

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 308 J.R.]

BETWEEN

N. M.

APPLICANT

AND

LIMERICK AND CLARE EDUCATION AND TRAINING BOARD

RESPONDENT

JUDGMENT of Mr. Justice McDermott delivered on the 27th day of June, 2017.

1. The applicant, a school principal, seeks an injunction restraining the continuation of any investigation or disciplinary process by the respondent in respect of a complaint made by a teacher in writing on 9th July, 2014 and notified to the applicant by way of letter from the Chief Executive of the respondent dated 15th July, 2014. He also seeks an injunction restraining the continuation of any investigation or disciplinary process in respect of a second allegation that a teacher in the school taught agricultural science on a one to one basis to the applicant's daughter as part of the teachers contracted twenty-two weekly hours and related allegations that the applicant assigned other teachers to teach his other children on a one to one basis in other school years. The second matter concerning the teaching of agricultural science was notified to the applicant by letter from the respondent's Chief Executive dated 3rd September, 2014. In addition, declarations are sought that the purported suspension of the applicant by the Chief Executive and the placing of restrictions upon him directing him not to enter the school or to contact any school staff members for the duration of his "administrative leave" were unlawful and/or *ultra vires* the Chief Executive and are null and void. A similar declaration is sought in respect of a suspension or administrative leave imposed upon the applicant in respect of the second complaint.

Background

2. The applicant is fifty-three years old and qualified as a secondary teacher in August, 1988. On 1st September, 1999 he commenced employment as principal of a secondary school which was operated at the time by County Limerick Vocational Education Committee. Under the Education and Training Boards Act 2013, Limerick and Clare Education and Training Board (the respondent) replaced County Limerick Vocational Education Committee as the operator of the school and as the applicant's employer. It is a large secondary school and his post requires a high level of skill, experience and professionalism.

The First Complaint-Sexual Harassment

3. On 15th July, 2014 the applicant was contacted by the Chief Executive of the respondent and informed that a complaint of sexual harassment had been made against him which he was advised could amount to gross misconduct. He was informed that he was required to attend a meeting with the Chief Executive on the same day and that he should be accompanied by a representative. The applicant attempted to procure the attendance of a solicitor who was unable to attend at such short notice due to his departure on vacation the following day. The applicant did not meet the Chief Executive but received a letter the same day. The letter informed the applicant that the Chief Executive had received from Ms. Shelagh Graham, Head of Human Resources, a serious complaint submitted by one of the teachers Mr. F.: a copy of the letter was furnished.

4. Mr. F.'s letter dated 9th July, 2014 stated that while employed in the school he had been the focus of "the unprovoked sexual advances of N.M." He outlined a series of alleged events:

"(a) The first event occurred after a staff night out in Limerick in May 2012. Having attended a bar and when going to a nightclub he left his car parked beside the bar. He states that he and another teacher were walking back towards the car when they spotted the applicant and another person walking towards them on the opposite side of the street. He sought to avoid them because he did not wish to give them a lift home. He and his companion were called over and asked for a lift as anticipated and as he was a new teacher in the school, having just finished college, he did not wish to offend a potential employer. It was agreed that they would meet in Eddie Rockets restaurant later.

As they were having a meal in Eddie Rockets the teacher alleges that the applicant who was heavily intoxicated asked where he got his hair cut. His "stubble" was then discussed and why he grew it. As he was uncomfortable with the conversation he went to the bathroom. When he returned and sat down the applicant is said to have asked his companion to leave them alone as he wanted to talk to him. His companion left. It is said that the applicant then complimented the teacher on the way he dressed, his teaching professionalism and the way he interacted with his children on projects in the school. He is then alleged to have stated that he was homosexual, that his wife knew about this and that he would be interested in having a relationship with the teacher. The teacher states that he was shocked and started nervously saying that he was not gay and was not interested. He was asked whether he was sure and started to say no. It is then alleged that the applicant stated that "it could be beneficial to you if you were". The teacher stated he was "dumbfounded" and indicated that he wished to go home. He dropped the applicant and his companion home and as he exited the car the applicant is alleged to have said that he hoped the teacher was okay after the conversation.

The teacher states that the next time he was in the school he had to see the applicant about signing a document. He was invited to sit down and informed that the applicant "knew where the skeletons were" and he would appreciate if he would keep the matter to himself but that the offer still stood if he changed his mind.

(b) The second alleged incident is said to have occurred in October 2012 while seated at a conference desk in the applicant's office. It is alleged that the applicant commenced to speak to the teacher but as he did so his hand strayed to his knee. The teacher "made a jolt and he jiggled it off". He said he did not wish to stay so made an excuse and ran from the office.

(c) The third incident is alleged to have occurred on the school debutante's night Friday 13th September, 2013. When leaving the event, the applicant is alleged to have intercepted him stating that he wished to talk to him about the next year and inviting him to stay a while longer. He agreed to remain. However, the applicant is said not to have appeared

and at approximately 1:00am the teacher decided to leave again but was intercepted once again by the applicant. Subsequently, at 2:00am the event concluded and the applicant is alleged to have approached him a third time and brought him and two other teachers to the reception area where they sat down. They remained for a couple of hours. Matters become somewhat fraught between the applicant and the other teacher and "(the applicant) got the other teacher kicked out". It is said that the applicant made comments to the effect that teachers he had looked after were now beginning to turn on him. The group was asked to leave the lobby. At this stage it is said that the applicant is alleged to have stated "I don't know my situation in the room whether I have a double or two singles but would you like to come up with me?" The teacher is said to have indicated no and that his friends were waiting for him outside. He was asked whether he was afraid of the applicant. He replied no and that he had to go and told him that he would see him on Monday.

The teacher states that he then left the banquet hall level of the hotel, went to the car and threw his bag into the front seat and hopped into the back. He went to sleep in the back of the car but was awoken by the applicant's voice calling his name. The teacher remained hidden below the blanket in the back of the car afraid to make himself known. The teacher received a telephone message on 14th September at 5:35 from the applicant looking for him.

(d) The teacher complained that approximately six weeks prior to the date of his letter i.e. sometime in late May or early June 2014, some eight months later, during an awards presentation ceremony for 4th years, the applicant spent the night staring in his direction which some of the pupils noticed. Whenever the teacher's name was mentioned during the night he said he got "a big smile and wink from him". This unnerved the teacher."

5. The teacher claimed that these episodes left him shaken and disturbed his sleep. He felt uncomfortable at work and lost confidence as a teacher. The teacher sought confidentiality.

6. The letter from the Chief Executive on 15th July, 2014 explained that having determined that the complaint was of a serious nature and could constitute gross misconduct it was necessary that it be dealt with under the terms of Circular 59/2009 – Procedures for Principals relating to their work, conduct and matters of professional competence in their role as Principals. He pointed out that the reference in that document to disciplinary matters being reserved functions under the Vocational Educational Committee (Amendment) Act 2001 no longer applied because the Act had been repealed and consequently, disciplinary matters became executive functions for the Chief Executive of each Education and Training Board under the Education and Training Boards Act 2013.

7. The Chief Executive also explained that the circular provided that alleged serious misconduct involving inappropriate behaviour/sexual harassment or harassment against an employee came within the definition of "gross misconduct".

8. The Chief Executive also expressed his concern that if the allegations were found to be substantiated following an investigation the applicant might constitute a threat to the health and safety of personnel in the school. For that reason, he decided that it was appropriate to place the applicant on administrative leave with pay with immediate effect pending the outcome of the investigation into the allegations against him. It was his preference that they would meet to discuss the decision to place him on administrative leave but since the applicant was unable to meet due to the unavailability of his legal representative this had not been possible. He stated that the decision was a precautionary one and assured the applicant that he had not come to any decision on the merits or otherwise of the allegations made against him.

9. The applicant was also advised not to make any contact with the complainant while on administrative leave and not to enter the school or contact any school staff members for its duration.

10. The Chief Executive also proposed that the teacher's allegations should be investigated by way of a formal process available under the model provided in the "Harassment/Sexual Harassment Prevention Policy - Complaint Procedure for Staff" (HSHP), a copy of which was enclosed.

11. The extent of the complaint, set out in the teacher's letter of 9th July, 2014, constitutes the extent of the allegation made. The letter from Ms. Graham to the Chief Executive enclosing a copy of the teacher's letter was also dated 15th July, 2014 and it is clear, therefore, that the Chief Executive acted promptly on foot of the complaint.

12. The applicant makes extensive allegations of bias against the Chief Executive and Ms. Graham in dealing with the complaint. He alleges that the Chief Executive's agenda is to remove the applicant from his position of principal at minimum cost to the respondent. Allegations were made that the complainant had been favoured by the respondent by the renewal of his contract and that previous complaints and labour relations issues were influencing the consideration of the complaint by the respondent, the Chief Executive and Ms Graham to the applicant's detriment. This is rejected by them.

Correspondence

13. By letter dated 21st July, 2014 the applicant's solicitors sought confirmation of his status as a person on "administrative leave". They noted that Circular 59/2009 provided that where there is an allegation of serious misconduct the principal may be suspended on full pay pending an investigation and the conclusion of any appeal process. It was also pointed out that he was enjoined not to contact the complainant and other third parties. It was submitted that since the complainant's contract was due to terminate on 31st August, 2014 and as the school was not currently operational, the applicant's status could not have any affect upon the complainant. It was submitted that the decision to place the applicant on administrative leave was unjust and disproportionate because the Chief Executive failed to take into account the fact that the applicant had been the victim of a concerted campaign of complaints by other members of staff over a lengthy period at least some of which were deemed to be malicious. It was alleged that this allegation was also malicious and untrue.

14. The applicant was anxious that the investigation or disciplinary process should take place as speedily as possible. In that regard it was submitted that the procedures under Circular 59/2009 would be more timely than those in the HSHP. The circular stated that its disciplinary procedure superseded all existing local and national disciplinary procedures and would be more expeditious. The writers sought confirmation that the matter would be dealt with under Circular 59/2009.

15. These issues were addressed by reply dated 25th July, 2014. It was stated that the applicant had been placed on administrative leave and temporarily relieved of his responsibilities but continued to receive regular pay and benefits. He was required to remain away from work. It was accepted that the Disciplinary Procedures set out in Circular 59/2009 referred to suspension and not administrative leave but the Chief Executive was of the view that placing the applicant on administrative leave rather than suspension was preferable when no decision on the merits of the complaint had been made. The Chief Executive stated that the temporary arrangement whereby the applicant was required to "step aside" from his duties while the complaint was being investigated reflected

his concern for him. He explained that it was necessary to take the decision without input from the applicant because of his unwillingness to meet without his legal representative on 15th July. However, if the applicant had a strong preference that his status be amended from "administrative leave" with pay to suspension with pay the solicitors were asked to confirm this and he would consider the request.

