THE HIGH COURT
JUDICIAL REVIEW

[2004 No. 587/JR]

BETWEEN

MARY BECKER

APPLICANT

AND
FRANK DUGGAN

RESPONDENT

Judgment of O'Neill J. delivered the 1st November, 2005.

1. The applicant was on the 14th July, 2004, given leave by O'Donovan J. to apply by way of judicial review for:

> (a) An order quashing the decision of the respondent made on the 6th April, 2004, in which the respondent stated that he was satisfied that an Interview Board discharged its duty correctly and that there was no unfairness in its procedures and thus upheld the decision of the Board of Management of St. Dominic's College, Cabra, Dublin 7, not to appoint the applicant to an Assistant Principal post of responsibility which decision was made on 4th December, 2003.

2. Leave was granted upon the following grounds:

> (1) The respondent's decision was made despite being on notice of the breach of para. 3.2.1 Circular 5-98 of the Department of Education and Science which document sets out the revised in school management structures and procedures relating to posts of assistant principal and special duties teachers in secondary schools as negotiated between the ASTI, the JMB and the Department of Education and Science.
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> (2) The respondent's decision was made despite being on notice of the fact that it was wholly inappropriate for the principal of the school to be a member of the Interview Board.
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> (3) The respondent failed to direct the Board of Management of the school to respond to the letter of the applicant addressed to the respondent dated 30th January, 2004, thereby denying the applicant reasonable opportunity of rebutting the contents of his submission furnished to the respondent by the said Board of Management.
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> (4) The respondent failed to direct that documentation sought by the applicant in a letter dated 29th March, 2004, be made available by the Board of Management of the school to the applicant.
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> (5) The respondent conducted an oral hearing in a manner which was oppressive to the applicant.
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> (6) The respondent failed to afford the applicant an opportunity to cross-examine witnesses at the oral hearing which occurred on the 2nd April, 2004, and in particular failed to afford the applicant the opportunity to cross-examine each of the members of the Interview Board.
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> (7) The respondent's statement of his findings is unsatisfactory in its brevity and fails to provide the reasons for the decision taken and what evidence was relied on in reaching this decision.

3. The background to this matter is that the applicant, who is a teacher in St. Dominic's College, Cabra, Dublin 7, which is a voluntary school under a Board of Management, applied for appointment to two posts of responsibility namely Assistant Principal (Permanent) Co-ordinator of External Education Initiatives and secondly, Assistant Principal (Temporary) Year Head for senior students. She was interviewed for these posts on 21st November, 2003, by an Interview Board which was composed of a Mr. Joe Boyle as Chairperson, Sister Maighread Gallagher, as Representative of the Trustees and Ms. Mary Keane the Principal of the school. Of the four candidates seeking these appointments the applicant was undoubtedly the most senior and unless found by the Interviewing Board to be "unsuitable" she was entitled to a post as of right.

4. The Interview Board found the applicant to be unsuitable and hence she was not appointed to either post.

5. Prior to this, the applicant had been interviewed on 2nd April, 2001, for appointment to a post of responsibility and apparently found suitable. A delay occurred in her taking up this appointment, during which the person who was entitled to the post on a permanent basis returned to work, so that in fact the applicant never took up this appointment.

6. Later on 18th October, 2001, the applicant was again interviewed for a post of responsibility and again appears to have been found suitable. A dispute arose concerning terms in the contract, the applicant objecting to certain terms concerning supervision. Ultimately she withdrew this objection and took up this appointment.

7. The applicant was interviewed on 14th October, 2002, for a third Assistant Principal post of responsibility. She was not successful in this interview, but appealed the decision and in due course her appeal was successful. The applicant was interviewed for the fourth time on 28th March, 2003, for appointment as Assistant Principal post of responsibility. The Interview Board recommended the applicant's appointment to the post with reservation but the Board of Management did not sanction the appointment. The applicant appealed the decision of the Board and the arbitrator upheld her appeal on 4th June, 2003, and directed the Board to readvertise the post.

8. The applicant's complaints relevant to the grounds upon which leave has been granted to apply for judicial review are that the chairperson of the interview Mr. Joe Boyle was not qualified to be a chairperson of that Board because he was not on a panel of approved persons for that purpose as required by para. 3.2.1 of circular 5/98 of the Department of Education and Science. Secondly that the Principal of the school Ms. Mary Keane should not have sat on the Interview Board because of conflict between her and the applicant as a consequence of which she was biased towards the applicant.

9. She submits that the refusal of the respondent to direct replies to the applicant's letters dated 30th January, 2004, seeking answers to certain questions from the members of the Interview Board and his refusal to direct that the documentation sought by the applicant in a letter dated 29th March, 2004, be furnished to the applicant in advance of the appeal was a denial of fair procedures and natural justice and prevented the applicant from being in a position to prepare for the appeal. She contends the respondent

induced the applicant to go ahead with the oral hearing by an assurance in correspondence that she would be given every opportunity to add to the submissions she had already made or to file additional written submissions, if she so desired, whereas in the hearing of the appeal the respondent displayed an aggressive manner towards her which had the effect of intimidating her and he refused her a right to reply after Ms. Keane had spoken. Furthermore no cross-examination arose; all of which amounted to a breach of the applicant's right to fair procedures and natural justice. She also complains that none of the documents which she had sought which were relevant to the issues in the appeal were obtained by the respondent.

10. The applicant complains that because she was the most senior of the four candidates for the post in question she was entitled to the post unless found to be unsuitable. Hence the rejection of her application for the appointment, involving as it does, a determination that she was unsuitable, has destroyed her reputation within the community of the school in which she teaches and in the wider community where she is known. She contends that because of the very serious consequences to her, of this, in effect, declaration of unsuitability, that she was entitled to the normal advantages of a procedure appropriate to the matters in dispute in the appeal and she did not get that.

11. For the respondent it is contended by Mr. O'Reilly S.C. that in the first instance that the applicant's complaint relates to her contract of employment with the school and did not raise issues which can be litigated under the procedure set out in Order 84 of the Rules of the Superior Courts and the relief she claims i.e. an order of *certiorari* is confined to a *"public law"* issue, and is not available as a remedy to the applicant, her dispute being one of private contract with her employer. In consequence of this it is contended for the respondent that these proceedings should be struck out *in limine*.

12. It was submitted that the application was not brought promptly and that the delay involved is neither excused nor justified by the applicant and hence the applicant is out of time for bringing these proceedings, and no grounds have been put forward to warrant an extension of time.

13. The respondent contends that the applicant was disentitled to relief by way of judicial review because of her lack of candour in two respects. Firstly in failing in her affidavit grounding the proceedings to set out details of the other proceedings and complaint procedures initiated by her against the principal of St. Dominic's School and secondly by reason of the explanation given by her in respect of the payment of €10,000 received by her from the A.S.T.I.

14. It was submitted that the failure of the applicant to be appointed to the post in question did not have the consequence for her reputation that she contends for, that there are thousands of these posts of responsibility in the secondary school system and that every year, thousands of teachers apply for, and fail to get these appointments and their failure to so do is not perceived as in any way being a slight upon the reputations of these unsuccessful candidates and although the applicant may subjectively perceive slight and insult to her, in her failure to obtain the appointment in question, objectively no such imputation on her reputation could be said to have occurred. Hence because of that, what may be described as the full panoply of the In *Re: Haughey* rights are not invoked in regard to the appeal which is provided for in circular 5/98.

