is factually different from the case before me because the Board in the present case accepted the sanction recommended by the DAP. In the course of her judgment, O'Malley J. noted that there was before her an application for extension of time under the provisions of Order 84 rule 21 and summarised the arguments and her conclusion in the following terms:-

> "142. The respondent also argues that, having appealed the decision to the Disciplinary Appeal Panel, the applicant must be taken to have accepted the legal validity of the November decision and cannot now impugn it.
>
> 143. The applicant submits she engaged in a statutory process which involved a number of stages. Had she moved for judicial review after the first stage she would have been met with the argument that she had an alternative remedy. In any event, the time taken by the appeal process and the remittal of the decision back to the Board was a matter that was not within her control.
>
> 144. I agree with the submission on behalf of the applicant. The process under consideration is not analogous to, for example, an appeal from the District Court to the Circuit Court. A person who is convicted after a flawed hearing in the District Court has the option of appealing or taking judicial review. If he or she appeals, and is then convicted after a proper hearing in the Circuit Court, there is no point in challenging the District Court hearing. However, the process engaged in by the parties in the instant case is quite different. If the principal appeals, there will be at least two stages after the original decision by the Board. As the DAP recommendation is not final the matter will always have to be remitted to the Board, for either reconsideration in the light of the recommendation or the implementation of the proposed sanction. The process may well take more than three months to reach the conclusion of the third stage, as it did in this case. That is not a matter within the control of the applicant. Furthermore, I do not consider that the policy behind the time limits for judicial review (which, as counsel for the Board argues, is to ensure that public law disputes are dealt with when they are ripe) should be understood to incentivise parties to litigate prematurely."

70. O'Malley J. did not explicitly say whether she was granting an extension of time or that an extension was unnecessary. It seems to me that there is some ambiguity in the above-quoted passage. One could read it as supporting the view that the process is a unitary one and therefore that time does not run until the final (second) decision of the Board; hence her rejection of the argument that the situation should be considered analogous to a criminal trial followed by an appeal. Alternatively, one could read it as supporting the view that the applicant was entitled to an extension of time because of the connectedness of the different phases of the process; hence the reference to the time-frame not being within the control of the applicant, and also bearing in mind that at this point in her judgment O'Malley J was discussing an application for an extension of time.

71. The issue of when the time limit runs in connection with the "stage 4" disciplinary process for teachers is an extremely important issue in this case for two reasons: (1) if the correct position is that an extension of time was required, then I would be disposed to rule against the applicant on her extension application on the basis that no explanation at all was put forward on affidavit for her delay in making the application; (2) the question of the relationship between the DAP appeal and the Board's process, and whether or not this is properly conceived of as a unitary process, is also crucial to my views on the substantive matters in the case.

72. My conclusion is that the "stage 4" disciplinary process set out in the Circular is a unitary process which does not conclude until the final decision of the Board following the conclusion of any appeal. I adopt the reasoning of O'Malley J. at paragraph 144 of her judgment in Kelly but it leads me to the conclusion that the process as a whole does not terminate until the final Board decision is made and that time for the purposes of a judicial review does not start to run until that point. Insofar as the judgment of O'Malley J. is ambiguous on this point, I adopt this interpretation of it. However, this interpretation also has an important impact on the substantive arguments in the judicial review; in my view, an applicant for judicial review must then persuade the Court that the disciplinary process as a whole was unsatisfactory. He or she cannot pick and choose unsatisfactory parts associated with an earlier phase of a proceeding if this is cured by later stages within the process. So, while the "unitary process" argument gets the applicant over the time-limit hump, it presents a bigger obstacle to her case on the merits.

The substantive issues in the judicial review

73. The respondent complained that the applicant was seeking to rely upon matters outside the parameters of the judicial review proceedings and so I think it is necessary to set out the reliefs sought and the grounds relied upon. The reliefs sought were as follows:

> (i) An order of *certiorari* quashing the Board's first decision which found that the applicant was guilty of the emotional abuse of a child and dismissing the applicant from her position as principal of the respondent school;
>
> (ii) An order of *certiorari* quashing the Board's second decision to accept the DAP's recommendation of the lesser sanction of demotion;
>
> (iii) A range of declarations ancillary to the orders of *certiorari* sought including, but not limited to, a declaration that the decisions of the Board were *ultra vires*, unreasonable and/or irrational, and vitiated by bias or prejudgment.