16. The Chief Executive also indicated that the direction not to contact third parties was not intended to prevent the applicant from preparing his response to the complaint. If he needed to contact other staff members for that purpose, he was clearly entitled to do so. The direction was intended to convey that he was not permitted to perform any of his duties as principal while on administrative leave. It was accompanied by a direction that he should not enter the school for the duration of that leave. If he required any documentation or material, he was welcome to contact the Chief Executive to arrange such access.

17. The Chief Executive rejected any suggestion that there was an element of prejudgment in his assessment of the complaint. The complaint was serious and required investigation. He repeated that no finding whatsoever had been reached by him in relation to the complaint pending the outcome of the investigation. He stated that if the complaint were found to be entirely unfounded and malicious, the applicant would be immediately reinstated.

18. The Chief Executive noted that unlike the HSHPP, the Disciplinary Procedure did not set out an agreed process of investigation nor did it contain a procedure for the appointment of agreed investigators. Any proposal to institute a mechanism for investigation under Circular 59/2009 would also have to be communicated to the complainant and his representatives. If the investigative process under HSHPP were not adapted to facilitate the investigation another appropriate procedure would have to be proposed. It was pointed out that this might take time. This proved to be the case. It is also clear that some of the procedures ultimately set out in the terms of reference are similar to those set out in the HSHPP.

19. In respect of the renewal of the complainant teacher's contract, the Chief Executive pointed out that he had been informed that the complainant would be offered further teaching hours for the year 2014/15. Though he was aware of the complaints previously made against the applicant he stated these were separate matters and had no bearing on any decision made by him concerning this particular complaint.

20. By letter dated 29th July, 2014 the applicant's solicitors complained, *inter alia*, that the placing of the applicant on administrative leave outside the terms of Circular 59/2009 was unlawful. It was submitted that under clause 4.3 of the Circular the suspension of the principal could only occur in the context of a disciplinary proceeding taken after a report has been received. The provision allows for suspension where an allegation of serious misconduct has been made prior to the conclusion of an investigation but can only be applied following an assessment of the necessity and justification for the suspension including the effect of such decision on the principal. It was noted that the HSHPP did not entitle the employer to suspend an innocent party who is the subject of a complaint in advance of investigation.

21. The court is satisfied that the placing of the applicant on administrative leave or suspension was not a disciplinary sanction imposed following a finding of gross misconduct. It was a suspension imposed pending the completion of the investigation and any disciplinary process that might follow.

22. The solicitors also complained once again of prejudgment of the complaint by the Chief Executive. They rejected an invitation to put forward proposals for an alternative to the HSHPP investigation procedure. It was stated that the Chief Executive had responsibility to devise a process which was impartial, fair and expeditious. The solicitors awaited his directions as to how an appropriate investigation under Circular 59/2009 might proceed. The solicitors were concerned that the time lines of the HSHPP would result in a longer process than that envisaged by the expeditious conclusion of a procedure under Circular 59/2009. It sought the completion of an investigation in advance of the publication of leaving certificate results prior to the school reopening. The court is satisfied that it was clear to both sides that the respondent was offering the applicant an opportunity to contribute proposals for an agreed alternative procedure at this stage.

23. By reply dated 6th August, 2014 the Chief Executive stated that the terms administrative leave and suspension are used interchangeably in practice and both mean the same thing: "administrative leave" was used as a less stark description. He added:-

"In effect Mr. M. is on paid suspension from his employment.

Having given due consideration to the complaint received, my decision to place Mr. M. on administrative suspension is based on the seriousness of the allegation against Mr. M. which if substantiated could constitute gross misconduct. Circular 59/2009 provides for the suspension of a person on those grounds. Your suggestion of some type of prejudgment has no basis whatsoever and is rejected."

24. The Chief Executive confirmed that Circular 59/2009 provided the mechanism by which the complaint was being processed. He noted however, that the document while providing for an investigation lacked a defined procedure bound by timelines to which all parties must adhere. The HSHPP process was proposed because it provided such a timeline. The Chief Executive had no objection to the use of an investigative process as provided under Circular 59/2009 but noted that the process would be ad hoc. His preference was to follow an agreed process that was acceptable to both sides.

25. By letter dated 12th August, 2014 the respondent through Ms. Graham, Head of Human Resources proposed to instruct Graphite HR Consultancy to investigate the complaints received and submitted their profiles to the applicant's solicitors.

26. By reply dated 14th August, the applicant's solicitors indicated no objection to the nomination of the investigators proposed but sought details of the process. In addition, they asked that the complainant be requested to furnish the exact dates of the alleged incidents and precisely what document he asked the applicant to sign as set out in his statement. The solicitors also requested that the respondent obtain from the complainant details of the witnesses whom it was proposed to call in respect of his allegations and to furnish a written summary of their intended evidence. They stated that as soon as they received that information their client would as quickly as possible furnish his full written response to the allegations.

27. By reply dated 22nd of August the respondent indicated that since no procedure had been outlined for investigation in Circular 59/2009 consideration had to be given to such a process including a time frame that was fair and transparent to both parties which was currently being devised. Parties would be notified in the coming days of the procedure.

28. By letter dated the 4th September, 2014 the Chief Executive wrote attaching the terms of reference under which the investigation of the complaint would be conducted. The final form of the terms of reference was as follows:

"The investigators will:

- (1) Conduct an investigation into the above complaint.
- (2) Write to both parties informing them of their appointment.
- (3) Afford fair procedure and natural justice to both the complainant and respondent.
- (4) Meet with the complainant to discuss the complaint and, if appropriate, take a further Statement. (Where parties to the investigation are being interviewed their representative may accompany them at all meetings with the investigation team).
- (5) Issue Statement to complainant to provide an opportunity to propose specific amendments (to be submitted in writing) on matters of accuracy or fact. The acceptance of any proposed amendments was a matter for the investigation team.
- (6) Receive Statement from complainant.
- (7) Meet with such other person(s) – witnesses as the complainant requests and as deemed warranted and, if appropriate, take a statement from any such person(s).
- (8) Issue Statements to complainant's witnesses to provide an opportunity to propose specific amendments (to be submitted in writing) on matters of accuracy or fact.
- (9) Receive Statements from complainant's witnesses. The acceptance of any proposed amendments was a matter for the investigation team.
- (10) Meet with the respondent to confirm the details of his response to the complaint and if appropriate, take a statement from him.
- (11) Issue statement to respondent to provide an opportunity to propose a specific amendment (to be submitted in writing) on matters of accuracy or fact.
- (12) Receive Statement from respondent. The acceptance of any proposed amendments was a matter for the investigation team.
- (13) Meet with such other person(s) as the respondent requests and has been deemed warranted and, if appropriate, take a Statement from any such person(s).
- (14) Issue Statements to respondent's witnesses to provide an opportunity to propose specific amendments (to be submitted in writing) on matters of accuracy or fact.
- (15) Receive Statements from respondent's witnesses. The acceptance of any proposed amendments was a matter for the investigation team.
- (16) If, during the course of the investigation, the investigation team is presented with additional matters relating to the original complaint, the investigation team should notify the parties to the complaint of any such information or evidence and provide an opportunity for the parties to the complaint to respond. No new complaints may be entered into this investigation.
- (17) Issue all Statements to complainant for commentary to provide an opportunity to propose specific amendments (to be submitted in writing) on matters of accuracy or fact.
- (18) Receive commentary from the complainant.
- (19) Issue all statements to respondent for commentary to provide an opportunity to propose specific amendments (to be submitted in writing) on matters of accuracy or fact.
- (20) Receive commentary from the complainant.
- (21) Close the investigation.
- (22) Prepare a report setting out the findings of the investigation, including findings of fact, and furnish a report to the CE of Limerick and Clare ETB."

29. Following the receipt of the initial draft terms of reference the applicant solicitors rejected them, in particular because of the alleged bias of the Chief Executive and Ms. Graham and the claim that para. 18 of the initial draft terms (now term 16) permitted the complainant to change or add to his complaint at any stage during the process. The solicitor suggested the appointment of a completely independent party to make findings not subject to review by the Chief Executive and proposed the appointment of a senior counsel for that purpose.

30. In a detailed response dated 2nd October, 2014, it was stated:-

"The terms of reference that have been devised are fair and consistent to both parties. There is no attempt to cause any unnecessary delay. The terms of reference are a standard approach adopted in the education sector or elsewhere for the handling of investigations into complaints. You have been furnished with all the details of the allegations that we have received. Your statement seems to infer that some elements have been withheld. I reject such an inference entirely and state clearly that the entirety of the complaint made by [the complainant] has been forwarded to [your client].

Your proposal that [your client] be allowed to 'confront, challenge and question [through his legal team]' is an attempt to make the process a quasi-judicial one. The provisions of Circular 59/2009, and of the other procedures that are used in

the investigation of complaints make no provision for this approach. This proposal is not acceptable to LCETB. All of the relevant procedures extant in the education sector have been framed following negotiations between representatives of school management, the secondary and other sector unions and the Department of Education and Skills.

Your proposal to appoint a senior counsel to devise terms of reference and carry out an investigation into this matter is not acceptable...The investigators that have been chosen to carry out the investigation are completely independent of LCETB. They are drawn from a national panel established and agreed by ETBI, (the body the [sic] represents ETBs) and the second level sector trade unions. LCETB has no influence over the investigators selected for the task nor does it have any desire to exercise such influence in the interest of fairness. The terms of reference that were submitted to you are based on the terms of reference that the investigators drawn from this panel use from time to time. Your allegation of taint and bias in this process is wholly rejected...

We therefore propose to proceed with the terms of reference in the investigation immediately as the procedures of query which you have raised have caused too many delays in the process."

31. By reply dated 9th October, 2014, the applicant's solicitors repeated his position in respect of the appointment of a senior counsel. They also required an assurance that neither the Chief Executive nor Mrs. Graham, or any member of LCETB would participate in the investigation, that none of the correspondence between the LCETB and the applicant's solicitors would be forwarded to the investigators and that the investigator would use a secretary independent of LCETB.

32. A particular issue that led to a change in clause 18 of the original draft of the terms of reference was raised at this stage by the applicant's solicitors. It was noted that the respondent in correspondence acknowledged that the investigation would consider solely the complaint made by the complainant and notified on 15th July, 2014, and no other matter, and that the entirety of the complaint was as forwarded to their client. On that basis, their client's concern in respect of the expansion and augmentation of the complaint no longer arose. They repeated their concern that their client be furnished with the dates of alleged incidents, the names of any proposed witnesses and a summary of what each proposed to say. The solicitors repeated their client's view that the Chief Executive and Ms. Graham had shown obvious bias against him and that neither should take part in any investigative or disciplinary process or any decision making role in respect of that process. The applicant's solicitors reasserted their client's continuing wish to have the matter dealt with expeditiously. They also noted that no actual timeframe had been proposed in correspondence.