15. It was submitted that there was no breach of fair procedures and that the respondent acted strictly in accordance with the procedures set out in circular 5/98 and there was nothing in the determination of the applicant's appeal which revealed error in the findings made by the respondent. Furthermore it was submitted that the appeal was in the nature of a private arbitration and that there is a well established public policy upholding the finality of an arbitration award. In this respect reliance was placed on the case of *Keenan v. Shield Insurance Company Limited* [1998] I.R. 89 at 96. It was further submitted that there was no obligation on the part of the respondent to state reasons, reliance for this submission being placed upon the case of *Manning v. Shackleton* [1996] 3 I.R. 85 at 96/97. It was further submitted that the school principal Mary Keane was a person required by paragraph 3.2.1 of circular 5/98 to be a member of the interview board and reliance was placed on the doctrine of necessity to submit, that notwithstanding the difficulties existing between her and the applicant, that she was required to sit on that interview board. In this regard reliance was placed on the case *of O'Neill v. Beaumont Hospital Board* [1990] I.L.R.M. 410 at 440. It was further submitted that the applicant did not object at the interview to the composition of the interview board and furthermore did not in the appeal or in advance of the appeal object to the chairman of the interview board and hence it was submitted it was not open to the applicant to raise this objection subsequently as a ground in these proceedings, the applicant being deemed to have waived any objection on such grounds. In this regard reliance is placed on the case of *Corrigan v. Irish Land Commission* [1997] I.R. 317 at 325/326.

16. The first issue necessarily to be dealt with is whether or not the relief of certiorari by way of judicial review is available to the applicant.

17. This is a topic which has confronted the courts with considerable difficulty, historically. What the applicant has to demonstrate is that the issues which she raises in these proceedings may be characterised as *"public law"* issues. The problem is, discerning what is a public law issue.

18. The following passage from the judgment of Lord Parker C.J. in *R. v. Criminal Injuries Compensation Board, ex p. Lain* [1967] 2 Q.B. 864 at p. 882 has been often quoted with approval, where he says:

> *"The position as I see it is that the exact limits of the ancient remedy by way of certiorari have never been, and ought not to be, specifically defined. They have varied from time to time, being extended to meet changing conditions. At one time the writ only went to an inferior court. Later its ambit was extended to statutory tribunals determining a lis inter partes. Later again it extended to cases where there was no lis in the strict sense of the word, but where immediate or subsequent rights of a citizen were affected. The only constant limits throughout were that the body concerned was under a duty to act judicially and that it was performing a public duty. Private or domestic tribunals have always been outside the scope of certiorari since their authority is derived solely from contract, that is from the agreement of the parties concerned…We have, as it seems to me, reached the position when the ambit of certiorari can be said to cover every case in which a body of persons, of a public as opposed to a purely private or domestic character, has to determine matters affecting subjects provided always that it has a duty to act judicially."*

19. In this case the primary submission of the respondent on this topic is that the issues raised in these proceedings by the applicant are properly to be considered to be of a purely private or domestic character arising it is submitted, solely out of the contract of employment between the applicant and her employers, the trustees of St. Dominic's School.

20. In ascertaining whether or not there is the necessary public law element present, two approaches appear to have emerged, the first being to identify the source of the power exercised and the second emerging in later cases is to focus on the nature of the power. Until the English case of *Reg. v. Take-over Panel ex p. Datafin Plc*. [1987] Q.B. 815 the availability of the remedy depended upon the source of the power being either of a statutory nature or of being derived from the common law. Clearly excluded were

decision making powers based on a contract or consent between the decision maker and the person affected. This excluded the affairs of clubs and private associations from the purview of judicial review. Examples of cases decided on this basis are *Murphy v. The Turf club* [1989]I.R. 171 in which Barr J. refused an application for judicial review by way of an order of *certiorari* to quash the Turf Club's decision to revoke a licence on the basis that the club did not derive its authority from statue or common law and that the relationship between the applicant and the respondent derived solely from contract so that in purporting to revoke the applicant's licence the respondent was not exercising a public law function.

21. In *Rajah v. The Royal College of Surgeons in Ireland* [1994] 1 I.R. 384 Keane J. (as he then was) refused relief by way of judicial review stating at p. 393 as follows:

> *"The test for determining whether judicial review is appropriate in a case of this nature was stated as follows by Barr J. in Murphy v. The Turf Club [1989] IR 171 at page 173:-*
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> *'Certiorari or prohibition will not issue to a body which derives its jurisdiction from contract or to a voluntary association or domestic tribunal which derives its jurisdiction solely from or with the consent of its members - see R. v. National Joint Council for the Craft of Dental Technicians, ex p. Neate [1953] 1 Q.B. 704 and The State (Colquhoun) v. D'Arcy [1936] IR 641'*
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> *The approach adopted by Barr J. in that case was expressly approved by Finlay C.J. in Beirne v. The Commissioner of An Garda Siochána [1993] I.L.R.M. 1 and is the one which I adopt in the present case."*

22. Keane J. then went on to distinguish the Rajah case from the *Beirne* case.

23. In *Beirne v. Commissioner of An Garda Síochána* [1993] I.L.R.M. 1 Finlay C.J. said the following at p. 2:

> *"The principle which, in general, excludes from the ambit of judicial review decisions made in the realm of private law is confined to cases or instances where the duty being performed by the decision making authority is manifestly a private duty and where the right to make it derives solely from contract or solely from consent or the agreement of the parties affected.*
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> *Where the duty being carried out by a decision making authority, as occurs in this case, is of a nature which might ordinarily be seen as coming within the public domain, that decision can only be excluded from the reach of the jurisdiction in judicial review if it can be shown that it solely and exclusively derived from an individual contract made in private law.*
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> *This test of the principle surrounding the limits of judicial review of the decisions of decision making authorities appears to be consistent with the cases to which we have been referred.*
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> *In R. v. Criminal Injuries Compensation Board, ex parte Lain [1967] 2 Q.B. 864 Lord parker C.J. at page 82, referring to the limits of the ancient remedy of certiorari stated as follows:*
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> > *'The only constant limits throughout were that the body concerned was under a duty to act judicially and that it was performing a public duty. Private or domestic tribunals have always been outside the scope of certiorari since their authority is derived solely from contract, that is from the agreement of the parties concerned.*
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> *'In the case of R. v. Panel on Takeovers and Mergers, ex parte Datafin plc [1987] Q.B. 815 ,Lloyd L.J. quoted with approval the decision of Woolf J. in R. v. British Broadcasting Corporation, ex parte Lavelle [1983] 1 W.L.R. 23 where, having reviewed the provisions of O. 53, or, 1 (2) of the Rules of the Superior Courts in England, and their effect upon the previously existing jurisdiction to grant relief by way of prerogative order he stated as follows:*
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> *'I regard the working of O. 53, R. 1 (2) and s. 31 (2) of the Act of 1981 as making it clear that the application for judicial review was confined to reviewing activities of a public nature as opposed to those of a purely private or domestic character. The disciplinary appeal procedure set up by the BBC depends purely upon the contract of employment between the applicant and the BBC and, therefore, is a procedure of a purely private or domestic character.'*
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> *In the case of Murphy v. Turf Club [1989] I.R. 171, Barr J. in reviewing these decisions on the principles applicable, applied, in my view, the correct test to the facts of the case before him and concluded, as is stated in the head note that judicial review was not applicable by reason of the fact that 'the relationship between the applicant and the respondent derived solely from contract, and in purporting to revoke the applicants licence, the respondents were not exercising a public law function'."*

