

THE HIGH COURT
JUDICIAL REVIEW

[2015 No. 665 J.R.]

BETWEEN

PIERCE DILLON

APPLICANT

AND

THE BOARD OF MANAGEMENT OF CATHOLIC UNIVERSITY SCHOOL

RESPONDENT

JUDGMENT of Ms. Justice Murphy delivered on the 8th day of October 2019

1. This application is a complex one, both as a matter of law and as a matter of fact. The applicant is seeking an order of *certiorari* of a finding by the respondent at the conclusion of a Complaints Procedure, that the applicant had engaged in inappropriate behaviour and language in relation to a student. He is also seeking an order of *certiorari* of a decision to issue him with a “final written warning” in respect of the alleged inappropriate behaviour and language which issued pursuant to the provisions of the Disciplinary Procedures set out in a departmental circular known as DES 60/2009. This decision followed on from the finding made by the Board of Management at the conclusion of the Complaints Procedure. Thirdly, he seeks an order of *certiorari* quashing the decision of the respondent refusing to permit him to appeal against the decision that he had engaged in inappropriate behaviour and language in relation to a student. This refusal was communicated to him by letter dated the 17th September 2015. The applicant is claiming various ancillary reliefs including declaratory reliefs.
2. The respondent has raised a number of preliminary issues including that the relevant decisions are not judicially reviewable and that the applications in respect of the Board of Management’s finding in the Complaints Procedure and the sanction issued in the Disciplinary Procedure are out of time.
3. In order to comprehend and contextualise the events which occurred, one has to understand the genesis of the complaint/disciplinary procedures and the evolution of the disciplinary aspect of those procedures.

The procedures

4. On the 1st September 2000, ASTI and the joint managerial body for voluntary secondary schools agreed procedures for the processing of complaints made by parents/guardians or students (who have reached the age of eighteen years) against a teacher. On the same date, the bodies agreed a disciplinary procedure for use by school management against a teacher in a voluntary secondary school. Both of these procedures are non – statutory but were adopted by both teachers and management as part of their contractual arrangements. The Complaint and Disciplinary Procedures of the 1st September 2000, as we shall see, are interlinked.

The Complaints Procedure

5. The document is a two-and-a-half-page document and reads as follows: -

“Introduction:

Procedures are necessary to ensure fair treatment for all in the school and acceptable procedures should be known, agreed, and observed in the interest of good industrial relations and harmony in the school environment. Periodic review of all procedures should take place to ensure practices are good and adhere to any developments in employment legislation or other legislation or case law.

Purpose of Complaints Procedure

- a) To provide a fair, consistent and equitable mechanism for processing complaints by parents/guardians or students (who have reached the age of 18 years) against teachers.*
- b) To do so in a manner that affords all concerned full rights in accordance with natural justice.*
- c) To outline the procedures which should be followed by all – employer, employees and their representatives - in the event of complaints being made against teachers.*

Exclusions

- (a) When complaints are deemed by the Principal/Manager/Board of Management to be: -*
 - (i) on matters of professional competence which cannot be dealt with at school level and which are to be referred to the Department of Education and Science for investigation;*
 - (ii) frivolous, vexatious or anonymous complaints and complaints which do not impinge on the work of a teacher in a school;*
 - (iii) complaints in which either party has had recourse to law or to another standard procedure;**they shall be excluded from the scope of this procedure.*
- (b) Verbal complaints may be processed informally through Stage 1 of the procedure. Where the complaint is made in writing initially, the complaint should be processed through Stage 1 but a copy of the complaint should be given to the teacher at Stage 1. Only those complaints which are written and signed by the complainants may be investigated through stage two and stage three of the procedure.*

Procedures

Stage 1

- 1.1 A parent/guardian/student who wishes to make a complaint should, unless there are local arrangements to the contrary, make an appointment and discuss the matter with the teacher with a view to resolving the complaint.*

- 1.2 *Where the parent/guardian/student is unable to resolve the complaint with the teacher, she/he should approach the Principal with a view to resolving it.*
- 1.3 *The resolution and outcome of Stages 1.1 and 1.2 should be communicated verbally to both parties.*
- 1.4 *If after Stage 1.2 the complaint is still unresolved, the parent/guardian/student should be advised that they may raise the matter formally with the Board of Management as set out at Stage 2 with a view to resolving it.*
- 1.5 *In the case of a complaint against a Principal, the parent/guardian/student should discuss the complaint with the Principal in the first instance. If the parent/guardian/student is unable to resolve the complaint with the Principal, the complaint may be processed as provided for at Stages 2 and 3 of this procedure.*

Stage 2

- 2.1 *If the issue is not resolved at Stage 1 then the parent/guardian/student should lodge the complaint in writing with the Board of Management.*
- 2.2 *The Board should acknowledge receipt of the complaint, note it formally and appoint two authorised representatives, one of whom may be the Principal, to deal with the matter.*
- 2.3 *The authorised representatives should, subject to the general authorisation of the board: -*
 - (a) *supply the teacher with a copy of the written complaint, and*
 - (b) *arrange a meeting with the teacher and, where applicable, the Principal and the complainant, with a view to resolving the complaint. Such a meeting should take place within 10 school days of receipt of the written complaint as specified at 2.1*
- 2.4 *The teacher may be accompanied by a colleague or the ASTI School Steward at this stage of the procedure.*
- 2.5 *The authorised representatives should convey the outcome of these discussions / investigation, in writing, to the teacher, complainant and the Board of Management and indicate whether or not the matter has been resolved to the satisfaction of all parties.*
- 2.6 *If the complaint has not been resolved at this stage and the complainant wishes to proceed to Stage 3 s/he shall indicate this in writing to the Board of Management within 10 school days of receipt of the letter referred to in 2.5.*

Stage 3

- 3.1 *If the Board of Management considers the complaint is not substantiated, the teacher and the complainant should be so informed within three days of the Board meeting.*
- 3.2 *If the Board of Management considers that the complaint warrants further investigation, it should proceed as follows:*
- (a) *the teacher should be informed that the investigation is proceeding to the next stage;*
 - (b) *the teacher should be supplied with a copy of any written evidence relevant to the complaint;*
 - (c) *the teacher should be requested to supply a written statement to the Board of Management in response to the complaint;*
 - (d) *the teacher should be afforded an opportunity to make a formal presentation of their case to the Board of Management. The teacher would be entitled to be accompanied and assisted by a colleague or union representative at any such meeting, and*
 - (e) *the Board of Management may arrange a meeting with the complainant. The complainant would be entitled to be accompanied and assisted by a friend at any such meeting, and*
 - (f) *the meeting/hearing of the Board of Management referred to in 3.2(d) and 3.2(e) will take place within 15 days of the meeting referred to in 2.3(b).*
- 3.3 *When the Board of Management has completed its investigation, the decision of the Board of Management should be conveyed in writing to the teacher and the complainant within five school days of the decision being taken.*
- 3.4 *The decision of the Board of Management shall be final, except in respect of matters governed by appeals procedures in the Education Act 1998.*
- 3.5 *In the case of a complaint which is upheld the matter may be dealt with by the Board under the provisions of Stage 3 of the agreed Disciplinary Procedures. In such circumstances, members of the Board who have acted as authorised representatives in the investigation of the complaint should not participate in the decisions of the Board relating to the application of disciplinary action.*

Notes

- (i) *In this procedure a school day means a day on which the school is in operation.*
- (ii) *At all stages of the Complaints Procedure a written record should be kept of*
 - a. *the investigation undertaken;*

- b. *communications to BOM/Parent/Guardian/Student and Teacher, and*
- c. *the steps and /or decision taken.*

Copies of this written record may be made available for inspection to the parties to the complaint and to the teacher(s) concerned.

(iii) The Complaints Procedure shall be reviewed by the parties every three years or at the request of any one of the parties.

6. On the evidence before the court, it appears that the complaints procedure has not been reviewed since the date of its agreement on the 1st September 2000, nor it appears on the evidence has there been any request by either of the parties for a review of the complaints procedure. The linked disciplinary procedure agreed on the same day, the 1st September 2000, is headed "*Procedure for use by school management against a teacher in a voluntary secondary school*".

"Introduction

a) *A Code of Practice for Disciplinary procedures was issued by the Minister for Enterprise and Employment in May 1996 under the terms of the Industrial Relations Act, 1990.*

b) *The Code of Practice states: -*

"procedures are necessary to ensure both that discipline is maintained in the workplace and that disciplinary measures can be applied in a fair and consistent manner. Apart from considerations of equity and natural justice, the maintenance of a good industrial relations atmosphere at workplace level requires that acceptable procedures be in place and be observed".