33. By letter dated 17th October, the applicant's solicitors were informed that the investigators had been instructed to commence the procedure immediately. The Chief Executive indicated that the investigation would be conducted by the investigators nominated by Education and Training Boards Ireland and were completely independent of LCETB. It was never the intention of the respondent that the Chief Executive or Ms. Graham or any member of LCETB would participate in the investigation. It was not intended to share any correspondence between LCETB and the solicitors with the investigators. The investigators would provide their own secretarial assistance independent of ETB. However, the Chief Executive indicated that it was not possible to accede to the request that he would not have any decision making role in respect of the outcome of the investigation and the disciplinary procedure. He pointed out that he had a statutory function in regard to any decision that was required to be made in the context of Circular 59/2009 which could not be abrogated or delegated to an investigator or any other person who does not possess the necessary statutory authority in that regard. Ms. Graham would continue to carry out her duties and role as Head of Human Resources as appropriate. The Chief Executive welcomed the solicitors' indication that their client would engage fully with the investigators.

34. The investigation commenced following the delivery of a letter dated 10th November, 2014, from the investigators to the applicant. It set out the formal investigation process. It noted that the investigation team would meet with the complainant to establish the exact nature of the complaint and any witnesses identified in the complaint to ascertain any relevant information they may hold. These would be forwarded to the complainant for his review. When completed, the documentation would be forwarded to the applicant and the respondent for their review and response and any witnesses appropriate to that response would also be interviewed at that time. A full set of statements and associated documents would then be forwarded to the complainant for comment. The letter stated:-

"The investigation would be conducted under agreed terms of reference which are enclosed for your reference. Where there is a finding that there is a case to answer in this regard, it will be dealt with under Circular 59/2009 which we understand that you are already in receipt of. In accordance with normal ETB practice, both parties to the complaint may be accompanied by a work colleague or by Trade Union but not any other person or body connected with Limerick and Clare ETB to ensure fair procedure is adhered to and to act as a support for you ..."

35. Permission was requested to record the content of any interviews for the purpose of making available a transcript to the investigators and the parties. The letter indicated that the independent investigators would ensure that the matter was thoroughly and quickly investigated in accordance with the principles of fair procedure and natural justice. All parties would be treated with respect and would be required to maintain confidentiality at all times.

36. The applicant's solicitors objected to the limitation on their attendance. It had been indicated that the applicant could only be accompanied by a work colleague or Trade Union representative but not any other person. By letter dated 2nd December, 2014, the LCETB indicated that in an effort to keep the current investigation moving, they were agreeable as an exceptional measure to allow the applicant to be legally represented by his legal advisers during the current investigation.

37. The court is satisfied that the respondent acted with all reasonable expedition in setting up the investigative process up to this point. It is clear that matters had to be agreed when the alternative process was not adopted. The terms of reference were modified and clarified for the applicant and the investigators were ready to proceed following the resolution of the issue of legal representatives in early December.

38. A further delay was caused by representations made by the complainant's representatives who sought changes in the proposed terms of reference of the investigators which were not resolved until February 2015.

39. The court is not satisfied that the reasonable steps taken by the respondent in securing agreed terms of reference and in addressing the concerns of the respective parties was dilatory or gave rise to unreasonable delay in carrying out the investigation.

40. In a letter dated 26th November, 2014, the applicant's solicitors stated that their client had suffered stress and anxiety and damage to his mental health as a result of the complaint and other matters which were currently in issue. He was under care but remained vulnerable. This vulnerability made it absolutely imperative that he have legal representation. In a letter dated 18th December, the Chief Executive made reference to the applicant's mental health and that he was suffering from anxiety and stress. He

added:-

"It is a matter of concern to me and LCETB as employer that you state that he is *'in receipt of medical treatment and care but remains vulnerable'*. You will be aware that Ms. Shelagh Graham has offered Mr. M. and his family psychological support through our Employee Assistant Programme (EAP). Mr. M. requested the financing of support outside of our EAP. This was granted and Mr. M. has availed of this and attended a number of sessions which have been extended at his request. However, on the basis of your statement that Mr. M. is currently in receipt of medical treatment and care, it is incumbent on the LCETB to be assured that Mr. M. is medically fit to engage in the procedures currently in train. Accordingly, the LCETB will require (him) to be assessed by Medmark which is the appointed public service occupational health assessor. An appointment will be set up and details will be forwarded to (him)."

41. The investigators informed the applicant by letter dated 12th January, 2015, that because of queries raised by the ASTI representing the complainant concerning the terms of reference, the presence of legal representation and other related matters, it was requested that the investigation be placed on hold until these issues have been resolved. Therefore, the investigation was further delayed.

42. By further letter dated 2nd February, 2015, to the applicant's solicitors, the Chief Executive indicated that following representations from the complainant's representatives, an addendum had been agreed for inclusion in the terms of reference. They were said to be standard elements of any investigative process and were to be inferred from the current terms of reference. They included:-

- "• The definition of sexual harassment to be employed in the investigation would be the definition of sexual harassment contained in the Employment Equality Acts.
- A rationale for the finding in respect of each element of the complaint will be provided by the Investigation Team stating whether each element of the complaint is upheld, not upheld or ruled out. In addition, that an overall finding would be provided in respect of the extent to which, if any, harassment/sexual harassment occurred.
- All witness statements will be provided to both parties for commentary. Both parties will be given the opportunity to provide further information/observations on any written submissions or statements furnished including the typed notes of any interview held, prior to any findings being made by the investigators.
- Parties will not be confined to the written statements furnished and will be allowed to elaborate on and provide clarification during interviews with the investigators.
- Parties may be represented in this process by a trade union representative and/or legal representative at any and all stages of this process. Legal representatives will not be allowed to cross-examine either party.
- It shall be a requirement that witnesses and the parties to the investigation agree to keep matters discussed and documents disclosed in the course of the investigation, strictly confidential."

43. By letter dated 12th February, 2015, the applicant's solicitors complained about the unilateral changes to the terms of reference thereby proposed. In particular, it was noted that clause 16 of the terms of reference stated that if during the course of the investigation additional matters relating to the original complaint arose, the Investigation Team would notify parties to the complaint of any such information and provide an opportunity to the complainant to respond. In particular, it was stated that no new complaints would be brought into the investigation. However, it was now proposed that parties would not be confined to the written statements furnished and would be allowed to elaborate by clarification during interviews with the investigators. This was considered to be a radical departure from the original position adopted by the respondent.

44. Objection was also taken to the absence to the right to cross-examine. It was submitted that the applicant should be afforded an oral hearing into the complaint at which both the applicant and his witnesses and the complainant and his witnesses could be confronted, challenged and cross-examined. It was stated:-

"Our client is an office holder. The allegations made against him have been deemed by LCETB to be capable of constituting gross misconduct justifying his dismissal. The effects on his reputations and standing both personal and professional and his health have been referred to already in this letter previously. The complaint comprises factual allegations. There are factual matters which our client wishes to put to the complainant – through his legal representatives – to rebut the complainant's allegation. Our client has no difficulty in presenting himself and his witnesses for cross-examination by the representatives of the complainant. Given all of these circumstances we cannot see any argument against an oral hearing and, in fact, it is our client's position that fair procedure and natural justice require that an oral hearing should be conducted. To deprive our client of the chance to confront and challenge his accuser can serve no purpose other than protect the accuser."

45. It concluded by stating that there was nothing in Circular 59/2009 which excluded the holding of an oral hearing which was necessary in this case.

46. The respondent by letter dated 27th February, 2015, addressed some of these issues. In particular, it was not accepted that the terms of reference had been altered. It was stated that clause 16 of the terms of reference applied but that in the course of an investigation, clarification may be sought of aspects of a complaint and of the responses given by the applicant. This addressed the need for both parties to speak about and address the complaint. Otherwise, the investigators would be reliant solely on written statements.

47. The letter confirmed that neither party's legal representatives would be allowed to cross-examine the other party or their witnesses.

48. It is clear that a structure was in place by the end of February 2015 for an investigation by investigators as to whether the applicant had a case to answer in respect of the allegations of gross misconduct. The court does not accept that the process was unreasonably delayed by the respondent. A considerable effort was made to meet the concerns expressed by the applicant about the terms of reference and later by the complainant. The representations by both sides were carefully considered by the respondent and a number of them were accepted. Unfortunately, the applicant's health deteriorated from in or about November, 2014 which eventually led to the suspension of the process on 8th April, 2015.

The Second Complaint - Alleged Abuse of Teaching Hours

49. While the correspondence set out above was occurring, a second complaint arose concerning the alleged assignment of a teacher to provide tuition on a one to one basis on the subject of agricultural science to the applicant's daughter as part of his contracted 22 weekly hours. It is alleged that the assignment covered five periods per week in the school year 2013 to 2014. By letter dated 3rd September, 2014 the applicant was informed that the Head of Human Resources (Ms. Graham) had made initial enquiries and submitted a report to the Chief Executive (also dated 3rd September) that the teacher concerned may have been assigned by the applicant to undertake these duties in May 2013. It was alleged that the classes were not listed in the school's official timetable and that agricultural science was not a subject taught in the school as part of the curriculum. It was indicated that the teacher "appears to be being paid by the ETB for teaching those classes as part of his contracted hours". It was alleged that these events raised the possibility of the unethical assignment of a teacher to provide instruction to the applicant's daughter within the teacher's 22 hour timetable and the possible fraudulent use of state monies for personal gain. If these facts were substantiated it was alleged that this "could constitute gross misconduct which could lead to a sanction up to and including dismissal."

50. The letter stated that the matter fell to be dealt with under the terms of Circular 59/1009 and in particular Stage 4 thereof. The applicant was informed that the Chief Executive intended to initiate an investigation into the matter details of which would be furnished as soon as possible. It was stated that as the applicant was already on "administrative leave/suspension in relation to another matter" and "as a precautionary measure only" that administrative leave/suspension would also apply in this case. He was informed that he should not contact the Deputy Principal or members of school staff, enter the school premises at any time or interfere with or use the school I.T. system until the conclusion of the process. The applicant was furnished with a preliminary report on the matter from Ms. Graham which it was proposed to discuss with him in the near future. It was observed that if the applicant accepted that the report was accurate further investigation might be deemed unnecessary and the issue could be dealt with under Circular 59/2009. However, if his preliminary response suggested that the enclosed preliminary report did not accurately state the facts "a more full investigation would be required." It was stated that no final decisions would be reached until the completion of a full investigation and "if appropriate the disciplinary process pursuant to C/L59/2009".