24. Finlay C.J. went on to consider in the *Beirne* case whether or not the contract between the applicant in that case and the respondent was the sole source of the power exercised and concluded that it was not, holding as follows:

> *"In these circumstances I have no doubt that once the power of the commissioner to terminate the training of the trainee by reason of his misconduct is stated to be one of the conditions of the employment, and that statement is true, it is not a jurisdiction which is solely or purely or even mainly derived from contract, but is a clear jurisdiction necessarily vested in the commissioner by reason of the office which he holds and the statutory powers which are attached to it."*

25. O'Flaherty J. who dissented in this case said the following at p. 11.

> *"The contract in issue is one that if it is breached the remedy is by ordinary action at law and not by judicial review. The distinction is this: if there is a dismissal under a contract it must be in accordance with the terms of the contract. If no procedure is laid down prior to dismissal the requirements of natural and constitutional justice in the case of an allegation of misconduct, require the person should know the substance of the charge and be given a chance to refute it; Glover v. BLM Ltd. [1973] I.R. 388 and Gunn v. Bord An Cholaiste Naisiunta Ealaine Is Deartha [1990] 2 I.R. 168. In the case of administrative decisions there is in addition an area of discretion which the decision maker must exercise having taken steps, or allowed steps to be taken, properly to inform himself of all the relevant circumstances and not just the fact that misconduct has been established. This is because judicial review of administrative action is concerned, aside*

from cases of manifest unreasonableness, see for example (Keegan v. Stardust Victims Compensation Tribunal [1986] I.R. 642 and Breen v. Minister for Defence, Supreme Court [1988] No. 340 20th July, 1990) - not with the decision reached but with the process by which the decision is reached."

26. In *Geoghegan v. Institute of Chartered Accountants in Ireland* [1995] 3 I.R. 87 Murphy J. in the High Court refused relief by way of judicial review holding that the procedure of judicial review pursuant to Order 84 of the Rules of the Superior Courts 1986 was not applicable to the affairs of the Institute of Chartered Accountants in Ireland and in this respect he followed the above quoted dictum of Barr J. in *Murphy v. The Turf Club* and the following passage from the judgment of the Master of the Rolls in *R v. The Disciplinary Committee of the Jockey Club, ex p. Aga Khan* [1993] 1 W.L.R. 909 where he said the following:

"The Jockey Club was not in its origin, its history, its constitution (or least of all) membership a public body…While the grant of a royal charter was no doubt a mark of official approval, this did not in any way alter its essential nature, functions or standing. Statute provides for its representation on the Horseracing Betting Levy Board, no doubt as a body with an obvious interest in racing, but it has otherwise escaped mention in the statute book. It has not been woven into any system of governmental control of horse racing, perhaps because it has itself controlled horse racing so successfully that there has been no need for any such governmental system and such does not therefore exist. This has the result that while the Jockey Club's powers may be described as, in many ways, public they are in no sense governmental. The discretion conferred by s 31(6) of the Supreme Court Act 1981 to refuse the grant of leave or relief where the applicant has been guilty of delay which would be prejudicial to good administration can scarcely have been envisaged as applicable in a case such as this.

I would accept that those who agree to be bound by the Rules of Racing have no effective alternative to doing so if they want to take part in racing in this country. It also seems likely to me that if, instead of Rules of Racing administered by the Jockey Club, there were a statutory code administered by a public body, the rights and obligations conferred and imposed by the code would probably approximate to those conferred and imposed by the Rules of Racing. But this does not, as it seems to me, alter the fact, however anomalous it may be, that the powers which the Jockey Club exercises over those who (like the applicant) agree to be bound by the Rules of Racing derive from the agreement of the parties and give rise to private rights on which effective action for a declaration, and injunction and damages can be based without resort to judicial review. It would in my opinion be contrary to sound and long-standing principle to extend the remedy of judicial review to such a case."

27. In the appeal to the Supreme Court in the Geoghegan case on the issue of the scope of judicial review, O'Flaherty J. with whom Blayney J. agreed, upheld the conclusion of Murphy J. in that the remedy of judicial review was not available, Denham J. with whom Egan J. agreed, held that it was. Hamilton C.J. reserved his decision on this issue until it would arise in a case as a question necessary for the determination of the claim.

28. Denham J. in the course of her judgment on this issue said the following:

"In view of the public nature of the source of the Institute, the functions of the Institute, and the nature of the contract between the Appellant and the Institute, the subject of Judicial Review becomes part of the question of constitutional justice of the relationship. There are a number of important factors:-

(1) This case relates to a major profession, important in the community, with a special connection to the judicial organ of Government and the Courts in areas such as receivership, liquidation, examinership, as well as having special auditing responsibilities.

(2) The original source of the powers of the Institute is the Charter, through that and legislation and the procedure to alter and amend the bye-laws, the Institute has a nexus with two branches of the Government of the State.

(3) The functions of the Institute and its members come within the public domain of the State.

(4) The method by which the contractual relationship between the Institute and the Appellant was created is an important factor as it was necessary for the individual to agree in a "form" contract to the disciplinary process to gain entrance to membership of the Institute.

(5) The consequences of the domestic tribunal's decision may be very serious for a member.

(6) The proceedings before the disciplinary committee must be fair and in accordance with the principles of natural justice, it must act judicially. In these circumstances, I am satisfied that a decision of the disciplinary committee may be the subject of Judicial Review pursuant to Order 84 of the Rules of the Superior Courts 1986."

29. In *Eogan v. University College Dublin* [1996] 1 I.R. 390 Shanley J. having reviewed the authorities went on to say the following:

"From the foregoing it appears that in considering whether a decision is subject to judicial review the following are among the matters which may be taken into account:-

(a) whether the decision challenged has been made pursuant to a statute,

(b) whether the decision maker by his decision is performing a duty relating to a matter of particular and immediate public concern and therefore falling within the public domain,

(c) where the decision affects a contract of employment whether that employment has any statutory protection so as to afford the employee any "public rights" upon which he may rely,

(d) whether the decision is being made by a decision maker whose powers, though not directly based on statute, depend on approval by the legislature or the government for their continued exercise."

30. It is crystal clear from these authorities that if the decision maker derives his authority solely from contract or agreement with the person effected, then the decision making is outside the scope of Judicial Review under O. 84 of the Rules of the Superior Courts and the reliefs of certiorari prohibition and mandamus are not available.

31. It is to be observed however as was stressed by Finlay C.J. in the *Beirne* case, that contract must be the sole source of the power exercised. And in my view it is implicit that that contract or agreement must be between, the, person affected and the decision maker or persons or bodies on whose behalf the decision maker acts and, with whom or with which the person affected enjoys privity of contract. The trainee in the Beirne case and the horse trainer in the Murphy case and the student in the Rajah case and the accountant in the *Geoghegan* case were connected by contract directly to the body which exercised the function of decision making concerning them.

32. In my view this is a critical ingredient in the reasoning for excluding persons in this category from public law remedies, because as was noted by O'Flaherty J. in his dissenting judgment in the *Beirne* case;

> *"The distinction is this: if there is a dismissal under a contract it must be in accordance with the terms of the contract. If no procedure is laid down prior to dismissal the requirements of natural justice in the case of an allegation of misconduct require that the person should know the substance of a charge and be given a chance to refute it…",*

33. Similarly as was observed by the Master of the Rolls in the *Aga khan* case:

> *"But this does not, as it seems to me, alter the fact, however anomalous it may be, that the powers which the Jockey Club exercises over those who (like the applicant) agree to be bound by the Rules of Racing derive from the agreement of the parties and give rise to private rights on which effective action for a declaration, and injunction and damages can be based without resort to judicial review." [emphasis added].*

34. Where private law remedies are available in contract there is no necessity, in order that justice may be done, for a public law remedy to be available.