"Such procedures serve a dual purpose in that they provide a framework which enables management to maintain satisfactory standards and employees to have access to procedures whereby alleged failures to comply with these standards may be fairly and sensitively addressed".

"The essential elements of any procedures for dealing with disciplinary issues are that they be rational and fair, that the basis for disciplinary action is clear, that the range of penalties that can be imposed is well-defined and that an internal appeal mechanism is available".

c) *The Code of Practice also states that: -*

"The procedures applied must comply with the general principles of natural justice and fair procedures which include:

- (a) that details of the allegations, complaints or issues of professional competence be put to the employee concerned;*

- (b) *that the employee concerned be given the opportunity to respond fully to any such allegations or complaints;*
 - (c) *that the employee concerned is given the opportunity to avail of representation;*
 - (d) *that the employee concerned has the right to a fair and impartial examination of the issues being investigated, taking into account the allegations or complaints themselves, the response of the employee concerned to them, any representations made by or on behalf of the employee concerned and any other relevant or appropriate evidence, factors or circumstances”.*
- d) *The following procedure, based on the principles set out above, has been agreed between the ASTI and the JMB for the processing of disciplinary matters relating to the employment of a teacher or teachers in a voluntary secondary school.*

Scope of this procedure

- (a) *this procedure should be used to investigate serious charges against a teacher of neglect of professional duties, or other serious charges relating to the schoolwork of the teacher, made by school management.*
- (b) *the procedure should be used to determine the appropriate disciplinary action in circumstances where an investigation by another agency or another procedure indicated that such action might be warranted.*

The upholding of a complaint under the complaints procedure seems to the court to be a procedure envisaged by this provision.

- (c) *the following matters are specifically excluded from the scope of this procedure:*
 - (a) *Matters of professional competence which cannot be dealt with a school level and which are referred to the Department of Education and Science for investigation, except as provided in (c) below;*
 - (b) *Frivolous, vexatious or anonymous complaints and complaints which do not impinge on the work of the teacher in the school;*
 - (c) *Complaints in which either party has recourse to law or to another more appropriate standard procedure.*

Procedures

Stage 1.

- 1.1 *The principal shall discuss the charge with the teacher with a view to resolving it.*

- 1.2 *If no resolution follows, the principal shall put the charge in writing to the teacher, stating the nature of the charge and advising the teacher in question that, if the situation is not satisfactory within a reasonable period, which must be specified, the principal will invoke Stage 2.*

Stage 2.

- 2.1 *If the issue is not resolved at Stage 1, then the principal should lodge the charge in writing with the Board of Management.*
- 2.2 *The board shall acknowledge receipt of the charge and note the charge and appoint an investigating committee which does not contain members of the Board, to deal with the matter.*
- 2.3 *The investigating committee should subject to the general authorisation of the board;*
- (a) Provide the teacher with a copy of the written charge;*
 - (b) Seek a report from the principal;*
 - (c) Arrange a meeting with the teacher with a view to resolving the charge. Such a meeting should take place within ten school days of receipt of the written charge as specified at 2.1. If the investigating committee deems it appropriate, the principal may be invited to attend such a meeting. The teacher may be accompanied by a colleague or union representative at this stage of the procedure.*
- 2.4 *The investigating committee shall consider the views conveyed to them and any other evidence adduced in support of the views and shall prepare a written statement of findings on the outcome of the investigation.*
- 2.5 *The investigating committee should convey the outcome of the investigation in writing to the teacher and to the Board of Management and indicate whether or not the matter has been resolved to the satisfaction of all parties.*
- 2.6 *If the matter has not been resolved at this stage, and the principal or the aggrieved party wishes to proceed to Stage 3, she/he shall indicate this in writing to the Board of Management within ten school days of the receipt of the letter setting out the outcome of the investigation referred to in 2.5.*

Stage 3.

- 3.1 *If the Board of Management considers the charge is not substantiated, the teacher should be so informed within three school days of the Board meeting. The principal should also be notified.*

3.2 *If the Board of Management considers that the charge warrants further investigation, it should proceed as follows: -*

- (a) *The teacher should be informed that the investigation is proceeding to Stage 3, which involves a formal hearing of the Board and may lead to disciplinary action up to and including dismissal;*
- (b) *The teacher should be supplied with a copy of any written evidence relevant to the charge;*
- (c) *The teacher should be requested to supply a written statement to the Board of Management in response to the charge;*
- (d) *The teacher should be afforded an opportunity to make a formal presentation of the case to the Board of Management. The teacher will be entitled to be accompanied and/or represented by a colleague or union representative at any such meeting;*
- (e) *The Board of Management may also arrange a meeting with any other party involved if it considers such to be warranted;*
- (f) *The principal may only attend at a Board of Management meeting in order to give evidence and should not be present at the meeting during the Board's deliberations on its decision.*
- (g) *The meeting/hearing of the Board of Management referred to in 3.2 (d) and 3.2 (e) will take place within 20 school days of the meeting referred to in 2.3 (c).*

3.3 *Decision of the Board*

When the Board of Management has completed its investigation, the decision of the Board of Management should be conveyed in writing to the teacher within five school days of the decision being taken.

3.4 *The Board may decide that the charge is unjustified, or is unproven or is substantiated and accordingly take no action or take disciplinary action as set out in s. 3.5*

3.5. *Disciplinary action*

If the charge is upheld, the Board of Management may implement disciplinary action.

Disciplinary action may include: -

- (a) *An oral warning;*
- (b) *A written warning,*

- (c) *A final written warning;*
- (d) *Suspension with pay;*
- (e) *Suspension without pay;*
- (f) *Demotion;*
- (g) *Other disciplinary action short of dismissal;*
- (h) *Dismissal.*

3.6 Implementation of disciplinary action

The steps in the implementation of disciplinary action should be progressive. For example, an oral warning should be followed by a written warning, and then a final written warning before further sanction. However, there may be instances where more serious action, including dismissal, is warranted at an earlier stage. A teacher may be suspended on full pay pending the outcome of the investigation into the alleged serious breach of discipline. Written warnings may be placed on a teachers' record within the school. They should be removed after a specified period of time and the teacher advised accordingly.

3.7 Decision of the Board.

The decision of the Board of Management shall be final and binding. This is without prejudice to the right of a teacher to have a recourse to the law to protect his/her employment or to appeal to the patron (Trustees) under contractual arrangements.

Notes

- (i) *The disciplinary procedure shall be reviewed after three years, or more often, at the request of either party.*
- (ii) *At all stages of the procedure a written record shall be kept of:*
 - (a) *The investigation undertaken;*
 - (b) *Communications between the principal, Board of Management and the teacher, and*
 - (c) *The steps and/or decision taken.*

The record shall be retained on a confidential basis on behalf of the Board of Management for one year after the conclusion of the investigation.

Copies of the written record shall be made available to the teacher or the teacher's representative, on request.

(ii) *In this procedure a school day is a day on which the school is in operation.*

(iv) *The investigating committee at Stage 2 should consist of:*

(a) *A teacher from another school, and*

(b) *A Board of Management representative from another school.*

(v) *In the case of a charge against a principal, the chairperson of the Board of Management shall undertake the role of the principal as set out in the various stages of the procedure. The investigating committee in this context shall include a principal from another school and a Board of Management representative from another school."*

7. Pausing for a moment to consider these procedures, it is clear that the 2000 Complaint and Disciplinary Procedures are parallel, complementary procedures which dovetail with each other. In the event that a complaint is upheld, i.e. that the matter complained of is found to have occurred, 3.5 of the complaints procedure grants a discretion to the Board of Management to transfer the matter to Stage 3 of the Disciplinary Procedure, if it considers it warranted.
8. If that occurs, then at Stage 3 of the disciplinary procedure the teacher is charged with the offending conduct. That charge of misconduct is to be determined by the Board of Management in accordance with para. 3 of the disciplinary procedure. It is not for the Board of Management to reach a finding of inappropriate behaviour or misconduct at the conclusion of the Complaints Procedure. The discretion afforded them is to conclude that there is a *prima facie* case of misconduct with which the teacher can be charged under Part 3 of the disciplinary proceedings. (emphasis added)
9. The Board of Management must decide whether the complaint which has been upheld does or does not amount to a serious charge. If they conclude that the complaint though upheld does not amount to a serious charge, they can in effect dismiss it. If, however, they consider that the conduct which has been found to have occurred warrants further investigation then they must follow the procedures set out in para. 3.2 of the disciplinary code. The teacher is entitled to have a written copy of the charge laid against him. He would be entitled to argue that the complaint which had been upheld did not amount to misconduct or that the incident was trivial and did not warrant any sanction. Having taken all of the steps set out in 3.2 of the disciplinary procedure, the Board of Management could conclude that the charge is unjustified or unproven or that the behaviour and conduct found to have occurred amounts to misconduct and impose one of the eight sanctions available, ranging from an oral warning to dismissal.
10. A teacher facing a serious charge under the 2000 disciplinary process had a specified contractual right to have recourse to law to protect his employment. Thus, a teacher who considers that he is or has been unfairly treated, had a contractual right to seek relief from the courts. In the 2000 disciplinary procedure the decision of the Board of Management was to be final, subject only to law.