51. Ms Graham's preliminary report stated that agricultural science did not form part of the curriculum of the school and was therefore not on offer as a choice in the school year 2013/2014. The applicant's daughter was taught agricultural science on a one to one basis by a teacher in the school for a total of two hours fifteen minutes per week of the teacher's contracted hours. Ms. Graham established the identity of the teacher and held an interview with him which she summarised:

"[The teacher] stated that he was approached by [the principal] ...in May 2013 and asked if he would teach [his daughter] a leaving cert student...agricultural science on a one to one basis for the school year 2013/2014....

[The teacher] was given five class periods during which he taught [the student] agricultural science. [The teacher] states that [the principal] told the teacher ...that if asked why he was providing this tuition that he should say the tuition was being provided on a voluntary basis.

Nonetheless as the timetable shows, two hours fifteen minutes of the tuition was occurring during [the teacher's] contracted 22 hours. [The teacher] states that he was uncomfortable with the situation but did not feel in a position to refuse the principal at that time.

The five class periods assigned to agricultural science coincided on the sixth year timetable with Accounting which [the student] had studied in 2012/2013. She gave up the study of Accounting and replaced it with Agricultural Science for the school year 2013/2014. [The student] was facilitated in the school to sit the Leaving Certificate Examination in Agricultural Science in June 2014.

In the previous year 2012/2013 [the teacher] was timetabled for 22 hours which included a two hour period to cover detention. This detention period was omitted from [the teacher's] timetable in 2013/2014."

52. By further letter dated 11th September, 2014 the Chief Executive acknowledged the receipt of a reply to his earlier letter by text. He now raised what he regarded as serious matters which had arisen relating to both allegations. In particular, the Chief Executive drew attention to the fact that the applicant's wife and daughter had visited the teacher concerned in the allegation concerning the Agricultural Science lessons on 9th September to discuss these matters with him. This was stated to be highly inappropriate and improper and an intrusion into the teacher's private and family life to discuss matters related to the applicant's professional life which had caused upset to him and his family. The Chief Executive stated that the teacher was a witness in the investigation into the Agricultural Science matter and that the visit could constitute interference with a witness. It was alleged that there was an inappropriate reference by the applicant's wife in the absence of his daughter to the sexual harassment complaint. This raised the possibility of a breach of confidentiality of that process "wittingly or otherwise". The point was also made that his wife and daughter appeared to have been in possession of personal data relating to the teacher such as his telephone number and address and that his wife had previously telephoned the teacher on a previous occasion concerning the matter. This was said to be a clear breach of data protection legislation which might also require some investigation. As a result, in order to avoid a repetition of this incident and as a safeguard to all involved the applicant was instructed not to make contact personally or through any other person acting on his behalf with any staff member or the relatives of any member of staff. However, should he need to contact a member of staff to assist in matters relevant to the investigations into the allegations made he should seek the express permission in writing of the Chief Executive. An issue was also raised with the applicant concerning a recent article in the Limerick Leader which reported that a spokeswoman on his behalf issued a statement to the press on matters relating to the operation of the school which was followed by further coverage on a local radio station. He was therefore instructed not to respond to media queries or issue statements to the media or have statements issued on his behalf to the media on any matters relating to the operation of the school. This was said to be a matter for the respondent.

53. By reply dated 17th September, 2014, the applicant's solicitors took issue with a number of matters raised by the Chief Executive in his letters of the 3rd and 11th September. The applicant rejected any wrongdoing in relation to the allegation concerning the Agricultural Science lessons. The authority of the Chief Executive to interfere with his communications with the Deputy Principal or any member of staff was questioned. The applicant would not contact any named complainant or staff member during school hours while an investigative or disciplinary process was ongoing but would remain free to communicate for the purpose of defending himself. His solicitors objected to the involvement of the Chief Executive or Ms. Graham in any investigative or disciplinary process.

54. It was stated that the teacher referred to in Ms. Graham's report had been a family friend of the applicant and his extended family for a number of years. He could have refused to see the applicant's wife and daughter when they visited but did not do so. It was not understood that the teacher was the complainant or a witness. The applicant's wife had the teacher's phone number for quite some time and was well aware of where he resided. The reference to a breach of data protection legislation was described as absurd.

55. In a letter of the 2nd October, 2014 (already referred to in respect of the first complaint) the Agricultural Science class issue was raised by the Chief Executive. He restated the nature of the complaint and noted that a significant amount of detail was provided to the applicant in the letter of the 3rd September in the attached report. He was advised that there would be a further investigation. The Chief Executive acknowledged the applicant's denial of any alleged wrong-doing and confirmed that when the allegation was put to the applicant at the end of an earlier meeting with the Chief Executive he had stated that it never happened.

56. He stated that he was entitled as the applicant's employer to make reasonable requests in the interest of allowing an investigation to proceed including requests related to staff. He restated his concern about contact with the teacher by telephone and a subsequent visit by the applicant's wife and daughter to discuss the Agricultural Science lessons. He reported that the teacher expressed his "deep concern at these intrusions" to the respondent as his employer. He also noted that the teacher stated that when his wife admitted the applicant's wife and their daughter to the house she did not recognise them.

57. In a further letter dated the 31st of October, 2014, the Chief Executive having addressed a number of other matters stated in the last paragraph that the investigation in respect of the Agricultural Science issue was ongoing and nearing completion. On its completion the relevant documentation would be forwarded to the applicant for his response. He also advised the solicitors that it had just been brought to his attention in the course of the investigation into the Agricultural Science matter that similar instances of one to one teaching of the applicant's children may also have occurred over a period of time in the school and that any documents and statements to that effect would also be furnished to the applicant once those facts had been established.

58. By letter dated 12th November, 2014 the applicant was informed that Mr. Ciaran Flynn had been appointed to investigate the Agricultural Science matter and the terms of reference of his appointment were enclosed. The investigator was requested to interview the Agricultural Science teacher concerned, the Deputy Principal and any other persons deemed appropriate. He was to take statements from them and furnish the applicant with a copy of same and any other documents he deemed appropriate. He was to meet with the Principal and any other persons or witnesses requested by him and take a statement from those persons. He was to ask all persons from whom statements were taken to verify and sign the statements as a true and accurate record of the interview. He was to conduct the investigation in as timely a manner as possible with a view to concluding the investigation on or before 30th November, 2014 or as soon thereafter as possible. He was to prepare a report for the Chief Executive setting out the findings of the investigation.

59. The applicant's solicitors wrote on 1st December noting that the letter of 3rd September indicated that the matter would be dealt with under Stage 4 of Circular 59/2009 which provided that

"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 and forwarded to the CEO. A copy will be given to the Principal."

It was pointed out that the Stage 4 procedure also provided that the CEO should notify the Principal of his decision and any intended disciplinary action if that is the outcome of his deliberations. If disciplinary action was required, the CEO might consider a number of sanctions:-

- deferral of an increment
- withdrawal of an increment or increments
- demotion (loss of Principal's allowance)

The letter stated that the solicitors deemed it "extraordinary" that the Chief Executive suspended the applicant and placed him under restrictions at the outset of the Stage 4 process which did not provide for suspension or dismissal. The letter sought confirmation that the current investigation would be carried out under Stage 4 and that in those circumstances there was no allegation of gross misconduct and no question of any sanction being imposed outside that expressly provided for in Circular 59/2009.60. In respect of the terms of reference his solicitors complained that the investigator had interviewed other members of staff about matters not solely related to the Agricultural Science issue but alleged that the investigator was now under instruction to carry out a "fishing expedition" in order to seek out evidence to be used against their client. The solicitors alleged that the Chief Executive was attempting to build a case of gross misconduct against their client through an investigative process which was not applicable to allegations of gross misconduct. They complained that their client was denied procedural fairness and natural justice and prohibited from contacting staff members who might assist him in refuting these allegations. They complained of gross unfairness, bullying and harassment by the Chief Executive and Ms. Graham. They stated that their client suffered and continued to suffer grievous harm to his mental health and reputation.

61. In a reply dated 18th December the Chief Executive noted the reference to Stage 4 procedures and complaints made in respect thereof. He stated:

"... However, I wish to make it clear that the section of [Circular] 59/2009 that is being applied in this instance is the gross misconduct section. The reference to the establishment of the investigation under Stage 4 of the procedure is a misprint. The investigation that has been initiated has been done so under the gross misconduct section of Circular 59/2009. Therefore, please be advised that the sanctions that may be applied in the event that the allegations are upheld include any and all sanctions up to and including dismissal. In my letter to [the applicant] of September 3rd, 2014, this was clearly stated ..."

The relevant section from that letter is quoted which states that if the facts were found to be as alleged "this could constitute gross misconduct which could lead to a sanction up to and including dismissal." It also stated that the matter would be dealt with under the terms of Circular 59/2009.

62. The Chief Executive also referred to the allegations of a "fishing expedition". He stated that the investigator was obliged to pursue facts relevant to the investigation as they emerged during the course of his inquiries. It was open at all times to the applicant in his response to any allegations made to seek permission from the employer to contact members of staff whom he believed could be of assistance to him in the matter. The Chief Executive denied that there was any bullying or harassment of the applicant.

63. On 12th January, 2015 the investigator sent an e-mail requesting a meeting with the applicant on the 20th January in respect of the Agricultural Science issue. The applicant was informed that the investigator met a number of the school staff and enclosed copies of statements made by them. Hard copies and other documentation would be furnished directly. It is clear from the attached

documentation that interviews were conducted and verified by the interviewees between 1st October, 2014 and the 7th November, 2014.

64. The applicant solicitor replied to the Chief Executive's letters of 18th and 22nd of December on 13th of January, 2015 after the Christmas break. Clearly, the solicitors did not accept the explanation that the reference to the Stage 4 process was a "misprint". They complained about the request by Mr. Flynn for a meeting on the 20th of January the email having been received on the 12th. The period was too short. They sought an explanation as to why Stage 4 was referred to as a "misprint". Some clarification as to what matters were under investigation was also sought. The solicitors requested a copy of all communications between the respondent and investigator and a list of all personnel interviewed for the purpose of the investigation together with a copy of their interview notes. They required access to school records, computers and timetables and a private meeting between the applicant and the Deputy Principal and any other relevant persons whose names would be furnished to the Chief Executive. At the same time the applicant's solicitors wrote to the investigator stating they had raised these matters with the Chief Executive and would not therefore be in a position to engage in the investigation until such time as these issues had been addressed "to our satisfaction".

65. The investigator also wrote to the applicant on 13th January enclosing hard copies of documents concerning his investigation. He outlined that he would be available to meet the applicant on 3rd, 12th or 13th February. He noted that he had to have his report concluded by 20th February and though he was reluctant to conclude a report without meeting the applicant, he stated that if he could not arrange to meet him on any of the dates proposed he would be finalising his report without his involvement and would submit same to the respondent.