74. The grounds relied upon assert that the Board of Management:

> (a) Erred in law by failing to provide any, or any adequate, reasons for the decisions reached; by failing to address the objections as to the procedural fairness raised by the applicant; and by giving undue weight to inconsistent evidence;
>
> (b) Applied the wrong standard of proof in reaching their decision;
>
> (c) Failed to comply with the provisions of Circular 60/2009 and the provisions of the Education Act 1998;
>
> (d) Breached fair procedures by concluding that the applicant was guilty of the emotional abuse of a child;
>
> (e) Acted unreasonably in treating the allegations of the inappropriate disciplining of a child under the Stage 4 process as opposed to the Stage 1 process;
>
> (f) Displayed bias and prejudgment towards the applicant and subsequently failed to recuse themselves;
>
> (g) Failed to comply with the procedures set out in the Children First National Guidance for the Protection and Welfare of Children 2011 and the Child Protection Guidelines for Primary and Post-Primary Schools.

Submissions of the Applicant

75. The applicant's basic position about the process engaged in by the Board was that it was so unfair and biased from start to finish that it was almost invidious to pick out individual instances of unfairness. Of course, the Court has to be careful to stay within the parameters of the leave given in these judicial review proceedings. I will return to those parameters below. At present, I wish merely to summarise the complaints made on behalf of the applicant. These can be grouped into complaints concerning different phases of the hearing.

76. First, complaint was made about a variety of aspects of what I will call the pre-hearing phase. This included a complaint about the Murtagh report on the ground that it demonstrated that an adverse opinion had been reached about the applicant from the outset. It was submitted that the report contained inaccuracies and that it was inappropriate for Mr. Murtagh to refer the matter to stage 4 of the process without going through other stages. Complaint was made about the alleged inadequacy of Mr. Murtagh's investigation prior to the submission of his report to the Board, in particular with regard to Mr. Power, a potential witness to incident B. Complaint was made that the letter from Mr. Murtagh to the applicant dated 24th October, 2016 showed bias or pre-judgment against her. Complaint was also made as to the inadequacy of the documents furnished to the applicant prior to the hearing. Ms Sheehy says that did not receive a copy of Mr. Power's statement until the day before he gave evidence at the hearing in June, 2017; that she did not receive copies of the emails that Mr Murtagh sent to the child's parents until November, 2017; and that it wasn't until October, 2017 that she was made aware that Mr. Murtagh had written to TUSLA in October, 2015.

77. Secondly, complaint was made about a number of aspects of the hearing, including what happened in the course of the oral hearings and what transpired in between them. One of the complaints was that certain members of the hearing panel should have recused themselves upon being so requested at the outset of the hearing. Complaint was made with regard to the role played by Mr. Murtagh at the hearing, which was alleged to be more in the nature of a prosecutorial role than a 'liaison' role. Complaint was made about interruptions during the questioning of witnesses on behalf of the applicant and rulings made during the course of the hearing, particularly rulings which amounted to postponing a decision on applications or simply saying that the objection or application would be 'taken into account'. Complaint was also made about interruptions which showed that the Chairperson did not understand the defence being put forward.

78. Particular criticism was levelled at a series of events which I have described as "the Varley accusation" which arose in between the two dates comprising the Board's oral hearing. It was submitted that the letter of the Chairperson Ms. Needham to Ms. Sheehy dated the 27th June 2017 displayed an unthinking attitude of acceptance of the allegations made Ms. Varley, demonstrating bias and pre-judgment as well as a fundamental misunderstanding of the issue being raised by the applicant in her defence.

79. Thirdly, a series of criticisms was made about the conclusions reached by the Board. First of all, it was said that the wrong burden of proof had been applied. This complaint arose from an averment in Ms. Needham's affidavit that the Board 'preferred the evidence of Mr. Power'. It was submitted that this language implied that the Board had applied a test of 'balance of probabilities' which was the wrong burden of proof. An area of heavy criticism was the conclusion that the applicant had engaged in "emotional abuse" of the child in circumstances where this phrase had never been employed throughout the process until the conclusion was reached, and where the applicant had never been considered a threat to any child and continued teaching throughout the process and was only suspended from teaching very late in the day. It was submitted that it was most unusual and anomalous for a Board of Management to reach a conclusion that a principal had engaged in abuse of a child instead of Tusla, and that for a Board to do so would require exceptional and compelling circumstances. It was said that the reality was that the Board wished to dismiss the applicant and had reached a conclusion of emotional abuse in order to justify her dismissal, and had retrospectively injected a supposed child protection feature into the process which was not genuinely there at any earlier stage of the process.