New disciplinary procedures – Department of Education and Science circular 60/2009

11. Section 15(2) of the Education Act, 1998 states, in respect of a board of management of a school, that:

“A board shall perform the functions conferred on it and on a school by this Act and in carrying out its functions the board shall –

(a) Do so in accordance with the policies by the Minister from time to time”

12. Section 24(3) of the Education Act 1998 provides that: -

“A board shall appoint teachers and other staff, who are to be paid from monies provided by the Oireachtas, and may suspend or dismiss such teachers and staff, in accordance with procedures agreed from time to time between the Minister, the patron, recognised school management organisations and any recognised trade union and staff association representing teachers or other staff as appropriate”.

13. The DES circular 60/2009 was brought into effect by the Minister for Education and Science in September 2009. It was issued under the provisions of s. 24(3) of the Education Act 1998. The circular contains detailed provisions in respect of disciplinary matters concerning teachers. It is specified to be made under s. 24(3) of the Education Act (1998) and it is argued has the force of law as an instrument of ministerial policy in relation to the disciplining of teachers.

14. DES circular 60/2009 replaces the disciplinary procedure of the 1st September 2000. It states: -

“This disciplinary procedure supersedes all existing local and national disciplinary procedures. Principals, teachers and boards of management will be made aware of and be made fully conversant with this procedure and adhere to its terms.”

15. The 2009 procedures encompass procedures relating to professional competence issues, which had previously been reserved to the Department and separately contains procedures relating to work, conduct and matters other than professional competence. It is the latter which concerns us here. At Chapter 2, the circular sets out general principles underpinning the disciplinary procedures. It provides *inter alia*: -

“Every teacher is personally accountable for his/her own behaviour and work performance. Early intervention at the appropriate level to address perceived inappropriate behaviour is desirable for all parties so as to minimise the risk of having to escalate sanctions as provided for in these procedures.

Every effort will be made by the Principal to address alleged or perceived shortcomings in work and conduct through informal means without invoking the formal disciplinary procedure.

Where circumstances warrant, a teacher may be placed on administrative leave with full pay pending an investigation, or pending the outcome of an investigation, a disciplinary hearing/meeting or the outcome of a disciplinary hearing/meeting.

The procedures are intended to comply with the general principles of natural justice and provide:

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

- that it will be considered a disciplinary offence for any person to intimidate or exert inappropriate pressure on any person who may be required to attend as a witness.
- that where a decision is taken to impose a disciplinary sanction, the sanction imposed will be in proportion to the nature of the conduct/behaviour/performance that has resulted in the sanction being imposed.
- These procedures are without prejudice to the right of a teacher to have recourse to the law to protect his/her employment

16. In that part of the circular dealing with the disciplinary procedures for teachers in primary, voluntary secondary, and community and comprehensive schools, the preamble states: -

"This disciplinary procedure for teachers employed in primary, community and comprehensive, and voluntary secondary schools was developed and agreed following discussions between the Department of Education and Science, school managerial bodies and recognised teacher unions representing teachers in these sectors. It takes account of employment legislation and the Labour Relation Commission's Code of Practice on Disciplinary Procedures. This disciplinary procedure supersedes all existing local and national disciplinary procedures. Principals, teachers and boards of management will be made aware of and be made fully conversant with this procedure and adhere to its terms".

17. In the introductory section, the circular acknowledges that the significant majority of teachers do their work in a competent and efficient way and the disciplinary procedures are therefore geared towards a minority of individuals within the profession: -

"It is also the case that any such process must recognise the reality that such matters are often of a transient nature and may have their origin in issues of a personal or professional nature which are of relatively short time duration. Isolated issues or omissions of a minor nature will where possible be dealt with informally".

The introduction advises that generally the approach to dealing with matters of work and conduct ". . . should involve a number of stages moving from informal stages to formal stages". There is however the caveat that although disciplinary action will normally follow the progressive stages, the procedure may be commenced by the school at any stage of the process if the alleged misconduct warrants such an approach. The circular then sets out the different stages of the disciplinary process.

18. The first is an informal stage which is essentially a chat between the teacher and the principal concerning any unsatisfactory conduct and the required improvement. If the teacher's conduct does not meet the required standards despite this informal intervention, then the disciplinary procedure is gradually escalated.

19. The first escalation is referred to as Stage 1 and consists of a verbal warning. Stage 1 states:

“A formal disciplinary meeting with the teacher will be convened by the Principal. The teacher will be given at least five school days’ written notice of the meeting, the notice should state the purpose of the meeting and the specific nature of the complaint together with any supporting documentation. The teacher concerned may be accompanied at any such meeting by his/her trade union representative or a work colleague.

At the meeting the teacher will be given an opportunity to respond and state his/her case fully and to challenge any evidence that is being relied upon for a decision. Having considered the response the Principal will decide on the appropriate action to be taken. Where it is decided that no action is warranted the teacher will be so informed in writing within five school days. Where it is decided that disciplinary action at this stage is warranted the Principal will inform the teacher that he/she is being given a verbal warning. Where a verbal warning is given it should state clearly the improvement required and the timescale for improvement. The warning should inform the teacher that further disciplinary action may be considered if there is no sustained satisfactory improvement. The teacher will be advised of his/her right to appeal against the disciplinary action being taken and the appeal process.”

20. The verbal warning will be active for a period of 6 months, and will cease following satisfactory completion of this time period.

21. The next stage of the disciplinary process is a written warning. This comes into play if, having received a verbal warning, the teacher’s conduct is perceived by the Principal to be less than satisfactory. Stage 2 states that:

“If, having received a verbal warning, the teacher’s conduct is perceived by the Principal to be less than satisfactory in relation to that required at Stage 1 a meeting will be arranged between the teacher and the Principal and a nominee of the board of management. The teacher will be given at least seven school days written notice of the meeting, the notice should state the purpose of the meeting and the specific nature of the complaint together with any supporting documentation. The teacher concerned may be accompanied at any such meeting by his/her trade union representative/s or a colleague/s subject to an overall maximum of two.

At the meeting, the teacher should be given a clear statement of the areas/s where his or her conduct is perceived as unsatisfactory. The teacher will be given an opportunity to respond and state his/her case fully and to challenge any evidence that is being relied upon for a decision and be given an opportunity to respond. Having considered the response the Principal and nominee of the board of management will decide on the appropriate action to be taken. Where it is decided

that no action is warranted the teacher will be so informed in writing within five school days. Where it is decided that disciplinary action at this stage is warranted the teacher will be informed that he/she is being given a written warning. Where a written warning is given it should state clearly the improvement required and the timescale for improvement. The written warning should inform the teacher that further disciplinary action may be considered if there is no sustained satisfactory improvement. The teacher will be advised of his/her right to appeal against the disciplinary action being taken and the appeal process."

22. A Stage 2 written warning is active for a period of nine months.
23. Stage 3 is referred to as a final written warning. This part of the disciplinary process may be invoked either following unsatisfactory conduct after a written warning, or, there is an occurrence of a more serious offence. Stage 3 states:

"If having received a written warning, the Principal perceives that the teacher's conduct remains less than satisfactory or there is an occurrence of a more serious offence a meeting will be arranged between the teacher and the Principal and a nominee of the Board of Management. The teacher should be given at least seven school days' written notice of the meeting. The notice should state the purpose of the meeting and the specific nature of the complaint together with any supporting documentation. The teacher concerned may be accompanied at any such meeting by his/her trade union representative/s or a colleague/s subject to a maximum of two.

At the meeting the teacher should be given a clear statement of the areas/s where his or her conduct is perceived as unsatisfactory. The teacher will be given an opportunity to respond and state his/her case fully and to challenge any evidence that is being relied upon for a decision and be given an opportunity to respond. Having considered the response the Principal and the nominee of the board of management will decide on the appropriate action to be taken. Where it is decided that no action is warranted the teacher will be so informed in writing within five school days. Where it is decided that disciplinary action at this stage is warranted the teacher will be informed that he/she is being given a final written warning. Where a final written warning is given it should state clearly the improvement required and the timescale for improvement. The final written warning should inform the teacher that further disciplinary action may be considered if there is no sustained satisfactory improvement. The teacher will be advised of his/her right to appeal against the disciplinary action being taken and the appeal process."