66. On 27th January, 2015, the Chief Executive wrote to the applicant's solicitors informing them firstly that Circular 59/2009 had been revised and that a new Circular 71/2014 had issued. The main provisions of Circular 59/2009 had been retained. There was no alteration to the applicable procedures.

67. The Chief Executive stated that he wished to make clear that the section of Circulars 59/2009 and 71/2014 that was being applied was the "gross misconduct section". He repeated that the reference to the establishment of the investigation under Stage 4 procedure was a "misprint". The investigation was initiated under the gross misconduct section of Circular 59/2009 which did not contain a specific procedure for the conduct of an investigation and that:

"An investigation is an investigation and the process to be applied in any investigation will be of a similar nature. Any investigation must be open, transparent and objective. Therefore, it is not possible for you to argue that the investigation to be conducted is that as provided for in Stage 4 of the procedure specifically."

68. At para. (ii) of the letter the Chief Executive stated that the matter under investigation was the allegation that Mr. M. as the person who has ultimate responsibility for the management of the school arranged to assign a teacher to teach Agricultural Science on a one to one basis to his daughter as part of the teacher's contracted 22 weekly hours. This instruction allegedly covered five periods per week throughout the school year. In addition, in the course of that investigation it had emerged that the applicant may have assigned other teachers to teach his other children on a one to one basis and specifically that:

(a) A teacher may have been assigned to teach the applicant's son Accounting on a one to one basis in the 2012/2013 school year.

(b) A teacher may have been assigned to teach his two daughters Mathematics together on their own over a two year period in the 2008/2009 and 2009/2010 school years.

It was stated that if these allegations were upheld the assignment of a teacher to instruct his children on a one to one basis as part of the teacher's contracted timetable hours would constitute

- unethical behaviour of (the applicant),
- a breach of trust between (the applicant) and his employer...
- a fraudulent use of state monies for personal gain."

69. It was noted that copies of communications between the respondent and the investigator would be forwarded and that a list of personnel interviewed and their statements would be forwarded to the applicant by the investigator. All relevant documentation including school records, computerised data, and timetables would be supplied to the applicant on receipt of a list of what was required. The applicant would be afforded an opportunity to meet with the Deputy Principal on Friday 6th February 2015 at 1.30 p.m., a time which would minimise school disruption. The Chief Executive requested a list of "other relevant persons" with whom the applicant wished to discuss the issues before the end of term. The facility was contingent on those persons agreeing to meet with the applicant.

70. On 3rd February 2015 the applicant solicitors again complained that the failure to acknowledge that the word "misprint" was simply masking an error which the Chief Executive had made. A complaint was made that a different procedure was now being adopted and furthermore a procedure that was different to that applied in respect of the sexual harassment complaint. The key differences were said to be (a) that their client was excluded from any participation in the process and (b) was not afforded a say in the appointment of the investigator and had no opportunity to assess his qualifications. The solicitors complained that the complainant had not been identified. He also complained about the lack of access to school staff and the school's computer system and what were said to be unreasonable restrictions. He objected to the continuation of Mr. Flynn as investigator. He was accused of having an agenda to finalise an investigation with a view to making a finding against their client. He was making it impossible for their client to prepare a defence to the allegations by setting unreasonably short periods for reply in order to achieve an adverse result against their client. He had failed to engage with their client and had presented materials on a piecemeal basis to him.

71. In summary, the solicitors alleged that the applicant had been suspended pending investigation in respect of allegations which he strenuously denied. The motives of the Chief Executive and Ms. Graham were questioned. Mr. Flynn had been appointed without agreement or consultation to carry out the investigation and the terms of reference were not agreed with their client. Mr. Flynn had unrestricted access to meet with members of staff during school hours and unfettered access to school records. Their client had not been contacted by Mr. Flynn prior to 12th January, 2015, two months after being advised of his appointment following which he sought an early meeting with their client on the 20th of January, eight days later. The Chief Executive failed to address serious issues raised in respect of the investigation. Though interview dates were offered by Mr. Flynn up to 13th February, the applicant had received further documentation on 2nd February, 2015.

72. The letter concluded by pointing out that the last letter from Mr. Flynn on 28th January led to "a dramatic worsening of our client's stress condition". He was advised not to engage further in the process this time. Fourteen days of rest were recommended.

73. The Chief Executive replied on 18th February that it was not necessary to nominate a complainant under the disciplinary procedure set out in Circular 71/2014. The situation arose because allegations against the applicant were advised and reported by Ms. Graham, as Head of Human Resources and "she would present the disciplinary issues which [the applicant] would be required to address." It was confirmed that all documentation relevant to the allegations had been supplied to the applicant and the complaints were repeated. It was noted that the investigator did not have unrestricted access to the I.T. system and it was necessary that the respondent should maintain control over access to its I.T. systems which contains information not relevant to matters in hand. The Chief Executive repeated the offer to facilitate access to staff and I.T. records.

74. In conclusion the Chief Executive noted that the applicant's health had been raised again by the solicitors. He stated that it was the policy of the respondent to refer employees in respect of whom there is a health concern to Medmark the occupational health service appointed by the Department of Education and Skills. It was proposed therefore to procure an early appointment for the applicant with Medmark.

75. By letter dated 6th March, 2015 the Chief Executive made further proposals in order to facilitate access by the applicant to the I.T. system under supervision. He also sought a list of the relevant persons with whom the applicant might wish to speak following receipt of which arrangements could be put in place for those who were willing to meet with the applicant. If no response was received by March 13th, the investigator would be authorised to complete his report.

76. By this time the applicant had been examined by a doctor at Medmark on 6th March who formed the opinion that the applicant was not fit to engage in any process for a period of at least eight weeks. The solicitors complained that the applicant should not be required to respond to the latest letter from the Chief Executive in these circumstances.

Suspension of Process

77. The applicant was referred to Medmark by the respondent on 20th February, 2015. As a result of the medical opinion obtained on 6th March the Chief Executive wrote on 8th April to Sweeney McGowan, solicitors indicating that the process was suspended until the respondent was informed that the applicant was declared fit to engage in the process by Medmark. The applicant was to be further reviewed on the 8th of May, 2015. On that date he was again found medically unfit to work and a review date following further treatment was advised to take place six to eight weeks later. He was deemed not to be in a position to return to work or engage with his employer.

78. The issue concerning the applicant's mental health was first raised by the applicant's solicitors in November 2014 and addressed by the respondent on 18th December, 2014 when it was indicated that it was incumbent upon the respondent to ensure that the applicant as its employee was fit to engage in the process.

79. The applicant then sought leave to apply for judicial review on 9th June, 2015. This was at a time when the process was still suspended by the respondent because it had been advised that the applicant was not to partake or engage in or with the process.

Investigator's Report on the Second Complaint

80. The applicant complained that notwithstanding the suspension of the investigation in respect of the agricultural science lessons allegations a report was submitted by Mr. Flynn to the respondent in April 2015. The final sentence of the report states a conclusion that having considered all the materials gathered in the course of the investigation "there is a case to be answered on the part of [the applicant] in relation to the timetabling of agricultural science in year 2013/2014 and the timetabling of accounting in the year 2012/2013".

81. There was no evidence to substantiate allegations made in respect of mathematics classes allegedly arranged for his two daughters in the years 2008/2009, 2009/2010, 2011/2012 and 2012/2013. On 10th June, 2015 the Chief Executive wrote to the applicant's solicitors informing them that the report was completed. The report was then forwarded. It was suggested that since the applicant had instituted legal proceedings, he was now in a position to engage in the process and a response was requested.

Suspension of Sexual Harassment Investigation

82. The Chief Executive states in his replying affidavit that he received no response to the mental health issues in the proposed reference to Medmark from the applicant's solicitors arising from his letter of December 18th, 2014. The referral was made to Medmark as stated above on 26th February, 2015. Following the medical examination, the investigation into the sexual harassment allegation was also suspended. It is clear that in respect of the applicant, the respondent was unable to procure his engagement until medical clearance was given that he was fit to do so.

83. There is no evidence of any further medical assessment by Medmark confirming the Chief Executive's opinion as expressed in his letter of 10th June and the formal lifting of the suspension of the investigations was not addressed further by either side in correspondence.

Circular 59/2009 and Circular 71/2014

84. Circular 59/2009 under which the investigations were initially initiated was replaced by Circular 71/2014. If a process concerning a disciplinary issue had commenced under Circular 59/2009 it would continue using the revised procedures contained in Circular 71/2014. The introduction to the section on "Procedures for Principals relating to their work conduct and matters of professional competence in their role as Principals" states *inter alia* that isolated issues or omissions of a minor nature would where possible be dealt with informally. The procedure for dealing with minor matters of misconduct might involve a number of stages ranging from an informal to a formal stage under Stages 1 to 3 which may at the end of the process result in disciplinary action (up to and including dismissal). However, the disciplinary procedure would normally follow these progressive stages. The procedure may be commenced by the school at whatever stage of the process was appropriate to the issues raised.

85. The informal stage under the disciplinary scheme consisted of stage 1 involving verbal warnings, stage 2 written warnings and stage 3 final written warnings. These stages do not apply to cases of "gross misconduct".

86. Gross misconduct under the process includes "serious bullying, inappropriate behaviour, sexual harassment or harassment against an employee ..." and "fraud or deliberate falsification of documents". Gross misconduct may also relate to an act which allegedly took place outside the school where it gives rise to a serious concern on the part of the Chief Executive in relation to the health and safety of the students and/or staff of the school.

87. The Circular also states that

"If there is an allegation of serious misconduct, the principal may be suspended on full pay pending an investigation and the conclusion of any appeal process".

88. The rights of the principal are summarised as follows in respect of an investigation

"In the course of investigation, the Principal concerned has the right to have the allegations brought to his/her attention and he/she has the right to respond to all allegations. If the investigation upholds a case of serious misconduct the normal consequence will be dismissal."

89. The following procedure applies under Stage 4 to allegations of gross misconduct.

"If it is perceived that the ... conduct issue is of a serious nature, a comprehensive report on the facts of the case will be prepared and forwarded to the CE (Chief Executive). A copy will be given to the Principal.

In accordance with the provisions of the Education and Training Boards Act 2013, employment matters including the suspension/dismissal of staff are executive functions. Consequently, the following procedures will apply.

4.1 The Principal will be provided with an opportunity to attend at a meeting with the CE (Chief Executive) accompanied by his/her trade union representative/s or a colleague subject to an overall maximum of two.

The Principal will be given at least seven day's notice of the meeting. The notice should state the purpose of the hearing and that disciplinary action may be considered.

At the meeting the Principal will be given an opportunity to make his/her case in full and to challenge any evidence that is being relied upon for a decision.