35. In my opinion if a decision maker, bound to act judicially, makes decisions affecting rights of or imposing liabilities on another, justice requires that the ordinary principles of natural justice should be observed. If the decision making is done in breach of natural justice, the aggrieved person should in principle, if not entitled to a private law remedy under contract, be entitled to a public law remedy. It is reasonable to suppose that the emergence of the great public law remedies must have been inspired by the need to provide a remedy where injustice was done by public authorities in decisions made, where the persons adversely effected clearly had no contractual connection with the decision maker.

36. It is therefore obviously crucial in determining whether or not a public law remedy is available to see whether or not the person affected by a decision made by a decision maker bound to act judicially, can rely upon a contractual relationship which would entitle the person affected to appropriate declaratory and injunctive relief to protect them from inter alia breaches of natural justice in the decision making process.

37. Turning then to the facts of this case one must ask the question whether or not the applicants contract of employment with the school entitles her to private law remedies in respect of a complaint of breaches of natural justice in the conduct of the appeal by the respondent.

38. The answer to this question depends upon the relationship between the respondent and ultimately the applicant. It is clear in my view that the applicant does not have a relationship with the respondent which gives to her the benefit of privity of contract with him. The respondent is engaged under the provisions of paragraph 4 of Circular 5/98 and by virtue of paragraph 4.1 is appointed by the A.S.T.I. and the J.M.B. for a fixed two year renewable term. It is plainly obvious that the respondent is neither the servant nor agent of either A.S.T.I. or the J.M.B. and in my opinion is to be regarded as akin to an office holder. Equally obvious is the fact that the employers of the applicant do not have any contractual relationship with the respondent and equally clearly neither does the applicant. Even if it were the case that the terms of circular 5/98 were to be regarded as part and parcel of the applicant's contract of employment, it could never be said that the respondent was drawn in as a party to that contract. It is quite clear from circular 5/98 that the respondent is envisaged as having an independent role; and necessarily so.

39. Neither is there anything in paragraph 4 of this circular to suggest that either A.S.T.I. or J.M.B. are in any way vicariously liable for the actions of the respondent, and it would appear to me to be quite unreal to suggest that the applicants employers have any vicarious liability for the actions of the respondent.

40. I have come to the conclusion that the nature of the respondents role as provided for in paragraph 4 of the circular is akin to that of an independent office holder and that the applicant does not enjoy privity of contract with either the respondent directly or with any other parties who would be liable in respect of the actions of the respondent, in the performance of his duties as provided for in paragraph 4 of the circular.

41. It necessarily follows from this, in regard to the applicant's complaints of breaches of natural justice concerning the conduct of her appeal by the respondent, that she is not entitled to any private law remedies either against the respondent, or A.S.T.I. or J.M.B. or against her own employers.

42. I am satisfied, and indeed there could really be no argument on the point, but that the respondent by virtue of the duties imposed upon him under paragraph 4 of the circular, was bound to act judicially in the conduct of appeals.

43. It would seem to me to follow that if there are no private law remedies available to the applicant in respect of her complaint, she must be entitled to resort to public law remedies by way of judicial review.

44. Apart from the foregoing there are many indicia of a public law element, otherwise present. Firstly circular 5/98, notwithstanding the fact that it reflects an agreement between A.S.T.I., J.M.B. on behalf of their members and the Minister for Education, is nonetheless in my view a governmental act, being a promulgation by the Minister for Education.

45. Secondly the provisions of the circular are not confined to the applicant but affects all of the thousands of secondary school teachers in Ireland. Thus its provisions apply to a very large professional group throughout Ireland.

46. All secondary school teachers have a personal and public interest in the proper discharge by the respondent of his duties as provided for in paragraph 4 of the circular.

47. Thirdly the appointments as provided for in the circular are of an immediate and intense interest to the tens of thousands of parents who have children attending secondary schools and who have a, public interest in the proper discharge by the respondent of

his functions as provided for in paragraph 4 of the Circular. Fourthly whilst Circular 5/98 was promulgated shortly before the enactment of s. 24 sub-s. (5) and (6) of the Education Act 1998, I would be of opinion that having regard to the mandatory nature of these subsections the continuance in force of the provisions of circular 5/98 after the enactment of the Education Act 1998 was necessarily dependent on and by virtue of the authority of sub-ss. 5 and 6 of s. 24 of that Act. Thus in my opinion at all times material to the matters in issue in these proceedings the source of the provisions of this circular was statutory or as was perhaps as was more accurately expressed by Shanley J. in the Eogan case where he says:

> *"Whether the decision was being made by a decision maker whose powers, though not directly based on statute, depended on approval by the legislature or the Government for their continued exercise."*

48. I am satisfied, that these factors bring the decision at issue in this case into the realm of public concern, or public domain, as mentioned by Shanley J. in his aforementioned judgment and by Denham J. in her judgment in the Geoghegan case.

49. I have therefore come to the conclusion that the remedy of judicial review pursuant to O. 84 of the Rules of the Superior Courts 1986 is available to the applicant in this case.

50. The next issue which necessarily arises is the respondent's submission that there has been delay on the part of the applicant in initiating these judicial review proceedings such that the proceedings should be struck out *in limine*.

51. Order 84 Rule 21 (1) of the Rules of the Superior Courts provides that an application for judicial review shall be made promptly and where the relief sought is *certiorari* within a period of six months from date when grounds for the application first arose. In this case the applicant was notified of the decision of the respondent on the 8th April, 2004. She made her ex parte application to this court on 12th July, 2004. As the primary relief claimed is an order of certiorari in respect of the decision of the respondent, clearly she is well within the six month period provided for by the above rule. The question then arises is whether or not she moved promptly.

52. It is quite clear from the correspondence which was handed into the court during the hearing of this matter, that the applicant applied to the A.S.T.I. for funding to contest the decision of the respondent.

53. She made this application formally by a letter of the 19th April, 2004, which was responded to by a letter of the 1st June, 2004, in which she was granted funding in respect of a legal consultation. This would appear to have taken place promptly and her solicitor wrote to the A.S.T.I. by letter dated 21st June, 2004, requesting funding for judicial review proceedings seeking to quash the decision of the respondent. This was responded to by letter dated 25th June, 2004, from A.S.T.I. to the plaintiff's solicitor in which A.S.T.I. set out what they perceived as a difficulty in relation to the providing of this funding, but that the issue would be decided at a standing committee meeting on the 30th June/1st July. No letter was produced containing the decision of the Standing Committee as of that date but I accept what I was told by the applicant that she was informed informally that her application for funding had been refused by the Standing Committee, whereupon she set about preparing the papers necessary to make the *ex parte* applications on the 10th July, 2004.

54. I was urged, very properly, by Mr. O'Reilly to consider the position of third parties affected in this situation, namely those teachers who in fact had been given either of the two posts for which the applicant had applied, one of whom or perhaps both might ultimately on the conclusion of these judicial review proceedings have to vacate their post.