24. A final written warning will be active for a period not exceeding twelve months. The record will be removed from the file after the twelve-month period subject to satisfactory improvement during the period.
25. The Stage 4 process is stated as follows: -

"If it is perceived that the poor work or conduct has continued after the final written warning has issued or the work or conduct issue is of a serious nature a comprehensive report on the facts of the case will be prepared by the Principal and forwarded to the board of management. A copy will be given to the teacher.

The board of management will consider the matter and will seek the views of the teacher in writing on the report prepared by the Principal. The board of management shall afford the teacher an opportunity to make a formal presentation of his/her case. The teacher should be given at least ten school days' written notice of the meeting. The notice should state the purpose of the meeting and the specific nature of the complaint and any supporting documentation will be furnished to the teacher. The teacher concerned may be accompanied at any such meeting by his/her trade union representative/s or a colleague/s subject to a maximum of two. The teacher will be given an opportunity to respond and state his/her case fully and to challenge any evidence that is being relied upon for a decision and be given an opportunity to respond. Having considered the response the board of management will decide on the appropriate action to be taken. Where it is decided that no action is warranted the teacher will be so informed in writing within five school days. Where following the hearing it is decided that further disciplinary action is warranted the board of management may avail any of the following options;

- deferral of an increment
- withdrawal of an increment or increments
- demotion (loss of post of responsibility)
- other disciplinary action short of suspension or dismissal
- suspension (for a limited period and/or specific purpose) with pay
- suspension (for a limited period and/or specific purpose) without pay
- dismissal.

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

Appeal

26. Scope for appeal of any decision made under the DES Circular 60/2009 is laid out within the Circular. It states: -

"It will be open to the teacher to appeal against the proposed disciplinary action. In the case of a sanction being imposed at Stage 1 the appeal will be to a nominee of the board of management. In the case of a sanction being imposed at Stage 2 and/or Stage 3 of these procedures the appeal will be heard by the board of

management. In the case of a sanction being imposed under Stage 4 of the procedure, an appeal will be to a disciplinary appeal panel appointed by the board of management."

27. Accordingly, in the instant case, the applicant's appeal would lie to the Board of Management – the same Board of Management which had already made a finding of inappropriate behaviour against him. The circular states specifically that it seeks to address perceived inappropriate behaviour. One of the general principles set out is that every teacher is personally accountable for his/her own behaviour and work performance.
28. Early intervention at the appropriate level to address perceived inappropriate behaviour is desirable for all parties so as to minimise the risk of having to escalate sanctions as provided for in these procedures. The general principles underpinning the procedures also states that every effort will be made by the principal to address alleged or perceives shortcomings in work and conduct through informal means without invoking the formal disciplinary procedures.
29. While the disciplinary procedures set out in Circular 60/2009 supersede the earlier disciplinary procedures of 2000, the procedures for complaints by parents or students agreed in 2000 appear to be still extant. There is a misalignment between the two procedures. The complaints procedure and the disciplinary procedure in 2000 are perfectly aligned. If a complaint is upheld, then a charge could be levelled against the teacher under the disciplinary code.
30. The scope of the 2000 disciplinary procedures was for the investigation of serious charges against a teacher of neglect of professional duties or other serious charges relating to the schoolwork of the teacher made by school management. If following the upholding of a complaint, a charge of serious misconduct or inappropriate behaviour is to be made, that falls to be dealt with under stage 3 of the disciplinary procedures 2000. Under that section in 2000, the charge would have to come before the board of management and the persons who had conducted the investigation into the complaint would be excluded from the board of management considering the charge.
31. Under Stage 3 of the 2000 proceedings the board would have to consider whether the conduct which the teacher had engaged in amounted to inappropriate behaviour. The board could conclude that it did not amount to inappropriate behaviour or it could conclude that the charge of inappropriate behaviour warranted further investigation. 3.2 requires that the teacher should be informed that the investigation is proceeding to Stage 3 which involves a formal hearing of the board and may lead to disciplinary action up to and including dismissal.
32. The teacher should be supplied with a copy of any written evidence relevant to the charge of inappropriate behaviour. The teacher should be requested to supply a written statement to the board of management in response to the charge. The teacher should be afforded an opportunity to make a formal presentation of the case to the board of

management. The board of management may also arrange a meeting with any other party involved if it considers such to be warranted.

33. The principal may only attend at a board of management meeting in order to give evidence and should not be present at the meeting during the board's deliberation on its decision. In short, what should happen following the upholding of a complaint, is a decision to charge a teacher under the disciplinary code and where the concern of the board would be to decide whether or not the conduct found to have been engaged in by the teacher amounts to inappropriate behaviour, it is open to the board to decide that the charge is unjustified, or is unproven or is substantiated, and accordingly take no action, or take disciplinary action, as set out in s. 3.5. If the charge of inappropriate behaviour is upheld, the board of management may implement disciplinary action which may include: an oral warning, a written warning, a final written warning, suspension with pay, suspension without pay, demotion, other disciplinary action short of dismissal, or dismissal. The steps in the implementation of disciplinary action should be progressive. Thus, having found the complaint to be justified, a range of sanctions was open to the board, under the 2000 disciplinary procedures.
34. In such a hearing, it would have been open to the applicant to argue that the conduct found as a matter of fact to have occurred, did not amount to inappropriate behaviour. Stage 3 of the 2009 proceedings are markedly different. There is only one sanction at issue, that being a final warning letter. None of the other less draconian sanctions are available.
35. The main changes effected by the Disciplinary Procedures of 2009 is to put the procedures on a statutory footing and to afford the teacher the right to an internal appeal mechanism at each stage of the Disciplinary Process. The Disciplinary Procedures no longer refer to a "charge" but rather to allegations or complaints of "inappropriate behaviour". No-one appears to have adverted to the potential difficulties which might arise from the disconnection of the Complaints Procedure from the Disciplinary Procedure.

Chronology of Events, Facts and Findings

36. These proceeding centre around incidents which occurred on the Thursday 8th May 2014 in which the applicant is alleged to have called a 15-year-old student "AB" a "little bitch". A further incident is alleged to have occurred between the applicant and "AB" occurred on the Friday 9th May 2014.
37. On Monday 12th May 2015 "AB"'s mother rang the school to register a complaint against Mr Dillon. This complaint outlined that "AB" had been called an offensive name and set out details of the incidents. Mr Dillon has at all times stated that he did not use the offensive term.
38. On learning of the complaint, the Deputy Principal, according to his statement, called the mother back to inform her that there was a Complaints Procedure for parents when they had a difficulty with a teacher and he asked her without prejudice to her right to use this if she would prefer that either the Deputy Principal or the Principal pursue the matter.

According to the statement she was amenable to that course. The Deputy Principal told her that she could always go back to the Complaints Procedure if necessary.

39. Later that morning, according to his note, the Deputy Principal interviewed "AB". According to his statement "AB" outlined the events as follows: -

"AB" said that on Thursday Mr Dillon called him a "little bitch". He was late for late for class. He had been talking to Mr Brett. AB said he was sorry for being late and got given out to. He had no paper to write on and asked "CD" for some paper. He was given out to again for disrupting the class. Mr Dillon asked a question and Harry felt ignored. He had his hand up and said he knew the answer. Mr Dillon said 'you little bitch' and sent him to the study hall about 10 minutes into class. He said "CD" heard this.

On Friday, CSPE was about to start. Mr. Dillon called "AB" aside and told him that he would be kicked out of his class for the next three weeks because his behaviour was disgraceful. "AB" said to Mr. Dillon that he was not allowed to call him a "little bitch". Mr. Dillon said he did not and "AB" told Mr. Dillon that he was a coward. He shut the door in his face.

"AB" said he was a bit of a messer in class but Mr. Dillon makes jokes and people react in different ways, but he feels picked on."

40. The deputy headmaster according to his statement then interviewed another boy, "CD", in the class and asked him had he heard any teacher say anything to AB. "CD" said that on Thursday he heard Mr. Dillon say to AB *"to stop whining you little bitch"*. At the time, it was said he thought it was funny, but he thought it was a very strange thing for a teacher to say. AB was sent out of the class.
41. His statement further stated that, on Friday, he heard AB arguing with the teacher at the door and the teacher was saying it was no way to enter his classroom. This was in the prefabs. AB said to the teacher *"You called me a bitch"*, and the teacher replied that he did not, and then AB said to the teacher *"you are acting as a coward"*. He feels the teacher in question does pick on AB and does not treat all the boys equally.