Following the hearing, the CE will make his/her judgment on the matter. In formulating his/her judgment the CE will take account of the report from the EO/Officer delegated by the CE and the other officer delegated by the CE and any other evidence of the Principal's representation (if any) thereon.

The CE shall notify the Principal of his/her decision and any intended disciplinary action, if that be the outcome of his/her deliberations. If it is decided to take disciplinary action, the CE may avail of any of the following range of sanctions.

...

- Suspension (for a limited period and/or specific purpose) with pay
- Suspension (for a limited period and/or specific purpose) without pay
- Dismissal

Where disciplinary action short of dismissal is proposed the case will be reviewed by the CE within a specified time period to consider whether further disciplinary action, if any, is required.

The CE will act reasonably in all cases when deciding on the appropriate disciplinary action. The nature of the disciplinary action should be proportionate to the work or conduct issue that has resulted in the sanction being imposed."

90. Stage 5 provides for an appeal in respect of any disciplinary action proposed. The Principal may appeal any sanction imposed under stage 4 of the procedure to a disciplinary appeal panel appointed by the Chief Executive as set out in appendix A to the procedure. The Appeal Panel must include an independent chairperson from the panel nominated by the Minister of Education and Skills, a representative of the recognised management body and a nominee of the relevant trade union. No person may be appointed to the panel to consider a case who has any prior interest in or dealings with that particular case. An appeal may be brought on the grounds that the provisions of the procedures were not adhered to, that all relevant facts were not ascertained, were not considered or not considered in a reasonable manner. The Principal may submit that he was not afforded a reasonable opportunity to answer the allegation or could not reasonably be expected to have understood that the behavior alleged would attract disciplinary action or that the sanction recommended is disproportionate to the misconduct alleged.

91. The procedure provides for written submissions or statements requesting the appeal and a replying submission from the employer. A date for the hearing will be set by the panel on the receipt of completed submissions. The panel may "at its sole discretion" invite any person to give evidence orally or in writing. It should also consider and decide on any request from a party to the procedure to give evidence orally or in writing. The Principal may make all submissions either in person or through a serving teacher or full time official of a trade union. If the panel convenes for the purpose of taking oral evidence or submissions the Principal, any person entitled to make submissions on behalf of the Principal, the Chief Executive of the ETB and any other person who the panel agrees may be present. Proceedings shall be informal.

92. Having made such enquiries as it considers necessary and considered any submissions made or evidence given the panel must form an opinion as to whether or not grounds for review of the case have been established and issue its opinion within ten days of the hearing to the Chief Executive, the Principal concerned and his/her representative. The Appeal Panel may, if it decides that a case for review has been established by the Principal concerned recommend that no further action should be taken in the matter. It may conclude that the disciplinary action decided upon should be amended or that the case should be reconsidered to remedy a specified deficiency in the disciplinary procedure. Where it forms the opinion that a case for review has not been established the Chief Executive will proceed with the disciplinary action. The final decision in respect of an Appeal Panel recommendation rests with the Chief Executive who must set out in writing the basis for any decision.

The Challenge

93. The investigation into the sexual harassment case has yet to conclude and is challenged on the grounds that the applicant has not been accorded fair procedures and natural justice in the disciplinary process adopted by the respondent. It would appear that the

investigation in respect of the school lessons case has concluded in that the investigator submitted a report on the matter to the Chief Executive in April 2015. This process is also challenged.

94. A number of the grounds relied upon are common to each complaint. It is claimed that the applicant was wrongfully suspended during the investigations, that the investigations were unreasonably delayed so as to cause irreparable damage to his personal and professional reputation and health, that the decisions made by the Chief Executive and Ms Graham were tainted by bias and their involvement in the process breached the rule *nemo iudex in causa sua* and that the breach of his right to fairness of procedures as set out in the affidavits and exhibited correspondence have rendered the process so unfair as to justify injunctions restraining its continuance.

95. The respondent claims that the application is not one appropriate to a public law remedy under O. 84 of the Rules of the Superior Courts but arises out of a contract of employment which is a private law issue. Furthermore, the respondent claims that if it is appropriate to seek relief under O.84 the application is out of time and no extension of time grounded on an appropriate affidavit has been sought under Order 84.

A Public Law Issue?

96. The court is satisfied that this application was properly brought by way of judicial review. The applicant is a principal employed at a secondary school. The statutory powers and functions in relation to his employment are vested in the Chief Executive of the respondent pursuant to the provisions of the Education and Training Boards Act 2013. (*Beirne v. Garda Commissioner* [1993] ILRM 1: *O'Donnell v. Tipperary (South Riding) County Council* [2005] 2 I.R. 483; *O'Connell v. the Turf Club* [2015] IESC 57 and *Zhang v Athlone Institute of Technology* [2013] IEHC 390). The source of the Chief Executive's power is statutory and there is clearly a public dimension to the source and nature of the powers exercisable by him in respect of the employment and dismissal of principals under the respondent's control. The principal occupies an important and senior managerial role in a secondary school providing educational services of great importance to the school and the wider community. His role has a particular social value in the community. There is a considerable public dimension to his contract of employment. I am satisfied in the light of the more recent Supreme Court authorities that the protective umbrella of judicial review has been extended to cover this type of case and have superseded what might be regarded as a more traditional view of the limitation of judicial review in a case of public employment in education addressed in *Becker v. Board of Management St Dominick's Secondary School Cabra* [2005] IEHC 169.

Extension of Time

97. Order 84, rule 21 (3) of the Rules of the Superior Courts (S.I. No. 691 of 2011) provides:

"(1) An application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose.

...

(3) Notwithstanding sub-rule (1), the court may on an application for that purpose, extend the period within which an application for leave to apply for judicial review may be made but the court shall only extend such period 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".

98. Under O. 84, r. 21(5) an application for an extension of time must be grounded upon an affidavit sworn by or on behalf of the applicant which sets out the reasons for the applicant's failure to make the application within the prescribed period and verifying the facts relied upon in support of those reasons.

99. The applicant seeks permanent injunctions restraining the continuation of the investigation into the sexual harassment allegation made on the 9th July, 2014 and the agricultural science lessons allegations first notified on 3rd September, 2014. The applicant did not and does not now seek to quash the decisions to place him on administrative leave or suspension at the time of the initiation of the investigations into these allegations.

100. The application for judicial review must be made within three months of the date upon which the grounds for doing so first arose. It is submitted that the applicant is out of time. The applicant submits that the delay in initiating these proceedings was caused by a reasonable reluctance to do so when he sought through his solicitors to resolve issues which he had raised concerning fair procedures with the respondent's Chief Executive. There was extensive and detailed correspondence set out above which evidenced a desire to secure fair procedures in the investigative process within a reasonable time. It is submitted that it would be unfair to allow the respondent to rely upon its own default and delay in addressing these issues by alleging that this effluxion of time during the period of correspondence deprived the applicant of his entitlement to challenge flawed procedures which he identified and sought to remedy.

101. There is very substantial reliance placed upon the delay by the respondent in bringing the investigated process to a conclusion as evidence itself of breach of procedures. It is claimed that the applicant was subjected to a suspension for an unreasonable period due to an inadequate investigative procedure which prevented the fair conclusion of an investigation within a reasonable time.

102. Both investigations were suspended on 8th April, 2015. The application for leave to apply for judicial review was made on 8th June. The applicant submits that this was well within the period of three months and occurred at a time when the applicant could no longer realistically expect that, if the processes were ever to resume, they would be conducted fairly. It is submitted that even if now conducted fairly, the damage inflicted upon his health, career and reputation are irreversible. It was alleged that the process was fundamentally flawed by reason of the delay taken up to that date.

103. The complaints were initiated on 9th July, 2014 and 3rd September, 2014. No substantive decision had been taken in respect of the complaints by April 8th, 2015: indeed the investigative process was continuing during this period. The applicant claims that at all times he sought an expeditious procedure. He raised numerous complaints about the fairness of the procedures applied by the

respondent. Some of these were addressed. For example, in respect of the first complaint the applicant's solicitors succeeded in procuring an entitlement to legal representation when meeting with investigators. It is claimed that until the processes were suspended he was entitled to take the view that the respondent might address further the issues which had been raised by his solicitors in respect of the investigations. It is therefore submitted that it was the suspension of the processes on the 8th April that triggered the grounds for the application. I am not satisfied that this was or could be so.

104. The medical issue in this matter had been raised in December 2014 and the respondent indicated his intention to address the issue. It did so by referring the applicant to Medmark for a consultation. No representation or response was made to the Chief Executive's concerning this step either encouraging or discouraging it. No medical report was submitted to support the assertions made about the applicant's health during the course of this procedure. The suspension of the process arose from the medical opinion obtained following the reference made by the Chief Executive on 22nd February, 2015.

105. If grounds for judicial review existed regarding the absence of fair procedures, it is clear from the correspondence that these were deemed to exist prior to the suspension of the investigations on 8th April. The court is satisfied on the correspondence which at times was highly charged, that these grounds were certainly raised prior to the end of February 2015. By 2nd February, 2015 it was clear that all of the matters raised had been addressed but not necessarily to the satisfaction of the applicant. By that time, it was clear that the respondent did not accept that the applicant's solicitors should have the right to confront and cross-examine witnesses before the investigators or have the issues investigated and determined by a senior counsel. I am satisfied that these issues had by that time crystallized between the parties but dialogue was continuing.

106. It is correct to say in respect of the second complaint that complaints as to the unreasonable time period within which submissions had to be received and the late furnishing of documentation led to a shifting of those dates in order to afford the applicant further time to respond. By that stage a medical assessment had been arranged for 6th March which itself resulted in an interruption of the process before its suspension. The delays in that particular process were canvassed extensively in January 2015. Indeed, the *bona fides* of the investigator had already been questioned. The application for leave to apply for judicial review might on one view reasonably be regarded as outside the three month period having regard to the fact that many of the grounds as set out in the application were clearly within the knowledge of the applicant by the end of February 2015. However, it is also clear that matters were in a state of uncertainty during much of the period as to what final form the procedure would take and that the applicant's mental health had been raised as an issue of considerable concern in November 2014.

107. In December 2014 serious concern had been expressed by the respondent as to the applicant's fitness to continue his engagement in the process as a result of the representations made by the applicant's solicitors and he expressed an intention to refer him for medical assessment. The referral took place in February 2015 and the first appointment was 6th March a period which overlapped with the continuing correspondence agitating the applicant's concerns about matters which are relevant to the grounds advanced in support of this application. The process was suspended on 8th April.