80. Another strand of criticism of the Board's findings was that inadequate regard had been had to the inconsistencies in the evidence of the complainants and of its approach to the conflicts of fact in the case. Indeed, it was said, the Board apparently failed to appreciate even that there was a conflict of fact insofar as it had said that certain matters were 'uncontradicted'. This referred in particular to the fact that the applicant's representatives had failed to formally put to witnesses that her position was that she had not punished the child or told her to kneel on the floor. It was said that it had to be borne in mind that the representatives of the applicant were union representatives, as they normally were at such hearings and would continue to be so in light of the decision in *McKelvey v. Iarnód Éireann* [2018] IECA 346, where the Court of Appeal had rejected a claim that an employee was entitled to legal representation at disciplinary hearings. The applicant had put in a full statement setting out her version of events, but the Board did not engage with it in any meaningful way. This complaint was also connected with a complaint that the Board had failed to give adequate reasons for its decision. Because of the Board's failure even to frame the issues correctly, or grapple with them adequately, the applicant here had no idea how they came to their decision, and it looked as if they had cimply adopted the (flawed) Murtagh report. Proper reasons should have been given in accordance with *Mallack v. Minister for Justice, Equality and Law Reform* [2012] 3 IR 297.

81. Counsel on behalf of the applicant submitted that the situation was akin to that in *Kelly v. Board of Management of St. Joseph's National School, Valleymount, County Wicklow*, [2013] IEHC 392 insofar as matters had become entangled and allowed to escalate to a point where the ultimate decision was not in accordance with fairness or rationality. As regards the issue of bias, counsel submitted among other things that it was not necessary to cross-examine the Board's deponents in order to establish bias and the Court was entitled to draw inferences.

Submissions of the Respondent

82. The respondent's fundamental position was that the applicant was not entitled to have decisions of the Board quashed in circumstances where she had availed of the appeal within the process to the DAP and had no complaints whatsoever about the appeal process or the composition of the appeal panel. The respondent also vigorously defended each of the points raised in respect of the Board's process as follows.

83. *Acquiescence/Waiver*: The respondent submitted that the applicant was not entitled to raise the issue of recusal in these proceedings because, having raised it initially at the first Board of Management oral hearing, she had failed to pursue it in any way thereafter and should be considered to have abandoned the issue and thereby waived her right to raise it in the judicial review proceedings. In her closing submissions to the Board, she had made no mention of the issue, and similarly, in her application to the DAP, she did not raise it. The appeal before the DAP was very broad in scope, as is made clear by Appendix A to the Circular, and there was no suggestion that the applicant had been precluded from raising any issue she wished to raise. On the contrary, the submission filed by her on appeal was very comprehensive and showed that she was well aware of the broad scope of the appeal. Yet she had failed to raise this issue at all. The decision in *State (Byrne) v. Frawley* [1978] 1 IR 326, for example, showed one might have a good point but lose the entitlement to raise it by reason of not having raised it at the appropriate time; and it had been repeatedly

stressed by the courts that the remedy must be sought at the right time; *Cullen v Wicklow County Manager* [2011] 1 IR 152; *Balaz v. His Honour Judge Kennedy and DPP* [2009] IEHC 110; *Vakauta v. Kelly* [1989] HCA 44 (approved in *Balaz*). It was accepted that the present case was slightly more complicated because the issue of recusal had been initially raised before the Board on behalf of the aplicant, but what was important was that the objection had not been pursued despite subsequent extensive submissions on other matters. In all the circumstances, it was submitted, there had been a waiver or acquiescence on the facts of the present case.

84. Counsel for the respondent urged me to stay within the parameters of the judicial review proceedings which did not include a challenge to the Murtagh report, but it was submitted that there was nothing objectionable in the report in any event; the word 'allegedly' was repeatedly used; it was accompanied by the letters of response from the witnesses so that anyone reading those would know exactly what had been allegedly witnessed; and Mr. Murtagh was perfectly entitled to use the term 'serious' in his report if the matter warranted that description. This investigative stage of the procedure had been considered in *Joyce v. Board of Management of Coláiste Iognáid* [2015] IEHC 809, and the report in that case was distinguishable from the reoprt in the present case. Further, Mr. Murtagh was entitled to conduct himself as he did prior to and at the hearing, including liaison with the witnesses. Indeed, he could have gone further and actually called the witnesses, but he did not in fact carry out that function.

85. With the regard to the hearing, it was submitted on behalf of the respondent that the applicant's complaints were based on excerpts from the transcript which were taken out of context and that the Court should read the entirety of the transcript in order to put matters in context in order to reach a conclusion on this complaint. It was submitted that the applicant was able to make her case, through her legal representatives and herself, at the oral hearing on all the issues raised in the present proceedings, including issue going to the merits of the issues as well as the fairness of Mr. Murtagh's investigations. It was further submitted that the chairperson's comments and interventions were fair, having regard to the repetitious cross-examination on behalf of the applicant. It was submitted that the Court was not entitled simply to reach its own conclusions on the evidence but rather must apply the usual judicial review standard which required the Court to intervene only if the decision was irrational and/or unsupported by any evidence.