Stage 1 of the Complaints Procedure

42. On the morning of the 21st May, the applicant and one of his teaching colleagues, who is the teacher's representative on the Board of Management, met the principal of the school to discuss the oral complaint made by "AB"'s mother.
43. On the 26th May, a meeting took place between the principal and the two parents of AB in the principals' office and the applicant complains that he has received no contemporaneous date or memo of such meeting. On the 26th May, there was a meeting between the parents of AB and the applicant who was accompanied by the same teaching colleague, with a view to resolving the complaint in accordance with Stage 1 of the complaints procedure. It appears that then and at the later stage, Stage 2, the parents were seeking an apology for the remarks made. It is agreed that the complaint was not

resolved because Mr. Dillon the applicant denied that he used the expression alleged by the pupil.

Stage 2 Complaints Procedure

44. On the 8th June 2014, the parents wrote to the secretary of the Board of Management in accordance with 1.4 of the complaints procedure, pointing out that the complaint had not been resolved because of the applicants' denial of the use of the language alleged. The parents invoked Stage 2 of the complaints procedure and attached to the letter of the 8th June were details of the incidents with "AB" and the applicant on the 8th May 2014 and the 9th May 2014. The formal details lodged with the Board of Management state: -

"On Thursday the 8th May 2014, AB and another boy had arrived late to CSPE class because he was talking to his history teacher Mr. Brett prior to class. AB apologised to Mr. Dillon for being late to class, and Mr. Dillon gave out to AB but said nothing to the other boy. After AB sat down, Mr. Dillon told the class to take out a piece of paper, "AB" asked another boy for some paper, as he had left his copybook in his locker. Mr. Dillon shouted at AB that he was disrupting the class. Mr. Dillon then asked the class a question about the Dáil, none of the class knew the answer and nobody except "AB" had their hand up. Mr. Dillon ignored him and "AB" said the answer out loud to the class. Mr. Dillon then told "AB" never to speak without being asked, then he said to "AB" that he was he was continually disrupting the class and that "AB" was always moaning and that he was 'a little bitch' and told him to leave the class. "AB" left the class and went to the study hall".

9th May 2014

On the 9th May 2014, "AB" was leaving school early to play for the school cricket team. "AB" went to Mr. Dillon before CSPE class to tell him that he would not be in class as he was playing cricket for the school team. Mr. Dillon called "AB" aside at the back of the class and told "AB" that he would be kicked out of the class for the next three weeks because his behaviour was disgraceful. "AB" then said to Mr. Dillon that he was not allowed to call him "little bitch". Mr. Dillon said he did not, and "AB" told Mr. Dillon that he was a coward. Mr. Dillon then shut the door in "AB's" face.

Previously I had spoken to Mr. Dillon at a parent teacher meeting where Mr. Dillon had called "AB" a "stupid twat". Mr. Dillon denied using this expression but did say that he did call students "twits". Mr. Dillon over the last three years had regularly mispronounced "AB's" surname and found this quite amusing. Again, I spoke with him at the parent teacher meeting but Mr. Dillon denied this.

45. On the 10th June, the principal of the school wrote to the applicant, attaching a copy of the letter of complaint received from the parents and notifying the applicant that the matter would be brought to the attention of the Board of Management that evening, Tuesday the 10th June at a special meeting. He was also informed that no discussion would take place of either the content of the complaint or complainant. The Board would

be solely discussing the matter in reference to the agreed complaints procedure. The applicant was later furnished with an email of the same letter, of which he is most suspicious because he does not have an email.

46. The minutes of the Board meeting of Tuesday the 10th June records:

"M. Daly (principal) advised the Board that he had received a letter dated the 8th June 2014, from (AB's parents), asking that a matter concerning their son, (AB), and Mr. Pierce Dillon, be investigated under Stage 2 of the complaints procedure. M. Daly read out the letter to the Board, and the record provided by the parents, and said that this material had also been forwarded to Mr. Dillon by email and by hard copy. M. Daly distributed a copy of the Complaints Procedure to each member of the Board. The chair went through the various stages and asked if the Board was happy that the matter should be dealt with under Stage 2 of the procedures. The Board agreed that the matter should be dealt with under Stage 2. The Board then agreed that Mr. Declan Mowlds and Mrs. Margaret Gavin should constitute the representatives authorised by the Board to address the matter under Stage 2.3 of the procedure."

47. On the 19th August 2014, the authorised representatives wrote to the applicant, Mr. Dillon, advising that they were now ready to have a meeting as provided for in 2.3 (b) of the complaints procedure, and advising him that he had already been furnished with a copy of the complaint and the procedures. The suggested meeting date was Wednesday 27th August 2014.
48. For reasons not explained on affidavit, the meeting appears to have occurred on the 3rd September at the Conrad Hotel. The notes of the meeting exhibited show that the authorised representatives met first with the applicant Mr. Dillon at 2 p.m. and thereafter met with the parents at 3:15 p.m. According to the notes of the meeting, the applicant flatly denied that he had used the phrase complained of. He also complained that he was not being afforded fair procedures in that he did not get a copy of the original phone call from AB's parents and he objected to what he termed, the parallel investigation carried out by the deputy principal. He pointed out that only one student was alleged to have heard the comment from a class of 24. The parents were adamant that the remark had been made; that their son had a very good memory, and that he had been backed up by another student. The parents sought an admission that the phrase was used, and an apology for their son.
49. On the 10th September 2014, the authorised representatives of the CUS Board of Management wrote to the applicant in accordance with stage 2.5 of the complaints procedure. They set out the fact of the meeting. They confirmed that they had not been able to resolve the issue pursuant to Stage 2 of the complaints procedure. They thanked the applicant for his attendance, and acknowledged the difficulty of his position and recorded appreciation for his cooperation in the process. Finally, they advised him that they intended to inform the Board of Management that they were unable to resolve the matter.

50. On the 17th September 2014, "AB's" parents wrote to the Board of Management referring to the unsuccessful attempted resolution at Stage 2 and requesting that the complaint be progressed to Stage 3 of the complaints procedure. This letter was sent within ten school days of being notified of the lack of resolution of the complaint process at Stage 2.

Stage 3 Complaints Procedure

51. On the 25th September 2015, the principal and secretary of the Board of Management, Martin Daly, wrote to the applicant advising him that the parents had invoked Stage 3 of the complaint process and further advising him that the Board would consider that request at its meeting on Monday 6th October.
52. On the 1st October 2014, the applicant wrote a lengthy letter to Mr. Frank Daly, chairperson of the Board of Management. He wrongly refers to the letter of the 10th September from the authorised representatives as having been sent to him by the chairperson of the Board of Management. He then, despite having cooperated with the process up to that point, sets out a number of complaints about the process, maintaining that the complaints procedure of 2000 had not been adhered to. He identified what he considered to be procedural flaws in the process. He complained, wrongly in the court's view, that the letter of complaint of the 8th June was not signed. He complained that documents furnished to him on the 8th June 2014 differed from the document that he was handed at the Stage 2 hearing in September 2014. He complained that there were two versions of the complaint, and therefore he did not know what complaint it was he had to answer. He complained that the enquiries made by the deputy principal, amounted to a parallel investigation, which tainted and prejudiced the complaints procedure. His letter lists six complaints: -
- (i) The complaint was not lodged with the complainant with the Board of Management as per Stage 2, procedure 2.1
 - (ii) The authorised representatives did not furnish me with a copy of the written complaint as per Stage 2, procedure 2.3.
 - (iii) There was no compliance with Stage 2, procedure 2.3 due to the failure to comply with procedures 2.2 and 2.1 above.
 - (iv) A copy of the written and signed complaint was only furnished to me at the Stage 2 hearing on the 3rd September 2014. This is totally contrary to the complaints procedure which provided that: -

"Only those complaints which are written and signed by the complainants may be investigated through stage two and stage three". It follows that the stage two should not have commenced until the written complaint was furnished to me in total.
 - (v) The verbal complaint was made on the 12th May 2014, yet I was not informed about the complaint until the 21st May 2014. It should not have taken nine days to notify me about the complaints. This constitutes serious delay.