108. The court is concerned that following the suspension of the process the investigator submitted a report to the respondent in respect of the second complaint before the applicant had recovered sufficiently to enable him to re-engage in the process. It is clear that the applicant's objections to the procedures followed were ongoing up to and beyond the referral for medical examination. Though many of the issues separating the parties were clear by that stage I am not satisfied that the grounds for review had completely crystallised and the correspondence on outstanding matters suggests a changing situation which the applicant's solicitors were making continuing efforts to address. Indeed, the applicant's case is based on a claim of unreasonable delay that was arguably continuing beyond the suspension and up to June 2015. I am therefore satisfied that the applicant should not be regarded as falling outside the time limit of three months for the initiation of the leave application.

109. The applicant's mental state was a concern to the respondent from December 2014 and resulted in the medical opinion of 6th March that he was not fit to engage in the process. The court is satisfied that even if the time limit of three months were deemed to run from 27th February, 2015 and had expired, there is evidence that the applicant could not engage with the disciplinary process during that period. I regard that as good and sufficient reason for not initiating the application for leave at that time and am further satisfied that his continuing health difficulties which the respondent recognised and addressed by suspending the process, were matters which were outside his control and could not reasonably have been anticipated by him. I do not consider it fair or just that time would not be extended in those circumstances and would exercise my discretion to do so.

110. In reaching this conclusion the court does not accept the applicant's submission on this issue that the respondent has failed to make a timely decision as a result of a culpable or unjustifiable delay in addressing the applicant's concerns or that it sought to avoid judicial review by delaying its investigative disciplinary process as alleged. Furthermore, the court does not accept that the course of the investigations was misrepresented by the respondent in correspondence. The correspondence with the applicant's solicitors was dealt with in a reasonable and timely fashion. The present suspension of the investigations occurred because of the applicant's ill-health and could (if otherwise appropriate) be resumed if he were deemed medically fit to engage with the respondent in the process. The court is not satisfied that it has been established that the applicant's ill-health was caused by the acts or omissions of the respondent, its servants or agents.

Fair Procedures

111. It is undoubtedly the case that the suspension of the applicant from his post pending the completion of the investigation was a serious matter. The suspension of a person from his or her post because of irregularities or misconduct may be regarded as a form of disciplinary action which prior to its imposition requires the application of fair procedures having regard to its serious consequences. However, a distinction may be drawn between a suspension for the purpose or duration of an inquiry or investigation and one applied as a disciplinary sanction.

112. In *O'Sullivan v. Law Society* [2009] IEHC 632 Edwards J. considered the level of fair procedures appropriate to an inquiry in respect of an allegation of overcharging under s. 9 of the Solicitors Act 1994 and stated:-

"What level of fair procedures and natural justice rights was the applicant entitled to?

It seems to this Court that the answer to this question depends upon the nature of the investigation being conducted by the Law Society. In very broad terms it can be stated that if an investigative process, or investigative processes (if two or more investigations are being run in parallel), has the potential to result directly in the making of an adverse finding or findings against, and/or the imposition of sanctions upon, the person under investigation that person must be afforded the level of fair procedures and respect for his/her natural justice rights appropriate to a formal disciplinary inquiry. If, however, an investigative process is in the nature of a preliminary step, in which the investigator does not have the power to make adverse findings against, or impose sanctions upon, the subject under investigation, and which involves

merely the gathering and sifting of information which requires to be assessed in order to determine if there is a basis for the initiation of some further process in the course of which the subject will have a full opportunity to deal with relevant complaints or concerns, e.g. a formal disciplinary inquiry, then less formal procedures may be quite adequate and appropriate. ..."

The Supreme Court upheld the High Court decision [2012] IESC 21 and was satisfied that the full panoply of natural justice rights did not necessarily apply at every phase of an investigative process. In particular, the overall procedures applicable in a particular case should be analysed. The court should consider the nature of the decision made on its own terms and in the context of the overall decision making process. If there are successive steps to be taken in the course of that process, these must be considered not only separately but as a whole. A distinction has to be drawn between the standard of fair procedures applicable to an investigation which was information gathering and that applicable to the making of a finding that could lead to the conclusion of a complaint by its dismissal or sending it to a further stage on a finding of a *prima facie* case. It was held that the procedures applicable when viewed as a whole were reasonable, fair and proportionate to the issues raised and the consequence for the applicant of the finding of a *prima facie* case. I am satisfied that the decision to be taken by the investigators in this case could not be regarded as a final or binding finding of fact against the applicant. The procedure under the Circular requires an extensive hearing before a determination could be made by the Chief Executive that a particular sanction should be applied. In the course of the investigation the principal has a right to have the allegations brought to his attention and the right to respond to them. This is set out in the terms of reference furnished to the applicant in this case. The investigators report is then furnished to the Chief Executive. The principal is then provided with an opportunity to attend at a meeting with the Chief Executive. At that meeting the applicant must be furnished with an opportunity to make his case in full and to challenge any evidence relied upon for a decision. The Chief Executive will make a determination following this hearing. The Chief Executive will take account of the report from the investigators and any other evidence. The principal has a right to challenge any evidence that is being relied upon. In this case, having regard to the very serious nature of the allegation of sexual harassment, that would necessarily require that he be accorded the opportunity to cross examine any person making an allegation against him or whose testimony he seeks to challenge. In addition, Stage 5 provides for an appeal process to a Disciplinary Appeal Panel appointed by the Chief Executive. The Panel may at its discretion invite any person to give oral evidence and there is a full opportunity to make written submissions on the appeal.

113. The court is satisfied that the role and purpose of the investigations in this case are similar to those in inquiries into professional misconduct e.g. under s. 38 of the Nurses Act 1994. In *Ó Ceallaigh v. An Bord Altranais* [2000] 4 I.R. 54 Hardiman J. noted that a decision to hold an inquiry under s. 38 into professional misconduct by a nurse required that the Nurses Board be satisfied that there was a *prima facie* case. This was regarded as a "very grave matter". The consequences were very serious and could be very damaging to a self-employed person "rather than a public official who would be paid while under suspension". A fair procedure required that the Board should notify the applicant of the complaints having regard to the nature and importance of the inquiry. It was a filtering process designed to avoid frivolous, vexatious or unnecessary inquiries. The court was satisfied that the right to fair procedures required a process by which representations could be made but "not necessarily by oral hearing but in whatever way was necessary for her reasonably to make her reply".

114. The court is satisfied that in this case the applicant was given full notice of the allegations made against him as is clear from the correspondence exhibited in the affidavits. The court is satisfied that the procedures set out in the terms of reference in respect of both complaints were fair and appropriate to the investigative stage of this disciplinary process. In addition, the applicant had secured the right to legal representation at any interview held by the investigators with him. He has a full opportunity to respond to any statements furnished. However, the court is not satisfied that he is entitled to an oral hearing or an opportunity to cross examine others who have given such statements as may be relied upon prior to the conclusion of the investigators report. The applicant must have a reasonable opportunity to make such submissions as he may wish in respect of the complaints and the materials gathered in the course of the investigation. Thus the court is satisfied that the investigative procedures as set out in the terms of reference are having regard to the tiered process prescribed for by the Disciplinary Procedure under the Circular, fair, reasonable and proportionate. The court has some reservations about the implementation of the appropriate fair procedures in respect of the second complaint to which I will return.

Suspension

115. If a person is to be suspended in the course of an investigation, he must be informed of the reason for the suspension in order to make appropriate representations in respect of the matter. I am satisfied in this case the applicant was informed of the reasons for his suspension and the nature of the complaints which were under investigation. Of course, such a suspension must not be a permanent one. It must only be for a reasonable period during which the investigation is brought to a conclusion. That may be measured by considering what is a reasonable period for the carrying out of an investigation appropriate to the matters under investigation. In this case the suspension imposed was with pay. There has been no challenge to the suspensions by way of *certiorari*.

116. There is a significant difference between a suspension which has to be imposed pending the investigation of a complaint and one which is imposed by way of sanction following the conclusion of disciplinary proceedings. Barr J. described it this way in *Quirke v. Luthchleas na hÉireann* [1988] I.R. 83 at p. 87:-

"... [a suspension] may be imposed as a holding operation pending the investigation of a complaint. Such a suspension does not imply that there has been a finding of any misbehaviour or breach of rules by the suspended person, but merely that an allegation of some such impropriety or misconduct has been made against the member in question. On the other hand, a suspension may be imposed not as a holding operation pending the outcome of an inquiry, but as a penalty by way of punishment of a member who has been found guilty of misconduct or breach of rules. The importance of the distinction is that where a suspension is imposed by way of punishment, it follows that the body in question has found its member guilty of significant misconduct or breach of rules."

Kearns J. (as he then was) noted in *Morgan v. Trinity College* [2003] 3 I.R. 157, that where suspension constitutes a disciplinary sanction the person affected should be afforded natural justice and fair procedures before the decision to suspend him is taken. However, where a person is suspended so that an inquiry may be undertaken, the rules of natural justice may not apply. The learned judge drew on the distinction emphasised by Lord Denning M.R. in *Lewis v. Heffer* [1978] 3 All E.R. 354 at p. 364:-

"Very often irregularities are disclosed in a government department or in a business house; and a man may be suspended on full pay pending enquiries. Suspicion may rest on him; and so he is suspended until he is cleared of it. No one, so far as I know, has ever questioned such a suspension on the ground that it could not be done unless he is given notice of the charge and an opportunity of defending himself, and so forth. The suspension in such a case is merely done by way of good administration. A situation has arisen in which something must be done at once. The work of the department or the office is being affected by rumours and suspicions. The others will not trust the man. In order to get back to proper work,

the man is suspended. At that stage the rules of natural justice do not apply: see *Furnell v. Whangarei High Schools Board* [1973] 1 All E.R. 400."

117. The court is satisfied that the suspensions in this case were to continue until the conclusion of the investigations and any disciplinary process that might follow. They were on full pay and imposed in circumstances similar to those contemplated by Lord Denning in *Lewis*. The purpose of the suspensions in early course was "good administration" to be followed by investigations which it was anticipated would be carried out within a reasonable period in respect of very serious allegations. The court is satisfied that the Chief Executive gave the applicant an opportunity at the outset to make representations in respect of the proposed suspensions which was reasonable in the circumstances. The investigative stage was to be followed by the procedure outlined in the Circular 71/2014 quoted above.

A Tiered Process

118. Following the conclusion of the investigative report, it must be forwarded to the Chief Executive. A copy is given to the principal. Under the Education and Training Boards Act, 2013 the suspension and dismissal of staff are executive functions reserved to the Chief Executive under s. 13 (1) of the Education and Training Boards Act, 2013.

119. To date no finding of facts has been made against the applicant which could lead to the imposition of sanctions. The investigative process has not been completed. The Circular clearly provides that when an allegation of serious misconduct is made against a principal, he may be suspended on full pay pending investigation and the conclusion of any appeal process. That is what occurred in this case.