86. With regard to the standard of proof, the relevant standard was the balance of probabilities and that this had been properly applied to the facts of the case.

87. It was submitted that there was nothing objectionable as to the manner in which the 'Varley accusation' had been dealt with, and that it certainly did not indicate either a bias or a lack of understanding on the part of the chairperson. Indeed, what was most interesting about this episode, it was submitted, was how the applicant had dealt with the issue before the DAP, namely that she had denied that she had made any such accusation at all in circumstances where it was clear from the transcript of the hearing that she had.

88. In relation to the finding of emotional abuse, it was submitted that the applicant was the disciplinary liaison person for this school and would have been well aware that what was alleged, in effect two instances of harsh discipline, amounted to an allegation of emotional abuse. It was not an 'additional finding', it was simply a characterisation of a factual finding being made in relation to the facts which had been clearly alleged. There was nothing improper about this finding having been reached.

89. With regard to the giving of reasons by the Board, it was submitted that the reasons given were within the appropriate parameters as established by such cases as *Mallack v Minister for Justice, Equality and Law Reform* [2012] 3 IR 297 and *Mulholland v. An Bord Pleanala (No. 2)* [2006] 1 IR 453. It was also submitted that the applicant was under no doubt as to how the Board had arrived at its conclusions, which was demonstrated by the detail of her submission to the DAP. It was incorrect to suggest that the Board 'preferred' the evidence of the complainants; rather it had weighed the evidence and reached a conclusion. While it was true that Mr Power did not stand over one aspect of the second incident, namely the allegation that the child was asked to face the wall, there was evidence from which the conclusion they reached could legitimately be drawn.

90. With regard to the general complaint that the entire process showed that there had been (actual) bias or bad faith towards the applicant, it was submitted that the Court should have regard to the recent clarification by the Supreme Court in *RAS Medical Ltd t/a Park West Clinic v. RCSI* [2019] IESC 4 as to when it was appropriate, and when not, to reach conclusions as to facts in dispute in circumstances where the evidence was solely on affidavit. The Supreme Court had sounded a warning note as to the reaching of conclusions adverse to the evidence of a deponent who had not been cross-examined and said:

> "… I am also satisfied that it is inappropriate for either a trial court or an appeal court to reject sworn affidavit evidence by reference either to other sworn affidavit evidence or to documentary materials without giving the deponent concerned an opportunity to answer any reasons why the sworn evidence should not be regarded as credible or reliable. The onus is on a party who wishes to urge on a court that sworn affidavit evidence should not be accepted, in respect of any point of fact material to the court's final determination, to ask the court to take appropriate measures such as granting leave to cross-examine, so that questions concerning the credibility or reliability of the evidence concerned can be put to the witness and the court reach a sustainable conclusion as to the accuracy or otherwise of the evidence concerned."

Here, the applicant had alleged bias and the witnesses had denied it on affidavit, but no one had been cross-examined on behalf of applicant. It was not open to the Court to reach a conclusion that a witness was biased in circumstances where he or she had not been cross-examined and given an opportunity to deal with the accusation.

91. In reply on the issue of waiver or acquiescence, counsel on behalf of the applicant further submitted that the decision in *Balaz* should be distinguished because there had been no challenge at all in that case, whereas the applicant's representatives in the present case had requested recusal of certain Board members at the outset of the first oral hearing. Emphasis was also laid on the fact that the Board's hearing was not a formal legal hearing. It was submitted that waiver or acquiescence should not be a legalistic trap for someone represented in such a process by INTO advisers rather than lawyers. The Court of Appeal in *McKelvey* [2018] IECA 346 had recently confirmed that the process under the Circular where the representation consisted of INTO members rather than lawyers, and it would be unfair in that context to hold such representatives to the same standards as lawyers. As regards the failure to include any submission of bias in the closing submissions to the Board, it was also submitted that it might well be that a person would not want to repeat the claim of bias in closing submissions to the very body to which she was addressing her points on the merits. It was also submitted that the issue of waiver or acquiescence had not been adequately pleaded in the Statement of Opposition.