55. There is no doubt that the existence or pursuit of these judicial review proceedings carries with it that potential result, but that is not a consequences of the alleged delay, but of the proceedings themselves.

56. It would of course have been better if the applicant had moved her ex parte application sooner but in my view the respondent has not pointed to any particular prejudice to third parties referable solely to any delay between the 8th April, 2004, and the 12th July, 2004.

57. In those circumstances a conclusion that the applicant had failed to act promptly such that her proceedings should be struck out *in linime*, particularly having regard to the fact that she ultimately found herself having to prepare and conduct proceedings herself, is not warranted.

58. I therefore have come to the conclusion that the applicant did not fail to act *"promptly"* as required by Order 84 Rule 21 (1).

59. This brings me to the question of whether or not there was any breach on the part of the respondent of principles of natural justice.

60. Given that the applicant was the most senior of the candidates for either of the two posts of responsibility, her failure to be given either undoubtedly amounts to a finding that she was unsuitable, that unsuitability being defined in terms of paragraph 3.2.2 of Circular 5/98, which requires suitability of applicants for a post to be determined, taking account of the requirements of the post and the professional performance and experience of the applicant.

61. Whilst it is easily understood that the applicant was very hurt by not getting either of these two posts, whether her reputation is to be seen as injured in the fashion she claims or apprehends must be determined objectively. I would accept, as is averred to in the affidavit of George O'Callaghan, that there are thousands of these posts filled annually and the failure of a teacher even a teacher of the experience of the applicant to be successful in an application for one, would not normally be seen by either the teaching community or the rest of the community as destructive of the reputation of the teacher in question.

62. That being so I am quite satisfied that the full panoply of the rights as set out in the case of In *Re: Haughey* [1971] I.R. 217, are not applicable.

63. The real question here is, notwithstanding the fact that all of the In *Re: Haughey* rights were not applicable, did the conduct of the proceedings by the respondent otherwise breach normal principles of natural justice.

64. In her appeal the applicant essentially raised two grounds of complaint, the first being that she was not given any reasons as to why she was held to be unsuitable by the interview board so that she might have had an opportunity of rebuttal and secondly that the principal of the school, Mary Keane, who the applicant claimed had a known bias against the applicant sat on the interview board.

65. The submission of the Board of Management to the respondent revealed a far reaching attack on the applicants suitability, firstly based upon her performance in the interview and secondly her performance in previously held posts of responsibility. The applicant

described herself as devastated by the content of the submission, contending that her sight of this submission was the first intimation to her ever, of any of the complaints against her, set out in the submission.

66. The applicant responded to this by a letter of 30th January, 2004, addressed to the respondent in which *inter alia* she contends:

> *"The agreed summary from the interview board grossly misrepresents what transpired at my interview.*
>
> *I have in my possession an accurate record of this interview which is utterly irreconcilable with this agreed summary which I will furnish at the oral hearing before your good self. In the interim I would ask that each member of the interview board furnishes me with copies of any written note or memorandum taken by them for comparison purposes. No doubt they will in any event have such written notes or memoranda at the oral hearing."*

67. She then goes on in this letter to set out what may be described as an overzealous notice for particulars.

68. She concludes this letter by saying in the final two paragraphs.

> *"I am of the certain view that the summary from the interview board as indicated earlier, wholly misrepresented the actual interview itself and before finalising a submission by way of reply I feel I am entitled to a response by the members of the interview to the issues raised in this correspondence.*
>
> *I do not in any way mean to be uncooperative in having the matter disposed of before you as expeditiously as possible but in fairness I am entitled to the replies to these queries."*

69. It would appear that the applicant's letter was passed on to the Board of Management of St. Dominic's College, because by a letter of the 23rd February, 2004, the principal of the school Mary Keane writes saying the following:

> *"Further to correspondence from Ms. Becker received from the Appeal Board on the 11th February, 2004, the Board of Management of St. Dominic's College will not be replying to Ms. Becker's correspondence. The Board will be represented at the oral hearing on 23rd March, 2004."*

70. This letter from the Board of Management of the school was sent by the respondent by letter dated 24th February, 2004, to the applicant and following upon that the applicant through her solicitor Robert Dore and Company wrote to the respondent reiterating the requests of the applicant and asking the respondent to direct that the Board of Management respond comprehensively to the applicant's correspondence.

71. This letter was replied to by letter of the 15th March, 2004 from the respondent, in which he says:

> *"I have ruled that it is optional for the school to reply to the issues raised by Ms. Becker. I confirm that Ms. Becker will be given every opportunity to add the submissions she has already made and to file additional written submissions if she so desires."*

72. By further letter dated 29th March, 2004, the applicant wrote to the respondent requesting that the respondent request the Board of Management to make available to the applicant copies of the documents which were set out in that letter. The documents all related to previous interviews in which the applicant had participated.

73. The applicant relying upon the assurance given by the respondent in his letter of the 15th March, 2004, to the effect that she could make any additional submissions she wanted at the hearing of the appeal, decided to proceed with the appeal notwithstanding the responses to either her letter of 29th March, 2004, or previous correspondence.

74. At the hearing of the appeal the applicant read from a written submission and spoke for some time. *Inter alia* she contends that she challenged the position of Mr. Joe Boyle as chairperson of the interview board on the grounds that he was not on the panel of approved chairpersons. The applicant complains that she was treated aggressively by the respondent and felt intimated and that she was not given an opportunity to respond after the principal of the school Mary Keane had spoken.

75. The determination of the respondent which is dated the 6th April, 2004, is in the following terms:

> *1. "Ms. Becker made various submissions in writing. Her solicitor made complaints in writing. Ms. Becker made lengthy oral submissions at the hearing of the arbitration at the Aisling Hotel on 2nd April, 2004, where I was advised by the nominees of A.S.T.I. and J.M.B. respectively, Mr. George O'Leary and Mr. Paddy Boyle.*
>
> *2. Ms. Becker's complaints were as follows:*
>
> *(a) the agreed summary is hopelessly flawed;*
>
> *(b) she was deeply concerned about the principal, Ms. Keane being involved in the selection process;*
>
> *(c) there were "three against one".*
>
> *3. Having heard all the evidence and considered the documents submitted I am satisfied that the interview board discharged its duty correctly and that there was no unfairness in its procedures an thus the appeal must fail."*

76. The jurisdiction of the appeal taken by the applicant is as set out in paragraph 3.2.5 of Circular 5/98, which reads as follows:

> *"The independent appeal system set out in Section 4 may be utilised by applicants who believe that the criteria by which suitability was assessed and/or the process through which the appointment was made were not in accordance with procedures outlined in this Circular."*

77. Section 4 of the Circular under the heading "Appeal Procedure" sets out the procedure for the appeal and is as follows:

> *"4.1 An Arbitrator shall be appointed by the ASTI and the JMB for a fixed two year renewable term of office to deal with such appeals.*

4.2 The Arbitrator will be advised by a nominated advisor from each of the JMB and ASTI in all cases.

4.3 A person may submit an appeal in writing to the Arbitrator setting out the grounds for the appeal. Such an appeal must be lodged within 10 school days of the announcement of the Board of Management/Manager's decision. The Arbitrator shall base any findings on the grounds for the appeal as submitted.

4.4 The Arbitrator shall obtain a written response from the Board of Management/Manager within 10 school days of an appeal under paragraph 3.2.5 of this Circular.

4.5 The Arbitrator will consult the advisors, based on the written statements which he/she will make available to both parties (Management/Appellant).