120. The principal has the right during the course of any investigation to have the allegations brought to his attention and the right to respond to all allegations. That process is in train. If the investigators uphold a case of serious misconduct it is stated that the normal consequence is dismissal. However, before that stage is reached the principal must be given an opportunity on the application of Stage 4 procedures to attend a meeting with the Chief Executive and an opportunity to make his case in full and challenge any evidence that has been relied in the investigator's report.

121. It is clear therefore, that a hearing must be held prior to the making of a finding of gross misconduct by the Chief Executive and the application of any sanction. The Chief Executive, when formulating a judgment in the case must take account of the report from the investigator and any other evidence or representation made by the principal in respect of the complaint. I am satisfied that the purpose of the hearing is to ensure that the principles of fair procedures and/or natural justice are observed in the final determination of the complaints.

122. It is clear and accepted by the respondent that the applicant must have the right to give evidence, to examine and challenge all evidence advanced and call persons providing such evidence for questioning. It is particularly important having regard to the nature of the post held by the applicant, the seriousness of the allegations of gross misconduct made against him and the clear conflict of evidence in respect of the events under review, that he must be afforded the opportunity to cross-examine the witnesses whose statements are to be relied upon. He faces possible dismissal if an adverse finding is made against him in respect of these complaints. However, this stage of the disciplinary process has not yet been reached. The investigative process has not yet been concluded.

123. The court is satisfied that the applicant's suspension was permitted only for such period during which it would not be reasonably practicable to hold a full investigation into the matter and conclude the disciplinary process thereafter. Though the suspension in this case was with pay, an open ended suspension might have deleterious consequences. A short period of suspension with pay against a clearly defined backdrop of numerous steps to resolve the disciplinary issue is less likely to result in the court's intervention on the basis of unfair procedures (*Flynn v. An Post* [1987] 1 I.R. 68 and per Kearns J. in *Morgan* at p. 171). The court is also satisfied that the initial suspensions in both cases were reasonable and justified on the authorities outlined above. The court is not satisfied that any of the restrictions placed on the applicant in respect of contacting members of staff or gaining access to school records or computer files or databases was unreasonable or calculated to inhibit his defence of these allegations. The evidence of the Chief Executive is that these steps were necessary and reasonable to protect the integrity of the investigations and the documents and records held by the respondent for which he was responsible. It seems to me that full and adequate steps were taken to ensure that insofar as staff members were willing to make themselves available to the applicant, this was facilitated. Likewise, the applicant or his solicitors could have made reasonable arrangements to gain access to any records or computer information. I do not consider any of the restrictions proposed or directed by the Chief Executive unfair or unreasonable in the circumstances and having regard to his overall obligation and function.

Reasonable Expedition

124. The court is also satisfied that the respondents made considerable and reasonable efforts to ensure that the investigations in both cases proceeded with reasonable expedition. A complaint in respect of the first matter was initiated on the 15th July, 2014 but the investigation had not concluded by the time of its suspension on the 8th April, 2015. Investigators were retained and terms of reference issued in September 2014. The investigators made contact on the 14th November, 2014 and enclosed the terms of reference. Unfortunately, representations made on behalf of the complainant and his union representatives, which also had to be considered were not fully addressed and the terms of reference were not finally concluded until 2nd February, 2015. In the meantime, the issue of the applicant's mental illness was raised in November 2014. He was referred for review in February 2015. There was protracted correspondence between the applicant's solicitors and the respondent throughout this period concerning the terms of reference. This resulted in an acknowledgment by the respondent that the applicant could be represented by a solicitor when interviewed by the investigators. Unfortunately, following a report made on 6th March, 2015 by Medmark, the applicant was deemed unfit to engage in the process any further. This continued certainly up to the date of application for leave to apply for judicial review. The court is satisfied that the respondents replied promptly and in detail to queries and representations made on behalf of the applicant by his solicitors in respect of the investigative process throughout the entire period. I am also satisfied that the procedures provided for the preparation of the investigators' report were fair and reasonable and would likely have led to its speedy preparation but for the untimely ill-health of the applicant. I am not satisfied that the disciplinary process initiated by the respondents is fundamentally flawed or irredeemably compromised by reason of the delay which has occurred. I am satisfied that the respondent took into account the representations made on the applicant's behalf and carefully constructed an investigative process which was independent and fair and appropriate to that stage of the disciplinary proceedings.

125. The second complaint arose on the 3rd of September, 2014 from which the second suspension dates. This investigation was also suspended on the 8th of April, 2015 for the same reason. However, this suspension was not fully observed by the investigator. I am satisfied that the overlap between the correspondence concerning proposed meetings between the investigator in respect of this complaint and the applicant and the referral of the applicant to Medmark to assess his suitability to engage further in the process by reason of his ill-health meant that the process should have been suspended and the further meetings proposed in February 2015 deferred pending his restoration to health.

126. It was inappropriate for the investigator to submit a report in respect of the investigation which had by April 2015, been suspended. It was clear by that stage that both sides accepted that it would be inappropriate to continue the investigative process because the applicant was unable to engage in it. It was therefore inevitable that he would not be able to respond to the allegations concerning the Agricultural Science and Accounting matters and would not be expected to do so until a further report had been obtained indicating that he was medically fit. In those circumstances it seems to me that the investigator ought to have been told to suspend the investigation pending the restoration of the applicant's ability to re-engage.

127. The court notes that Mr. Flynn determined that there was a case to answer in respect of the Agricultural Science and Accountancy lessons but not in respect of the two other periods relating to the teaching of Mathematics to the applicant's two daughters. The court rejects the submission that evidence said to be favourable to him from a teacher in the school was improperly excluded from the documentation furnished to him. It is clear from the report that the statement was appropriately considered by the investigator and had no bearing on the negative determination reached. The process remained formally suspended though it is clear that a response to the investigator's report was sought from the applicant following the successful application for leave in June 2015 on the basis that he must now be able to engage in the process, if able to pursue legal proceedings.

128. In that regard an order of prohibition was sought against Mr. Flynn conducting any further investigation into the applicant or furnishing any report to the respondent. That application is now moot as a report had at the time and unknown to the applicant already been submitted in April 2015. An order was not sought quashing the report though an injunction is sought restraining the continuing disciplinary process by the respondent in respect of those allegations arising from the Agricultural Science lessons. It would appear that, at the very least, there was a breakdown in communication between Mr. Flynn and the respondent concerning the conclusion of his investigative report. Clearly the respondent wished to make available all relevant documents and to give supervised access to the applicant to the I.T. system in respect of matters pertinent to these allegations. The applicant did not have any opportunity to engage with the investigator prior to the report's submission. The fact that the report had been submitted in April was only made known to the applicant after the leave stage. The court also notes that no application was made to amend the grounds upon which relief is sought based on that fact nor was leave sought to quash the report/determination thereafter. The matter was addressed in submissions. However, the court is satisfied that the report could not be regarded as properly completed in its present form and it could not therefore be regarded by the respondent as a basis upon which to proceed to convene a Stage 4 disciplinary hearing on foot of the conclusions expressed. The court will not make a formal order granting relief in respect of the second complaint but observes that any further procedure based upon that report will likely be open to a further challenge.

Natural Justice

129. It is submitted on behalf of the applicant that the involvement of the Chief Executive in the disciplinary process is in breach of the principle *nemo iudex in causa sua*. The Chief Executive has a statutory function under s. 13(1) of the Education and Training Boards Act 2013 and is the designated person obliged to reach conclusions concerning dismissal and the issues covered under Circular 71/2014. The extent to which that principle is applicable under employment legislation was summarised by Barrington J. in *Mooney v. An Post* [1998] 4 I.R. 288 at p. 298, who stated when delivering the judgment of the Supreme Court:-

"The terms natural and constitutional justice are broad terms and what the justice of a particular case will require will vary with the circumstances of the case. Indeed two of the best known precepts of natural and constitutional justice may not be applicable at all in certain cases. As the learned trial judge has pointed out the principle of *nemo iudex in sua causa* seldom applies in relation to a contract of employment where the employer judges the issue and is an interested party. Likewise it is difficult to apply, to a contract of employment, the principle of *audi alteram partem* which implies the existence of an independent judge who listens first to one side and then to the other.

If the contract or the statute governing a person's employment contains a procedure whereby the employment may be terminated, it usually will be sufficient for the employer to show that he has complied with this procedure. If the contract or the statute contains a provision whereby an employee is entitled to a hearing before an independent board or arbitrator before he can be dismissed, then clearly that independent board or arbitrator must conduct the relevant proceedings with due respect to the principles of natural and constitutional justice."

As noted by Peart J. in *Kelleher v. An Post* [2013] IEHC 328 it is inevitable that during an internal or in-house investigation leading to a dismissal the decision maker in some or all of the investigators will have some form of contact and they may be in communication of some kind about the issues involved. Those in authority are not to be regarded as "hermetically sealed" from each other. I am satisfied that in the present circumstances it is completely impracticable and unreasonable to require the Chief Executive or the Head of Human Resources to become or be disengaged from the disciplinary process. Both have extensive responsibilities for the maintenance of standards and discipline within the organisation and in the schools under their care. The Chief Executive has responsibilities in respect of employment and dismissal. A procedure was put in place for the investigation of these complaints by independent agents who were tasked with the preparation of reports. If the report indicated that there was no substance to the allegations, that would be an end to the matter and the applicant would be reinstated forthwith. If that were not the case the matter would then proceed to a hearing in which the Chief Executive was involved. I am not satisfied that this in itself is an unfair procedure having regard to the statutory framework under which the Chief Executive carries out his functions. Furthermore, the Chief Executive's decision may be appealed to the Appeal Board as set out above. (See *O'Neill v. Beaumont Hospital* [1990] ILRM 419 at p. 440).

Bias

130. The court has also considered a number of allegations of bias or apprehended bias on the part of the Chief Executive against the applicant in suspending him and instigating an investigation in respect of the two complaints. The court is satisfied that there is no substance to these allegations.

131. In particular, it was alleged that:-

(a) the Chief Executive was in some way biased against the applicant and wished to have him removed from office because of a report in respect of labour relations produced in respect of the school and various labour relation issues which required to be addressed; and

(b) the complainant teacher in the first allegation was said to have been given undue preference in having his contract extended by the Chief Executive.

For his part the Chief Executive states that he had only been recently appointed to the post when these issues arose and denies any allegation of subjective or objective bias. The court is satisfied that the applicant has not established any basis upon which bias could be inferred or the investigations initiated by the Chief Executive could be regarded as tainted by bias against the applicant. The court

is satisfied that the Chief Executive ensured that the investigators appointed acted independently of him in so far as that was possible in the circumstances.

Conclusion

132. The court is satisfied that for all of the above reasons the applicant has failed to establish any grounds upon which to grant the relief sought.