Discussion and Conclusions

My primary conclusion

92. All of the reliefs sought concerned decisions made by the Board of Management. There was no criticism made of, or relief sought against, any aspect of the process or decision of the DAP. In my view, the applicant is not entitled to rely on alleged flaws in the

Board process when she subsequently had the benefit of a full hearing before the DAP in respect of which she now makes no complaint whatsoever. An appeal to the DAP is very broad in scope and it is clear from her submissions to the DAP that she availed of the full scope of this wide-ranging appeal. If the process is a unitary one for the purpose of the time limit (as argued for on behalf of the applicant), it must surely follow that it is the process as a whole which should be reviewed by the Court. It seems to me that on close examination, the arguments of the applicant's legal team about the time-limit and on the substantive issues are inconsistent with each other and smack of the cake being eaten and had. They submitted that the time-limit did not run until the final decision of the Board because it was a unitary process; yet their seeking to quash the decision of the Board in circumstances where they have no criticism of the appeal to DAP strives to drive a wedge between the Board and DAP stages of the process. Either it is a unitary process for the purposes of judicial review or it is not. If I am correct in my earlier conclusion that the process is a unitary one for the purpose of the time limit, a logical consequence is that the applicant, in order to succeed on the substantive issues, would have to demonstrate flaws other than the type of flaw complained of in the present case. This might arise, for example, if the applicant complained of a flaw in the appeal process, or a flaw in the Board's process which carried over and tainted the appeal process, or a flaw in the Board's process which the applicant was precluded from raising in the appeal because of the scope of the appeal. In this case, none of the applicant's complaints are of this kind; they are all about the Board process and she makes no complaint about the process before the DAP or the impartiality of its members.

93. The above conclusion is in my view sufficient to dispose of her judicial review on the merits. It may nonetheless be helpful if I set out my views in respect of the various complaints made about the Board's process, either for the eventuality that I am found to be wrong in my primary conclusions or by way of general assistance to Boards engaging in such a process.

The Murtagh report

94. On the issue of Mr. Murtagh's investigative report, my views are as follows. First of all, it is not directly within the scope of these proceedings as there was an is no formal challenge by way of judicial review to his investigation. Secondly, I do not think that the language of his report demonstrated bias or prejudgment. He talked about serious issues and concerns but said that these arose *if* the allegations were substantiated. I do not think that the language he used in his report overstepped the mark. Thirdly, however, I do think he should have obtained a written response at an early stage from Mr. Power who was clearly a potential eye-witness to one of the alleged incidents. He offered a variety of explanations for this failure but none of them are satisfactory. In the normal course, any investigation which seeks to be impartial should interview all relevant persons in order to elicit potentially exculpatory as well as inculpatory evidence. However, Mr. Power did ultimately give evidence at the hearing and it is the Board's conclusions which are attacked in these proceedings and not Mr. Murtagh's report. The only way I can see Mr. Murtagh's report becoming relevant to these proceedings would be in an indirect manner, such as if the Board decision was improperly influenced by the report. I do not consider that such a situation arose here. To do so would be to find that the two lengthy days of oral hearings conducted by the Board were a sham exercise and that the decision-maker acted in very bad faith. My reading of the transcript of the Board hearings does not support this interpretation. Indeed, as I have described earlier, the Chairperson was impatient with the length of the cross-examination of Mr. Murtagh precisely because of her view that his report was simply his opinion and that the task of the Board was to hear the witnesses give direct evidence. Overall, I think that the Board appreciated the distinction between an investigative report and its own task of adjudicating on the oral evidence and so the Murtagh report is ultimately irrelevant to the issues I have to decide.

The recusal issue

95. On the issue of whether the Chairperson and certain other Board members should have recused themselves because of earlier comments they had made about the applicant, my views are as follows. It will be recalled that the applicant's union representative made an application at the outset of the first Board hearing that some of the decision-makers recuse themselves because they had accused her previously at a Board meeting or meetings of telling lies. As described above, the Chairperson responded to the recusal application by saying that the objection would be taken into account. This was in my view a most unsatisfactory response; a recusal application should be ruled on one way or another and should not be postponed. However, the Board proceeded to conduct the hearing. This was an implicit refusal of the application even if there was no explicit ruling on the issue. The issue of recusal was not raised on behalf of the applicant again, even though her representative formally reserved her position on the point. I appreciate the point that union representatives may not always deal with legal points in the same way as lawyers, but a recusal application is a serious matter and I think that it must be obvious to any experienced union representative that this would be an important matter not to let fall quietly away, whether by immediately leaving the hearing, writing an objection, seeking leave to bring judicial review proceedings, continuing to place the objection on record at every opportunity including the closing submission and the appeal to the DAP, or some combination of the above. In fact, what happened was after the initial skirmish over the participation of some of the Board members, the issue of recusal was never raised again, and I consider that the applicant must be taken to have abandoned or waived the point.