- (vi) It emerged at the hearing on the 3rd September 2014 that there was in existence on the file other communications relevant to the complaint against me and that these were never made available to me in advance of the hearing and indeed were only furnished to me after the hearing when I received a letter dated the 5th September 2014 from Fr. Martin Daly, principal. (The court takes it that this is a reference to the note of the deputy principals' conversation with a second student who had allegedly witnessed the events.) This is another breach of the rules of natural justice which make it incumbent on the authorised representatives to provide me with a copy of everything that it was going to put to me and rely on, in investigating the complaints against me.
53. The applicant went on to describe the investigation that had happened to date as resembling the operation of a kangaroo court. He alleged that he had been seriously prejudiced and that he was reserving his rights against the school and Board of Management *"for the manner in which it conducted the investigation of the complaint against me"*. He further alleged that as the entire process was fundamentally flawed, it could move to Stage 3 without contaminating that part of the process as well. He asked the chairman to treat the letter as a *"reservation of rights letter"*. He concludes by saying *"Please also take notice that if this investigation proceeds to Stage 3 of the complaints procedure, I will seek to have any findings judicially reviewed on the grounds that the whole basis of the investigation to date is flawed and is a breach of the complaints procedure and the rules of natural justice"*.
54. The Board of Management considered the request of the parents to have the complaint progressed to Stage 3, and the applicants' letter of complaint of the 1st October 2014 at its meeting on the 6th October 2014. The teachers' representative on the Board was asked to leave the meeting as he had been the person who had attended with the applicant both at the Stage 1 and Stage 2 hearings. The teachers' representative was unwilling to leave and an issue about legal advice was raised.
55. By letter dated the 17th November 2014, the chair of the Board of Management replied to the applicants' letter of the 1st October. Puzzlement was expressed that the applicant having complied fully with Stages 1 and 2 of the complaints procedure was now objecting to the entire process. His complaints of failure to comply with the complaints procedure was rejected, as was the allegation of some parallel investigation by the deputy principal. The letter then specifically addressed the six points raised by the applicant in his correspondence and rejected them, giving reasons. The applicant suggests that the reference in the last paragraph of that letter by the chairman, to the fact that the applicant had made no reference at any point to the serious complaints that had been made against him, was indicative of prejudice or bias on behalf of the chair towards him.
56. On the same date, a board meeting was held at which the question of a conflict of interest of the teachers' representative on the Board was again discussed. The teachers' representative had accompanied the applicant to various meetings including the Stage 1 and Stage 2 meetings, and the concern was that that might give rise to at least a

perception of bias on his part in dealing with the complaint as a member of the Board of Management. The teachers' representative was not persuaded, but he left the meeting reserving his position. Thereafter, a decision was taken that the complaint should be progressed to Stage 3 of the complaints procedure.

57. On the 27th November, the chairman of the Board of Management again wrote to Mr. Dillon notifying him that at its Board meeting of Monday the 17th November 2014 the Board of Management had considered the request from the parents of AB to proceed to Stage 3 of the complaints procedure and had concluded that the complaint warrants further investigation and was notifying him that the investigation was then proceeding to the next stage in accordance with Stage 3.2 of the procedure, the applicant was requested to supply a written statement to the Board in response to the complaint. The Board of Management also offered him the opportunity to make a formal presentation of his case to the Board at its next meeting which was due to take place on Tuesday the 27th January 2015. The letter also notified him of his entitlement to be accompanied by a colleague or union representative at any such meeting. The letter also referred to the fact that all relevant documentation was enclosed. The applicant was asked to confirm his attendance at the meeting by Friday the 9th January 2015.
58. By letter dated the 12th December 2014, the applicant issued a rejoinder letter to the letters sent by the chairman on the 17th November. In the course of the letter he again complains of breach of fair procedures and states that he would not be participating further in "your procedure" and he again reserves his rights in that regard. In respect of the letter of the 27th November 2014, notifying the applicant of the Stage 3 meeting on the 27th January 2015, the applicant made no reply until the 24th January 2015. That letter points out a list of alleged discrepancies in documentation furnished to him, and a list of allegedly missing documents. The letter also points out that 3.2 (f) states that the meeting/hearing of the Board of Management at the Stage 3 process will take place within fifteen days of the meeting referred to in Stage 2.3, that is the meeting with the authorised representatives.
59. The applicant in his letter characterises the time limit as mandatory, whereas in fact the word "must" is not used in the procedures. The applicant also complains of the removal of the teacher representative from the Board dealing with the Stage 3 process. The Stage 3 complaint hearing scheduled for the 27th January was deferred until the 24th February 2015. The court has no evidence before it as to the precise reason for deferral. In any event, on the 9th February 2015, the applicant was notified by letter that the Stage 3 hearing would take place on Tuesday the 24th February at 7:45 p.m.
60. The applicant was again invited to make a formal presentation of his case to the Board at the meeting of the Board of Management. He was also advised that should he wish to do so, he was entitled to be accompanied and assisted by a colleague or friend at the meeting. He was asked to confirm his attendance by the 13th February 2015.
61. On the 16th February 2015, the chairman of the Board replied to the applicants' letter of complaint of the 24th January about discrepancies in documentation and missing

documentation. Explanations were offered in respect of all issues raised and in respect of the time limits in the complaints procedure. It was contended that the time limits are not strict, and it was suggested that much of the delay which had occurred had been caused by the need to reply to queries which the applicant had raised. In this letter of the 16th, the applicant was advised that the meeting would take place on the 24th February at 7:45 p.m. He was urged to reconsider the position he had taken and to attend the meeting as he was entitled to do, so that he could present in person his account and understanding of what took place and his response to the complaint. The applicant was specifically advised that in the event that he decided not to attend the meeting it would not be adjourned and would proceed in his absence. On the 17th February 2015, the applicant wrote to the chair of the Board stating: -

"Due to the failure of the Board of Management of CUS to furnish me with all relevant documentation as requested in my registered letters of 12th December 2014 and 24th January 2015, which is my right under the agreed complaints procedure and in natural justice and the continuation of the unlawful exclusion of the teacher representative Mr. Vincent McMorrow from the Board meeting on the 24th February 2015, I am not in a position to make a full and informed presentation to the Board at its scheduled meeting on the 24th February 2015.

Further, it will be approximately 90 days since the complaint was lodged to the Board and as the agreed complaints procedure states at 3.2 (f) the Board of Management must hold the meeting/hearing within fifteen days which clearly is at total variance to the agreed complaints procedure and the Board of CUS have utterly failed to date to give any valid explanation as to the reason for this inordinate and inexplicable delay which is a serious breach of the agreed complaints procedure and once again I believe strongly in the legal idiom 'justice delayed is justice denied'".

The court notes that the applicant misquotes rule 3.2(f) for a second time in this letter, asserting that the time limits are mandatory.

62. By letter dated Monday the 23rd February 2015, the day before the Stage 3 Complaints Procedure Board meeting, Mr. Dillon sent a further letter to the chair of the Board of Management. In this letter, he complains that he only got the letter of the 16th February on Sunday the 22nd February because he was away during the midterm break. He asked that the Board would only correspond with him during school days and not during school holidays. He again complains about alleged discrepancies in the documentation. He maintains a right to see and cross-examine any witness statement of the independent witness to the events. He complains that the initial redaction and later unveiling of the name of the student witness and the use of this evidence, rendered the process unconstitutional.
63. In this correspondence, the applicant again sets out his complaint about a discrepancy in the documents, pointing out that on the 5th September 2014 he was handed a 28 – page document and on the 27th November 2014, he received a 39 – page document.

64. He also complains that on the 16th February he was provided with notes from the investigating committee for the first time. He asserted a right to see and cross-examine any witness statement of the student who corroborated "AB's" complaint. He asserts that the fact that the identity of the student was first of all redacted and then revealed indicated that the evidence was to be used against the applicant in the complaint procedure. He asserted that he had been "reliably informed" that the complaint procedure is now unconstitutional in these circumstances. He challenged the absence of contemporaneous notes of a meeting between the principal and the complainants on the 21st May 2014 and asserted that this was contrary to school policy. He complained that the failure to provide him with the minutes of relevant Board of Management meetings in respect of the complaint prior to February was contrary to his rights under the agreed complaint procedure and under the Data Protection Act. He challenged the copy of an email dated the 10th June 2014 furnished to him on the 23rd January 2015, as not being a true copy. He complained that all documents were not furnished to him in good faith but were fed to him in a slow fashion and on a "need to request basis". He complained that out of a class of 24 students, the deputy principal only identified one witness who he complained was a scholarship student recommended by the deputy principal. Finally, he again complained of the delay in processing the complaint which he attributes to the Board of Management of CUS. This delay he complained had seriously prejudiced his right to a fair hearing. Once again, he reserved his position and stated that he will seek to have any findings judicially reviewed on the grounds that the whole basis of the investigation to date was seriously flawed and was a breach of the complaints procedure and the rules of natural justice.

Board of Management Hearing of Parent's Complaint

65. The meeting of the Board of Management took place on the 24th February 2015.

According to the minutes of that meeting, the teacher member of the board was absent, the chair, Frank Daly, explained that it was a single item agenda – complaints procedure, Stage 3, in regard to the complaint of the parents of AB about the applicant Mr. Dillon. The state:

The chair outlined the complaints procedure and explained the purpose of the meeting. He outlined the history of the matter and that a resolution had not been achieved under Stage 1 or Stage 2. He indicated that the board would be meeting the parents but that the applicant had declined to attend the meeting.

The Board of Management was supplied with all correspondence/submissions up to and including a submission from Mr. Dillon dated 23rd February 2015 and was given time to read the submissions. In his role of secretary, M. Daly (the principal) went through the various submissions and correspondence and outlined the sequence of same.