4.6 The Arbitrator may decide to hold a hearing at which to interview the parties. The Arbitrator shall have power to call witnesses and to make arrangements to have evidence heard in camera if necessary. Any expenses arising shall be shared by the ASTI and the JMB.

4.7 The Arbitrator shall give reasonable notice to the parties of the hearings. When notifying parties to an appeal of the date of the hearings, it should be indicated to the parties concerned that in the event of failure to appear the Arbitrator may proceed to decide the case if he/she considers it appropriate to do so.

4.8 The parties may be represented or accompanied at such hearings by a teacher or management colleague, other than a member of Standing Committee of the ASTI or official of the ASTI or a member or official of the JMB.

4.9 The Arbitrator shall act as correspondent and shall issue his/her findings to the ASTI, the JMB and to other parties involved within 30 school days of the submission of the appeal to him/her…..

4.12 Without prejudice to the rights of any of the parties involved to have recourse to litigation, the decision of the Arbitrator shall be final and binding on all of the parties…".

78. Paragraph 3.2.5 limits or restricts the range of material that can be canvassed in an appeal to that which is relevant to an assessment of the criteria used to assess suitability and/or the process by which the appointment was made so that the Arbitrator, with the benefit of advice from the nominated advisers, can determine whether the appointment was made in accordance with the procedures set out in the circular.

79. Whilst paragraph 3.2.5 clearly defines the jurisdiction exercised by the Arbitrator there could be no doubt in my opinion that in the exercise of that jurisdiction natural justice and fair procedures would have to be observed.

80. Whilst the decision maker on an appeal is described in s. 4 of the Circular as "an Arbitrator" it is common case that this does not express or imply that the appeal is an arbitration governed by the Arbitration Acts. It was conceded by the respondent that the Arbitration Acts do not refer to employment matters and hence this appeal procedure is outside their scope.

81. The first issue to be considered is whether the range of complaints made by the applicant in the appeal procedure were firstly within the jurisdiction created by paragraph 3.2.5 and secondly whether these complaints were validly made within the appeal procedure.

82. At the time that the applicant formulated her appeal she was concerned with two things mainly; the position of Ms. Keane and the absence of any opportunity to rebut the reasons or factors which would have led to a finding of unsuitability. The submission of the Board of Management containing as it did a broad ranging attack on the applicants suitability deepened the dispute considerably and prompted the correspondence dealt with above, in which the applicant in her initial letter sought notes of the interview and very great detail as to the questioning in the interview. The respondent declined to require the Board of Management to reply to this correspondence leaving a reply optional for them. In his letter of the 15th March, 2003, the respondent confirmed that the applicant would have the opportunity to add to her submissions or to file additional written submissions if she so desired. In that context the appeal hearing was set for 2nd April, 2004. Thereafter in a letter of 29th March, 2004, the respondent requested documentation related to previous interviews.

83. When the appeal hearing came on the applicant in her grounding affidavit at paragraph 17 says the following.

"I was then invited to make an oral presentation during which I referred inter alia to the main points at 4, 5, 6, and 7 above. In refuting the statements in the Board of Management submissions I also read from a prepared document. I am going to refer to a true copy of this document upon which marked the letter K I have signed my name prior to this hearing hereof."

84. Paragraphs 4, 5, 6 and 7 of her grounding affidavit set out her complaints in relation to the position of Mr. Joe Boyle as chairman of the interview board and also her a complaint that the principal of the school Ms. Keane should not have sat on the interview board because of what the applicant had perceived as bias on her part against the applicant.

85. Having regard to the extensive nature of the material raised in the written submission of the Board of Management, and the fact that this was unknown to the applicant when she formulated her appeal and having regard to the correspondence detailed above and in particular the letter of the 15th March, 2004, from the respondent permitting the applicant to raise additional submissions both verbally and in writing, in my view fair procedures would require that all of the complaints detailed by the applicant in her correspondence and in her oral and written materials furnished at the hearing would have to be considered as properly raised by her in the appeal, provided that the subject matter was within the jurisdiction created by paragraph 3.2.5 of the circular.

86. The replying affidavit of the respondent does not dispute the content of paragraph 17 of the grounding affidavit of the applicant.

87. On the basis of the evidence in these proceedings I have come to the conclusion that the following issues were raised by the applicant in the course of the appeal procedure namely:

1. That the chairman of the interview board Mr. Joe Boyle was not entitled to act as such or to be on the interview board.

2. That the principal Ms. Keane was not entitled to be a member of the interview board.

3. That the "agreed summary from interview board" was a wholly inaccurate note of the interview and that the applicant had prepared and submitted a true and accurate note of the interview.

4. That the allegations made in the submission of the Board of Management concerning the conduct of the applicant in posts of responsibility previously held were untrue and made for the first time in that submission.

88. The matters set out at paragraphs 1 and 2 above clearly relate to the procedures set down by the circular for the conducting of interviews and are manifestly within the jurisdiction of paragraph 3.2.5.

89. The complaint in relation to the inaccuracy of the "agreed summary from interview board" is relevant to the procedure followed by the interview board and also to the criteria whereby suitability was assessed because if the applicant is right in her contention that the agreed summary is not an accurate note of what happened and that her note of the interview is accurate, this necessarily raises the question of what criteria were used to assess her suitability and was the assessment dominated by bias, and hence this complaint comes within paragraph 3.2.5.

90. The complaint made at item no. 4 above relates directly to the criteria by which her suitability was assessed i.e. her past performance, and is within paragraph 3.2.5.

91. This complaint also raises a relevant procedural issue namely whether or not these allegations or any of them were raised with the applicant prior to the sending of the submission to the respondent and in particular whether these allegations or any of them were raised in the interview or discussed with the applicant in an appropriate forum prior to the interview. There could be no doubt in my opinion but that in the conduct of an interview in accordance with the provisions of the circular natural justice and fair procedures would have to be observed in an appropriate way. A relevant matter for the respondent to have considered arising out of the complaints made to him by the applicant was whether or not the interview board had raised any of these allegations or referred to them in any kind of appropriate way and, whether any failure to so do was a breach of natural justice and fair procedures in the circumstances.

92. This brings me to consider what is the nature of the appeal as provided for in paragraph 3.2.5. Is it a full rehearing like an appeal from the District Court to the Circuit Court or from the Circuit Court to the High Court or is it in the nature of a review similar to an appeal from the High Court to the Supreme Court.

93. It would appear to me to be wrong to interpret the provisions of paragraph 3 or 4 of the circular in such a rigid way as to confine it to either one or other of those models.

94. I am sure it was not envisaged in this procedure that the Arbitrator would either rehear or re-conduct the interview. On the other hand I'm sure it was not envisaged that the Arbitrator could not disturb conclusions where it was apparent to him from proofs, readily accessible to him, that the conclusion of an interview board was wrong on a question of fact or that the constitution of the interview board itself was incorrect. Paragraph 4.6, which enables an arbitration to interview the parties or to call witnesses necessarily implies that the arbitrator, can interfere with for factual conclusions as to suitability reached by the interview board.

95. I would be of opinion that the Arbitrator should not disturb conclusions of fact reached by an interview board, where he was satisfied that there was credible material available to the interview board to support its conclusions, unless it was readily apparent from the material supplied to the Arbitrator or readily accessible to him that a conclusion is wrong.

96. Where an appellant disputes the conclusions of fact leading to a finding of unsuitability the Arbitrator as a minimum must be satisfied that the conclusion is supported by credible material which the applicant had a reasonable opportunity to challenge either at the interview or in another appropriate forum.