The Varley accusation

96. With regard to the "Varley accusation", I find the position of both parties somewhat disproportionate to what occurred. I think that the root problem was generated by the questions put by the applicant herself to Ms. Varley in the passage set out in full above. When a person who lacks professional experience in the questioning of witnesses engages in the exercise, words are sometimes not as carefully chosen as they might be. Indeed, it might be said that unnecessary confusion and heat are sometimes generated by the carelessness of the language in questions asked by professional lawyers, never mind a lay person. There was a shift within the focus of the questions from the putting of one proposition (that the child had a propensity to kneel) to something more particular involving the witness herself. That said, the defensive response of the witness also fed into a shift in the focus of the questions being put. My overall sense of the relevant passage in the transcript is that the applicant's main and perhaps only purpose was to put forward a part of her defence (which was that the child could have voluntarily kneeled down rather than in response to an instruction) but that the witness became extremely defensive at the line of questioning because she interpreted it as an accusation rather than seeing it in context. The subsequent reactions of Ms. Varley and Ms. Needham as set out in the correspondence described appears to me to be rather excessive, but so too was the position of the applicant, whose counsel before me engaged in considerable hyperbole concerning the matter. The matter obviously became even more contentious at the DAP appeal, with the applicant denying she had ever made any accusation against the witenss and the respondent considering this to be a flagrant contradiction of the transcript. My own view is that the transcript did not support either of their positions in a clear-cut way and was open to interpretation. In any event, there is a danger of relevant points being lost in this web of accusation and counter-accusation. Ultimately, the only potential relevance of the point is that the Chairperson's response to the incident (as displayed in her letter) might be taken as demonstrating pre-judgment on her part and/or a complete failure to understand the point that the applicant was making as part of her defence.

The oral hearings generally

97. Indeed, I would have a concern from reading the transcript as a whole whether there was a sufficient understanding of the

applicant's defence on the part of the Board. I find the failure of the Chairperson to grasp the relevance of the child's alleged propensity to kneel down even at a late stage of the proceedings somewhat worrying. I would also have had some concerns as to whether the Board was sufficiently aware of the need for caution, having regard to what I would describe as a number of 'red flags' in the case, that is to say, warning signs which would put any reasonable decision-maker on their guard against reaching over-hasty conclusions. The first red flag was that the complaint of mistreatment of a single child had arisen in the context of a fraught industrial relations dispute and in the course of a letter containing a litany of complaints about the applicant's behaviour towards the staff (and not children). A second red flag was that the allegations were first made to the Board of Management some considerable time after the events; thus raising the issue of the impact of delayed reporting upon the memory of witnesses which is a well known path to any legal system. These two factors created a risk that something which was not thought to be sufficiently serious to report to the Board at the time it happened might later with hindsight have become susceptible to distortion or exaggeration because of the poor relations between the principal and her staff. The first issue, that of the impact of the passage of time on memory is exemplified in the evidence of Mr. Power who frankly admitted his memory difficulties regarding the incident in the course of the oral hearings. The issue of motivation or potential hindsight exaggeration potentially arose with the other teacher-witnesses. A third red flag was in my view the nature of the allegation itself; the essence of which that the applicant had told the child to adopt a certain position or posture by way of punishment on two separate occasions. It was therefore the type of allegation where there was a need for careful attention to detail (for example, was the child told to sit or to kneel on each of the separate occasions? What words were actually used by the principal to the child?); potentially different interpretations (for example, is admitting you gave a child a "time-out" an admission to admitting you were administering a punishment or not?); and a need for contextualisation (a restless 4-year old may often voluntarily sit or kneel on a floor in a way that an older child would not). Consider the difference between telling a child to kneel and face a wall as punishment, on the one hand, and telling a child to stay in a particular place with another teacher for a few minutes, during which the child voluntarily sits or kneels down on the ground and reads a book. The difference is in the detail; while the first would be an over-harsh method of punishment, the other would not. A different type of allegation, such as hitting a child, would not require such careful attention to nuance; the decision-maker would either believe that the eye-witness saw the blows being administered, or not. If this were a criminal trial involving an allegation requiring such attention to matters of detail, nuance, motivation, and delay, a trial judge would be likely to urge a jury to exercise a considerable amount of caution before proceeding to a conviction. However, this was not a criminal trial. This is a process established for the disciplining of teachers and principals and it is, by design, a system which will involve inexperienced lay decision-makers and non-legal representatives.