The Board then invited the parents of AB to attend the meeting. They were asked to outline the sequences of events from their point of view on the 8th and 9th May 2014 and were also offered the opportunity to elaborate if they needed to on the complaint of the 8th June 2014. The chair outlined to the parents and the Board

that the Board would only be concerning themselves with what happened on the 8th and 9th of May and the Board would not be relying upon or discussing any matters relating to reported witnesses.

After (parents of AB) had outlined their complaint, they left the meeting and the Board considered whether or not the complaint was substantiated. Following some further clarifications and discussions, it was agreed unanimously that the complaint dated the 8th June 2014 from (parents of AB) was substantiated and that Mr. Dillon engaged in inappropriate behaviour and language in relation to AB on the 8th and 9th May 2014. The Board also directed that the matter be taken up under Stage 3 of the disciplinary proceedings. The Board agreed that the chair would make a decision regarding a nominee of the Board to such a disciplinary committee in accordance with those procedures."

66. While the court is satisfied that the Complaint Procedure agreed between the teacher union and the secretariat of Boards of Management was never intended to be as legalistic as Mr. Dillon contends, the court is however, satisfied, that there are some deficiencies in the process as conducted by the Board of Management.
67. First of all, they reached a conclusion on the facts without having any direct evidence of the events giving rise to the complaint. While it is understandable that the adults would not want to involve a fifteen-year-old in the complaints process, it should have been possible for the board to have direct evidence from "AB" either in person or in the form of an attested written statement which could have been furnished to the applicant. Instead, they proceeded on the basis of the hearsay evidence of his parents. According to the minutes of the Board meeting, the Board specifically discounted the potentially corroborative evidence of the second student who allegedly witnessed the interactions between the applicant, Mr. Dillon, and AB.
68. A more serious defect, it appears to the court, is that the Board of Management exceeded its powers under 3.5 of the Complaints Procedure. That provision empowers the Board of Management to either uphold or reject the complaint. If, as the Board did, they uphold the complaint, that is simply a finding of fact that the matters complained of occurred. It appears to the court that the Board fell into error by going further than merely upholding the complaint. It made a finding that the applicant had engaged in inappropriate behaviour and language in relation to AB on the 8th and 9th of May 2014. This was outside their powers under the Complaints Procedure. What 3.5 of the Complaints Procedure authorised the Board to do was that in the event that they concluded that the upheld complaint *prima facie* amounted to inappropriate behaviour and language, was to transfer that charge to the disciplinary process for investigation as to whether or not the facts found amounted to inappropriate behaviour and language.
69. As we have seen, the scope of the 2000 Disciplinary Procedures included the use of the disciplinary procedures to determine the appropriate disciplinary action in circumstances where an investigation by another agency or another procedure indicated that such action might be warranted. Under Stage 3 of the disciplinary procedures of 2000, the applicant

would be charged with inappropriate behaviour and inappropriate language before the Board of Management. While in the circumstances of this case, it would not be open to him to challenge the finding of fact made, it would be open to him to argue that those facts did not amount to inappropriate behaviour or inappropriate language. As we have seen, the Stage 3 procedure under the 2000 disciplinary procedures required the board first of all to consider whether the charge warranted further investigation. If it did, then having taken all of the steps set out at 3.2 and having excluded the principal from its deliberations as required by 3.2(f), the Board could decide that the charge was unjustified or unproven and take no action, or alternatively, if the charge of inappropriate behaviour and language was made out, and the charge was upheld, then the Board could implement disciplinary action ranging from an oral warning to dismissal.

70. In the Disciplinary Procedures of 2009 the Stage 3 process is completely different to Stage 3 of the 2000 Disciplinary Procedures. The 2009 procedures refer to the giving of a final written warning. The 2000 Procedures refer to an investigation by the Board of Management. The Board of Management ignored this difference and simply referred the matter to stage 3 of the new Disciplinary Procedures 2009. All other things being equal, it appears to the court that this might not have been fatal if they had referred it as an allegation of inappropriate behaviour, because stage 3 of the 2009 disciplinary procedures permits a final written warning to be invoked where there is an occurrence of a more serious offence, but there is no escaping the fact that Stage 3 of the 2000 Disciplinary Procedures required that a teacher be charged with an offence rather than entering the disciplinary process with a finding of guilt already made against him.
71. In any event, on the 26th February 2015, the applicant was notified by letter that the Board of Management considered the complaint of AB to have been substantiated and that the applicant "*engaged in inappropriate behaviour and language in relation to AB on the 8th and 9th May 2014 and that in accordance with s. 3.5 of the Complaints Procedure, the Board has directed that the matter will now be dealt with under the provisions of Stage 3 of the disciplinary procedures.*"

Inappropriate Behaviour

72. The applicant avers that he was disturbed and deeply upset to read that the Board of Management had found him guilty of "*inappropriate behaviour and language in relation to AB on the 8th of May and 9th of May 2014*" and contends that inappropriate behaviour in relation to a student in the context of a student/teacher relationship has a sinister connotation. He avers that it suggests, or is likely to be understood as referring to, serious wrongdoing of an abusive kind. The court disagrees that the phrase "*inappropriate behaviour*" has such sinister connotations. In fact, the general principles underpinning the 2009 procedures refers specifically to "*inappropriate behaviour*" in the fourth paragraph of the general principles of the 2009 procedures. It states: -

"Every teacher is personally accountable for his/her own behaviour and work performance. Early intervention at the appropriate level to address perceived inappropriate behaviour is desirable for all parties so as to minimise the risk of having to escalate sanctions as provided for in these procedures".

73. The very purpose of the disciplinary procedures is to address *"inappropriate behaviour"*. The range of potential inappropriate behaviour is wide. It would probably be inappropriate behaviour for a teacher to light up a cigarette in front of his class. It would probably be inappropriate behaviour for a teacher to conduct a class under the influence of alcohol or drugs. It would probably be inappropriate behaviour for a teacher to give a student a cigarette or alcohol. It would probably be inappropriate behaviour for a teacher to refuse to correct a student's homework, or to ban a child from class without cause. The court merely offers these examples to illustrate that *"inappropriate behaviour"* does not have the sinister connotations attributed to it by the applicant and that it is in fact inappropriate behaviour that the disciplinary code of 2009 is designed to regulate.
74. Having been informed of the finding of the Board, the applicant sought and received the minutes of the Board of Management meeting of the 24th February 2015. Despite the applicants' assertions of unconstitutionality, lack of fair procedures and natural justice, his assertion that the complaints hearing was a kangaroo court and his repeated statement of intent to judicially review any adverse findings against him, the applicant did nothing upon receipt of the decision of the Board of Management.
75. It appears to the court that the complaints procedure, unlike the disciplinary procedure contained in DES Circular 60/2009 is a matter of contract and not a matter of public law, and while the applicant would not have been entitled to a judicial review, it was certainly open to him if he felt aggrieved by the process and the outcome, to seek injunctive and declaratory relief by way of plenary action, to *inter alia*, to prevent the matter proceeding to disciplinary action. He chose not to do so.

Disciplinary Process

76. On the 13th March 2015, a letter was hand delivered by the principal notifying the applicant that further to the decision of the Board of Management of the 26th February 2015, he was being invited to a meeting under Stage 3 (final written warning) of the Disciplinary Procedures, on Friday the 27th March 2015 at 1:00 p.m. The 2009 procedures say that the principal and a nominee of the Board of Management shall attend. Mary McPhilips had been nominated by the Board of Management. Arrangements were made to have his class supervised to facilitate the meeting. The letter then states: -

"The purpose of the meeting is to discuss what if any disciplinary action at this stage is warranted in light of the Board of Management's decision to substantiate the complaint made by (parents of AB) on the 8th June 2014".

The letter notified Mr. Dillon that he was entitled to be accompanied by a trade union representative or colleagues of his choice to a maximum of two, and he was asked to confirm his attendance and to indicate who would be accompanying him. The content of the letter suggests that the disciplinary panel was open to an argument that no disciplinary action was required.

77. The applicant wrote back on the 18th March complaining that the letter of the 13th was delivered to him in class and he asserted that that was done for the purpose of

embarrassing him. Again, the court considers that the applicant may be being oversensitive in this regard, as no one in the class could have been aware of the content of the letter. He complained about the delay of seventeen days in notifying him of the disciplinary hearing. He complains that he had not yet been furnished with the notes of the Board of Management meeting of the 24th February and he complains that a copy of the Disciplinary Procedure was not attached. He asserted that the agreed procedure does not indicate a facility for a final written warning and once again asserts that the investigation of the complaint is "seriously flawed and in breach of the complaint procedure and the rules of natural justice".