97. This brings me next to consider the conduct by the respondent of the appeal procedure.

98. The applicant's first complaint relates to the pre-hearing procedures and in particular the failure or refusal of the respondent to have directed the Board of Management to reply to the requests or demands made by the applicant in her letter of the 30th January, 2004. As noted earlier this letter was passed on by the respondent to the Board of Management but on the basis that a reply to it was optional for them.

99. In the light of that the Board of Management indicated that they would not be replying.

100. At no point either in correspondence or indeed in written or verbal submissions made in these proceedings does the respondent contend that he lacked a power under s. 4 of the Circular to a rule that a reply to that letter from the applicant was obligatory on the part of the Board of Management. In what was obviously likely to be a hotly contested appeal, it would seem to me that forwarding the applicant's letter of the 30th January, 2004, to the Board of Management on the basis that a reply was optional, was a pointless exercise.

101. In the light of the contest over the truth and accuracy of the "agreed summary from the interview board" I would be of opinion that natural justice and fair procedures required that the applicant have access to the written notes made by the members of the interview board. Whilst there is nothing in s. 4 of the circular which expressly makes provision for this kind of exchange after a submission has been put in, neither is there anything there which rules it out.

102. In some cases natural justice would require such documents to be furnished, and I would construe the powers of the Arbitrator, as encompassing a power to require the exchange of documents, to demand the production of documents to himself. In my view this was a case in which it was necessary, to do justice, to compel, the exchange of the interview notes, and the production of them to the Arbitrator.

103. The depravation of this material to the applicant in preparing for the appeal and in conducting her case at the appeal, was a breach of natural justice.

104. The long list of detailed questions set out in this letter of the 30th January, 2004, which I earlier described as an over zealous notice for particulars, did not in the interests of natural justice require an obligatory answer.

105. The request made by the applicant in her letter of the 29th March, 2004, to the respondent for further documentation was having regard to the fact that the appeal hearing was scheduled to go ahead on the 2nd April, 2004, made too late to provide a reasonable opportunity to reply, the applicant having in the light of the respondents letter of the 15th March, 2004, agreed to the appeal hearing going ahead on the 2nd April, 2004.

106. This brings me to the conduct of the appeal hearing on the 2nd April, 2004.

107. At the outset one must consider the role of the respondent in this appeal procedure, where neither of the contending parties i.e. the applicant or the Board of Management were professionally represented that being out ruled by paragraph 4.8 of the Circular. The respondent was the only professional lawyer involved in the process. I infer from the circular that legal representation is ruled out to avoid unnecessary legal complexity but that a professional lawyer is chosen for the role of Arbitrator to ensure that constitutional and legal propriety is observed.

108. The significance of this scheme of things in my view is to place a significant burden on the Arbitrator to ensure that the proceedings are conducted in accordance with the Constitution and with law but with a minimum of legal formality.

109. Paragraph 4.6 is illuminating in this regard. It gives the Arbitrator a discretion to hold a hearing and to interview the parties. In addition the Arbitrator is given the power to call witnesses. In my view in the light of the exclusion of legal representation there rested upon the Arbitrator, in this case the respondent, a duty to consider whether in the circumstances of the appeal it was necessary for him to interview witnesses and to call other witnesses. In other forensic proceedings i.e. court proceeding these functions rest with the legal representatives of both sides. In my view in an appeal under the provisions of s. 4 of this circular that duty rests primarily with the respondent.

110. When this appeal came on for hearing on 2nd April, 2004, it must have been readily apparent to the respondent that the interview board had found the applicant unsuitable because it had reached a conclusion that her performance in the interview was, as demonstrated by the "agreed summary from interview board", extraordinarily bad and that her performance in previous posts of responsibility held by her was also very poor. It must have been equally apparent to the respondent that the applicant challenged the truth and accuracy of the interview board's record of the interview and gave an entirely different account of that interview as contained in her record of it and that she vehemently denied all of the allegations in respect of her performance in previously held posts of responsibility and contended that she had not heard of these allegations prior to seeing the submission of the Board of Management to the respondent.

111. Taking this former issue first the respondent was given the applicants note of the interview at the hearing. On the one hand the "agreed summary from the interview board" on the face of it looks a very improbable account of an interview with somebody apparently seeking a post. On the other hand the applicant's record of the interview reads like a credible account of the interview.

112. Faced with this situation, in my view the respondent or indeed any forensic tribunal could not reach a conclusion as to who was right without taking as a minimum certain forensic steps. Firstly it was essential for the respondent to have demanded and obtained sight of all of the interview notes prepared by the members of the interview board and any secretary present (if there was one). Secondly at least one of the interviews board should have questioned by way of interview or cross-examination by the respondent as provided for in paragraph 4.6 of the circular. In any other proceeding where an issue of this kind would arise cross-examination of the members of the interview board by the affected party i.e. the applicant would be considered essential but having regard to the exclusion of legal representation and in the context of an appropriate interview by the respondent, armed with all of the documentation above referred to, I would be inclined to regard a cross-examination by the applicant as not essential.

113. The evidence as to what happened at this oral hearing is contained in paragraphs 4, 5, 6, 7, 17, 18, 19 and 20 of the applicants grounding affidavit and paragraphs 4 and 9 of the affidavit of the respondent. From this evidence I have reached the conclusion that the respondent did not do any of the above things.

114. That being so I am satisfied that the respondent insofar as the issue concerning the truth or accuracy of the competing records of the interview are concerned, the respondent did not himself take any competent forensic steps as indicated above, to test the veracity of either side's contentions, nor did he take any step to put himself in a position to be satisfied that the materials relied upon by the interview board in this regard were credible.

115. The issue as to the truth or falsity of the allegations made by the Board of Management concerning the applicant's performance in posts of responsibility previously held gives rise to similar considerations.

116. I am satisfied on the evidence that the respondent took no steps himself to test forensically the veracity of the contentions of either side either by the conducting of an interview or the calling of witnesses under the provisions of paragraph 4.6 of the Circular or by the examination of documents relevant to that issue such as was sought by the applicant in her letter of the 29th March, 2004. Furthermore I am satisfied, on the evidence, that the respondent took no steps to put himself in a position to be satisfied that the conclusions of the interview board in regard to these allegations was based on credible material which the applicant had a reasonable opportunity to challenge in advance of or at the time of the interview.

117. As a separate consideration, arising out of this issue, there is no evidence that the respondent took any step to establish or to be satisfied as to when these allegations were first made against the applicant. If it were the case as is contended for by the applicant that the submission by the Board of Management to the respondent was the first intimation of them to her, clearly a breach of natural justice would have been established on the grounds that she was denied an opportunity to challenge these allegations at an appropriate time and in an appropriate forum. This potential or apparent denial of fair procedures to the applicant should of itself have been sufficient, if established, to have persuaded the respondent to overturn the decision of the interview board, but as discussed, the respondent on the evidence did not take the necessary forensic steps to enable himself to reach a conclusion on the point.

118. In the light of the foregoing, I cannot accept, as is contended for in the Statement of Opposition and in the submissions of the respondent, that the respondent acted in accordance with the procedures contained in Circular 5/98 and in particular paragraph 4 thereof.

119. I have come to the conclusion that for the respondent to have reached a conclusion adverse to the applicant where the above issues were clearly in contention before him, following a procedure which had the deficiencies discussed above was having regard to the role of the respondent as envisaged in s. 4 of the Circular, a denial of natural justice and fair procedures to the applicant.