Reasons

98. This leads into the issue of the Board's reasons for its decision. I am mindful that the conflict in the case was a factual one and came down ultimately to an assessment of the credibility and reliability of the witnesses. Credibility adjudications are a type of case in which the need to set out reasons is more minimal than in some other situations. On the other hand, I am also mindful of the red flags to which I have referred above, the presence of which would ideally have led the Board to set out more fully why it considered the allegations proven notwithstanding those obvious reasons for exercising caution. However, I have concluded that although I would have preferred to see explicit reference in the Board's ultimate conclusions that it was aware of the need for caution in this case, I do not think the absence of such a reference was fatal to the adequacy of the reasons given. Further, the conclusion itself was not so divorced from the evidence given as to be irrational or without foundation. It was a conclusion which it could have reached after exercising the necessary caution, and I am not persuaded that the appropriate caution was not exercised. More importantly, there is no suggestion that the DAP failed to exercise appropriate caution when considering the transcript of the oral evidence. It must have considered the transcript in light of all the complaints made by the applicant about the attitude of the Board towards her and the history of the case, and I cannot simply assume, and in any event there is no complaint, that the DAP reached their conclusion on the basis of insufficient caution or an inadequate understanding of the issues. So, even if I am taking an overly favourable view of the Board's approach to its fact-finding task, the applicant's case must fail because it is not alleged that any defect at this stage of the process somehow tainted the appeal.

The conclusion of emotional abuse

99. As to the submission that it was wrong of the Board use the language of 'emotional abuse' in its conclusions when this had never been mentioned before, it seems to me that the important point here is that the applicant was in no doubt as to the precise factual basis of the allegations and cannot have been under any illusion that, if this were found to have taken place, it would fall within the meaning of over-harsh disciplinary procedures, which in turn falls within the definition of emotional abuse. The scope of the definition of "emotional abuse" in the Guidelines, set out above, is very wide and it explicitly includes over-harsh disciplinary methods. In my view, the conduct which the Board found the applicant to have engaged in would be reasonably considered to be at the lesser end of the spectrum over over-harsh discipline. One can well imagine the types of more serious patterns of emotional basis that could arise between a teacher and pupil, but the definition is also broad enough to include one or two incidents of over-harsh discipline. I do not think there is any substance to the applicant's complaint in this regard.

The Standard of Proof

100. On the issue of the standard of proof, my views are as follows. Regarding the standard of proof, counsel for the applicant relied on the decisions in *O'Laoire v. Medical Council* (unreported, High Court, 27 January 1995), *Law Society v. Walker* [2006] IEHC 387 and *Lawlor v. Members of the Tribunal of Inquiry into Certain Planning Matters and Payments* [2010] 1 IR 170 in arguing that the correct standard of proof which should have been applied by the Board in reaching its conclusions was the standard of "beyond reasonable doubt". In *O'Laoire*, a case which arose from a Medical Council inquiry into whether the applicant, a neurosurgeon, was guilty of professional misconduct. Keane J. set out that he was:-

> "…satisfied that the onus lay upon the Council *to prove beyond reasonable doubt every relevant averment of fact which was not admitted…and to establish beyond reasonable doubt that such facts, as so proved or admitted, constitute a professional misconduct*. It also follows from this principle that the onus rests on the Council in this case of negativing every reasonable hypothesis consistent with Mr. O'Laoire's innocence of the allegations against him." (emphasis added)

However in *Georgopoulus v. Beaumont Hospital* [1998] 3 IR 132, a case which involved an inquiry by the Beaumont Hospital Board into complaints made against the appellant arising out of the performance or non-performance of his duties as a neurosurgical registrar, the Supreme Court (Hamilton C.J.) concluded that:-

> "It is true that the complaints against the Plaintiff involved charges of great seriousness and with serious implications for the Appellant's reputation. *This does not, however, require that the facts upon which the allegations are based should be established beyond all reasonable doubt. They can be dealt with on "balance of probabilities" bearing in mind that the degree of probability required should always be proportionate to the nature and gravity of the issue to be investigated*." (emphasis added)

The Supreme Court addressed the issue in Walker [2006] IEHC 387 in the context of an investigation into the alleged professional misconduct of a solicitor by the Solicitors Disciplinary Tribunal, with Finnegan P. stating that:-

> "As to standard of proof at an inquiry I have regard to the dicta in O'Laoire v Medical Council The Supreme Court 25th July 1997. *The standard is the criminal standard of proof beyond reasonable doubt*. Notwithstanding reservations expressed by O'Flaherty J. and Murphy J. this remains and will remain so unless and until the Supreme Court directs otherwise. This is a factor to which regard may be had in determining whether a prima facie case is disclosed." (emphasis added)

In *Lawlor v. Members of the Tribunal of Inquiry into Certain Planning Matters and Payments* [2010] 1 IR 170, the Supreme Court considered the issue in the context of the standard of proof to be applied by a Tribunal of Inquiry. Murray C.J. said:-

> "In principle evidential requirements must vary depending upon the gravity of the particular allegation. This is not to adopt the "sliding scale" of proof advocated by counsel for the applicant, but rather to simply recognise, as an integral part of fair procedures, *that a finding in respect of a serious matter which may involve reputational damage must be proportionate to the evidence upon which it is based*. For example, a finding that a particular meeting occurred on one day rather than another may be of such little significance that a tribunal could make a finding in that respect on the bare balance of probabilities. A finding of criminal behaviour on the other hand would require a greater degree of authority and weight derived from the evidence itself." (emphasis added)

These authorities do not in my view make it easy to determine what precise standard should be applied in the present context and allegations, which was a disciplinary procedure in respect of a school principal where the allegation was in substance that she had emotionally abused a child by administering over-harsh punishment on two occasions, with the possibility of a range of sanctions up to dismissal from her job. Insofar as it is necessary for me to express a view on the matter, it seems to me that the strict standard of "beyond a reasonable doubt" has so far been confined to specific legal contexts such as the Medical Council or the Solicitor's Tribunal and has not been applied to the broader range of administrative decision-making contexts, even those of a disciplinary character and which carry the risk of a loss of employment. The normal standard of "balance of probabilities" seems to me to be the appropriate standard in the present context, but with due regard to the judicial comments quoted above to the effect that the degree of probability required should always be proportionate to the nature and gravity of the issue to be investigated. In the present case, the applicant seeks to challenge the standard of proof applied by the Board, but neither the pleadings nor the submissions on her behalf complain about how the DAP applied the standard of proof. My overarching approach to the applicant's case is that she is not entitled to succeed on the basis of procedural defects alleged to have infected the Board process in circumstances where she engaged in a full appeal before the DAP and has no complaint about the latter process. Applying this approach to the standard of proof issue, I conclude that the judicial review cannot succeed on this particular ground in the circumstances of this case. For future reference, however, it would seem to me to be advisable for decision-makers in this arena (i.e. Boards of Management and Disciplinary Appeals Tribunals) to state explicitly what standard of proof they are applying; to state that they are aware of the relationship of proportionality between the degree of probability required and the nature and gravity of the issue to be investigated; and to explain how they have interpreted and applied that proportionality test to the facts of the case before them.

The penalty

101. On the issue of penalty, I must confess to being surprised that the conduct of the applicant even as found by the Board was ever considered to be worthy of dismissal. The pendulum of attitudes towards the disciplining of children in Irish schools has happily swung very far away from where it was some decades ago, when the harsh disciplining of children was the norm, but one wonders whether there is a danger of it swinging too far in the other direction when a matter such as this, where no report was made to the Board of Management at all when it arose initially, ultimately went straight to a Stage 4 disciplinary process and almost led to the dismissal of a principal from her position. For my own part, I would have thought that lesser action at an earlier stage might have been an appropriate course of action; but as a Court engaged in judicial review it is not my place simply to substitute my own decision as to what was appropriate. There was no judicial review challenge to the decision to refer the matter to Stage 4; and the actual sanction of dismissal was ultimately reduced following the recommendation of the DAP and there is no challenge to the sanction of demotion ultimately imposed as such but rather the process leading to the factual conclusion underpinning it.

Bias and prejudgment

102. Finally, I wish to make a comment about the drawing of any conclusion about bias. My decision in this case is fundamentally based on the point that even if there were any defects in the Board's process of the kind complained of, none of these were alleged by the applicant to have infected or tainted the appeal before the DAP. The issue of bias was simply not raised in respect of the composition of the DAP, nor was any argument constructed to connect or link the Board decision to the DAP decision such that the DAP was somehow influenced by a decision made by an allegedly biased Board. However, I would also consider it inappropriate to reach any conclusion of actual bias against individuals who had sworn affidavits denying this state of mind and who had not been cross-examined. Actual bias is a serious accusation and the Supreme Court has recently cautioned against drawing inferences on contested issues of fact in circumstances where individuals are not cross-examined (*RAS Medical Ltd t/a Park West Clinic v. RCSI* [2019] IESC 4). In my view, the point made by the Supreme Court must have even greater force where the issue on which there was no cross-examination was whether the individual was actuated by bias or bad faith. Therefore, while I have set out in detail the concerns I would have about the manner in which the Board approached the hearings (to include how the Varley accusation was dealt with) which might suggest that there was a general negative attitude towards the applicant and an impatience with her defence, I would not have been prepared to move from this position of concern to a conclusion of bias or prejudgment in the absence of cross-examination.

103. For the reasons set out above, I propose to refuse the reliefs sought.