120. Natural justice requires in a judicial or quasi-judicial enquiry that such procedures as are minimally necessary to properly resolve the issue for determination must be adopted. The reaching of conclusions, which adversely affect a party, where the proceedings held cannot properly resolve the matters in dispute is contrary to natural justice and fair procedures.

121. The above conclusion would be sufficient to dispose of these proceedings but for the sake of completeness and in deference to the able and learned submissions made on both sides I should express an opinion on the remaining matters argued in the case.

122. Turning first to the position of Mr. Joe Boyle the chairman of the interview board, I am satisfied on the affidavits that this matter was raised in the appeal. It is quite clear that Mr. Boyle was not included in the list of approved chair persons and this fact must have been or should have been readily apparent to the respondent. A mere perusal of the list demonstrates this fact. The fact that Mr. O'Boyle was not on the list of approved persons meant that the interview board was not properly constituted in accordance with the provisions of the circular. Proof of that fact, alone, before the respondent should have been sufficient to have persuaded him to overturn the decision of the interview board as being ab initio invalid.

123. The failure or refusal of the respondent to come to such a conclusion can only be explained as being the result of either the failure or refusal by the respondent to consult the list which would manifestly be a denial of fair procedures to the applicant or alternatively that the conclusion is simply irrational in the sense that that term is used in the case of Keegan v. Stardust Tribunal [1986] I.R. and later cases in the same line of authority.

124. It was submitted by the respondent that the applicant did not get leave to apply for judicial review in respect of the ground relating to the position of Mr. Boyle. I cannot agree with this.

125. Paragraph 1 of the grounds set out in paragraph E in the statement although imperfectly drafted manifestly refers to the issue concerning Mr. Boyle, having regard to the fact that paragraph 2 of paragraph E of the statement of ground expressly refers to the complaint about the position of the school principal as a member of the interview board.

126. It is the case that the grounds which are set out in the applicant's statement required to ground the application for judicial review do not expressly raise the issue of irrationality in respect of the decision or absence of decision concerning the position of Mr. O'Boyle. I am of the opinion that paragraph 1 of paragraph E does challenge the respondent's decision, it having been made despite being on notice of the breach of paragraph 3.2.1. of circular 5/98. Here, in my view, in the interests of justice, some allowance must be made in favour of the applicant having regard to the fact that she is a lay litigant and prepared the papers for this judicial review without the benefit of legal representation. It is noteworthy that nowhere in her grounds is there a mention of the terms "natural justice" or "fair procedures". That notwithstanding, it is perfectly clear from the grounds, what the nature of the case is and in my view the same can be said of ground no. 1 in paragraph E of the statement of grounds.

127. The submission by the applicant that the principal of the school, Ms. Keane was not entitled to sit on the board was one which in my view the respondent was entitled to reject and having regard to the provisions of paragraph 3.2.1 of the circular.

128. Under this paragraph she was a necessary member of the board, without whom the board could not be validly constituted. That being so notwithstanding the history of conflict between the principal and the applicant and the attendant risk of a perception of bias, I accept the submission of the respondent that the doctrine of necessity dictates that she had to be a member of the interview board.

129. The respondent submitted that there was a public policy to the effect that the court should not interfere with the outcome of an arbitration. Undoubtedly that is so where the arbitration is one conducted under the provisions of the Arbitration Acts. As was mentioned earlier it was conceded that the subject matter of this dispute and indeed all employment matters are excluded from the ambit of the Arbitration Acts. In any event paragraph 4.12 of the circular, expressly preserves a recourse to litigation. In my view the submission by the respondent fails.

130. It was further submitted by the respondent that because the proceeding was in the nature of an arbitration that there was no obligation on the part of the respondent to give reasons for his decision.

131. As stated earlier the appeal in this case was not an arbitration governed by the Arbitration Acts and hence in my view any jurisprudence relating to arbitrations which excludes an obligation to give reasons for a decision does not necessarily apply to these proceedings. The line of authority which is to the effect that reasons do not have to be given in arbitrations derives from cases where the outcome of the arbitration is the award of a sum of money or the refusal of it. In my view that type of proceeding is substantially different from one where a constitutional and legal rights are in issue, and where the result of the proceedings or the final decision cannot be fully or even adequately comprehended without a statement of the reasons underlining it. I am satisfied that there was an obligation on the part of the respondent to give reasons for his decision.

132. The applicant submits that the respondent failed to give reasons for the decision taken.

133. Taken as a whole the record of the decision dated 6th April, 2004, does not adequately reflect the range of issues necessarily confronting the respondent and indicates merely in the most general terms that the applicants complaints in regard to the proceedings of the interview board are rejected.

134. Notwithstanding the forgoing, the brevity and lack of content in the decision is not such as to inhibit or prevent this court exercising its judicial review jurisdiction and that being so, this submission fails.

135. In the statement of opposition and in the written and oral submissions made on behalf of the respondent some stress was laid upon the fact that the respondent is, pursuant to paragraph 4.2 of the circular advised by a nominated adviser from each of the JMB and ASTI.

136. I have no doubt that the availability to an Arbitrator such as the respondent of this advice is a great assistance but of itself could not turn a bad decision into a good one. Ultimately the respondent was the decision maker and regardless of what assistance he had by way of, no doubt expert advice, his decision and his decision alone stands to be tested against the usual criteria for judicial review. If the decision is found wanting, having regard to the normal criteria for judicial review, the fact that the respondent has the assistance of able advisers could not have the effect of saving it from relief by way of judicial review.

137. This brings me finally to the submission by Mr. O'Reilly that the relief sought, being discretionary relief should be refused on the grounds of a lack of candour on the part of the applicant. I am quite satisfied that this submission must fail. The first allegation of

lack of candour related to what was said to be the absence of disclosure in the grounding affidavit, of the court proceedings and other dispute resolution procedures invoked by the applicant against the principal of the school Mary Keane. In fact the grounding affidavit does refer to the fact that proceedings were initiated by the applicant against the Board of Management of the School and the principal Mary Keane. The obligation of disclosure is in respect of all material that might effect the determination of the court. In my view it was wholly unnecessary for the applicant to give a full or detailed description of all of the other proceedings between her and the school, the dispute raised in these proceedings being as to the discreet topic of whether or not the respondent in this case, who had no involvement whatsoever in other disputes between the applicant and the school, had conducted his proceeding in accordance with natural justice and fair proceedings.

138. The second reason relied upon by the respondent as demonstrating an absence of candour arose out of the reasons advanced by the applicant in her verbal submissions, to the court, as to the delay in initiating the proceedings and the connection between that delay and the seeking of funds from A.S.T.I. for her legal fees connected with the case. She had told the court that the upshot of the representations to A.S.T.I. in May and June of 2004 was that there was a refusal by the Standing Committee to advance funds to her. It transpired that in September of 2004 a payment of €10,000 was made to her. I accept her explanation, that this payment of €10,000 was made on the express basis that it was not for her legal fees in these proceedings but was to help her to defray legal expenses which had arisen in connection with other or earlier disputes.

139. I am quite satisfied therefore that there was no lack of candour on the part of the applicant.

140. In all the circumstances therefore I have come to the conclusion for the reasons set out above that the applicant must succeed in these proceedings and there will be an order of *certiorari* in respect of the determination by the respondent dated 6th April, 2004.