78. By letter dated the 20th March 2015, the applicant wrote to confirm that he would be attending the disciplinary meeting on Friday the 27th March and notifying the chairman of the Board of Management that he would be accompanied by his union representative. At the conclusion of the letter he states: -

"Please note that I will be attending WITHOUT PREJUDICE to my common law right to natural justice and I still reserve my position in this seriously flawed procedure".

79. On the 24th March 2015, the applicants' union representative wrote to the chairman of the Board of Management referencing the remarks in the minutes of the Board of Management meeting which stated, "*following some further clarifications and discussions*" it was agreed unanimously that the complaint dated the 8th June 2014 was substantiated. The applicants' union representative asked who had provided the clarifications and who had engaged in the discussions in questions, on which the Board concluded that Mr. Dillon "*engaged in inappropriate behaviour and language in relation to AB on the 8th and 9th May 2014*".
80. Two days before the proposed disciplinary meeting the applicant again wrote to the chair of the Board of Management reminding him that one of the general principles of natural justice set out at p. 3 of the DES Circular 60/2009 provide that the disciplinary procedures are without prejudice to the right of a teacher to have recourse under law to protect his/her employment. He states that he fully intends to protect his employment and again criticised the complaints procedure, stating: - "*This so – called complaints procedure which you have run is a shambolic exercise which does not even pay lip service to the agreed guidelines and I fully intend to expose it and all who endorsed it*". He raised an issue again about the signing of the complaint made by the parents of AB and again suggests that the complaints procedure was not properly complied with.
81. The court has very little evidence as to what transpired at the formal disciplinary meeting of the 27th March. The complainant avers that he attended the meeting convened by the school pursuant to Stage 3 (final written warning) of the DES Circular 60/2009 with the principal and a nominee of the board on the 27th March. He says that the format of the meeting did not, and was not designed to, address any of the deficiencies specified in his statement of grounds. Essentially his complaints in the statement of grounds was that the disciplinary action was not taken in accordance with the DES Circular 60/2009; that he was not advised in advance of the disciplinary meeting in writing of the precise nature of

the matters concerned and nor was he given copies of all relevant documentation; that he was not given the opportunity to examine and challenge all evidence available and call witnesses or persons providing such evidence for questioning; that he was not given a fair and impartial examination of the issues being investigated taking into account the allegations or complaints themselves, the response of the teacher concerned, any representations made on behalf of the teacher concerned, and any other relevant or appropriate evidence, factors or circumstances.

82. The applicant has averred that while he sought to participate as fully as reasonably possible in the circumstances, it was clear that the hearing was not convened for the purpose of addressing any of his underlying concerns or of addressing the substantial procedural deficiencies which stemmed from the fact that no disciplinary hearing/meeting had taken place pursuant to DES Circular 60/2009. He avers that instead the hearing was limited to the question of what sanction was to be imposed by the Board of Management. It doesn't appear on the evidence that Mr Dillon or his Union representative engaged with that issue or made submissions to the effect that the conduct complained of was trivial. He further avers that insofar as the decision-making process regarding the imposition of sanction was concerned, he believes that the decision to impose a final written warning had, in reality, been reached.
83. Unfortunately, the court has no evidence at all from the respondent as to how the formal disciplinary hearing has been conducted the respondents' affidavit baldly states that disciplinary sanction, a final written warning, was imposed following full compliance with the provisions of the disciplinary procedure and that that decision was not appealed by the applicant. The respondents' affidavit is silent as to the manner in which compliance with the disciplinary procedure was achieved. The court notes that the parties conducting the disciplinary hearing were Martin Daly, and Mary McPhilips, nominee of the Board of Management. The court further notes that both parties were in attendance and participated in the Board of Management meeting which purported to find the applicant guilty of inappropriate behaviour and inappropriate language and had supported that decision.

The Aftermath

84. Two letters issued to the applicant on the 21st April 2015. One was from the chairman of the Board of Management dealing with the issue raised by the applicant in his letter of the 18th March of the absence of any link or cross-reference in the parents' Complaints Procedure of 2000 to the Disciplinary Procedures of 2009. The chairman states: - "As you are aware there was such a link to the previous disciplinary procedure. In particular, Clause 3.5 of the complaints procedure states that 'in the case of a complaint which is upheld, the matter may be dealt with by the Board under the provisions of Stage 3 of the agreed disciplinary procedures'".
85. The letter goes on to state the previous disciplinary procedure was replaced in 2009 with a new disciplinary procedure. The letter stated:

“Stage 3 of the old disciplinary procedure dealt with how a Board of Management deals with a disciplinary issue, and this section has in effect been replaced with Stage 4 of the new disciplinary procedure. However, the decision was taken that, in the case of the current complaint, Stage 4 would not be appropriate as the normal sanction at Stage 4 is dismissal. Accordingly, it was decided to proceed by way of Stage 3. However, as the Board had already reached a conclusion in relation to the complaint, there would have been no point in discussing whether the complaint was or was not well founded at Stage 3.”

86. The second letter sent to the applicant on the 21st April was from Martin Daly the principal and Mary McPhillips, nominee of the Board. It states as follows: -

“The Board, at its meeting of 24th February 2015, agreed unanimously that the complaint dated the 8th June 2014 from [Parents of AB] was substantiated and that you engaged in inappropriate behaviour and language in relation to AB on the 8th and 9th May 2014. The purpose of the meeting, as per the disciplinary procedures Stage 3, para. (d) was to consider what if any disciplinary action at this stage is warranted.

As you know, pursuant to Stage 3 of the disciplinary procedures, the nominee of the Board, Ms. Mary McPhillips, and I met with you and your union representative, Ms. Maura Collins, on Friday the 27th March 2015. We have given careful consideration to all that you and Ms. Collins have said to us. The Board of Management had previously decided that the complaint of [Parents of AB] was well – founded. Our decision is that you should be given a final written warning. You are therefore warned that it is expected that there will be no further incidents of this nature involving you and pupils. It is expected that this will be the case henceforth. If there is a repetition of this or similar conduct in the future you will face further disciplinary action, up to and including dismissal.

CUS is a Marist Catholic School which as its mission statement says, has always been known for the kindness and humanity with which it treats the pupils and for the high value it places on the quality of relationships. Your behaviour and language in regard to AB fell far short of what is expected of a teacher in Catholic University School. We expect that you will relate to all of the pupils in the school in a respectful and professional manner and that this will be evident in the manner in which you address them, in your use of language in doing so and in your behaviour towards them. It is expected that you will follow the procedures of the school in dealing with any matters that may arise between you and pupils, either in regard to their performance, or their interaction with you about any matter in the school.

The final written warning will be active for a period of twelve months, and subject to satisfactory service, will expire at the end of the twelve-month period. You are entitled to appeal this decision. A decision to appeal should be communicated to the secretary of the Board within ten working days of receipt of this letter. We hope that there will be no further reoccurrence of this language or behaviour, and that

we can expect the highest levels of professionalism and a quality of relating to pupils consistent with the mission statement and ethos of the school”.

87. The letter is signed by both the principal, Martin Daly, and the Boards' nominee, Mary McPhilips. On the 10th May 2015 by registered post, the applicant wrote not to the secretary of the Board, but to the chairman of the Board, Mr. Frank Daly. It reads: -

“Dear Mr. Daly,

I refer to your letter dated the 21st April 2015 received at my home address on Monday 27th April 2015 by ordinary paid post. I wish to register in writing my decision to appeal the decision of the Board of Management of CUS within the ten school days of receipt of this decision as stated in the agreed complaint procedure”.

88. There was much debate in the course of the hearing about the meaning of this letter. The letter is addressed to the chairman of the Board of Management and specifically refers to the agreed complaints procedure. The respondent points out that under the agreed complaints procedure there is no appeal and the decision of the Board of Management is final. The applicant avers that his reference to the agreed procedure was a slip and that it was clear that his intention was to appeal the decision made under the disciplinary procedure provided for by DES circular 60/2009. On balance, the court considers that the interpretation of the respondent is correct as a matter of probability. The letter is addressed to Mr. Frank Daly, chairperson of the Board of Management who had written to the applicant on the 21st April 2015 about the Complains Procedure and its interaction with the disciplinary procedure. He did not write to the secretary of the Board of Management who was the person nominated to receive an appeal against the disciplinary sanction. Secondly, the decision which the applicant asks to appeal is the decision of the Board of Management of CUS and not the decision of disciplinary panel.

89. That said, it is clear that the applicant expressed a wish to appeal and under the disciplinary procedure, he was entitled to appeal and notice of his wish to appeal was given within the ten working days of the pronouncement of the decision of the disciplinary body. The applicants' letter was sent within the school term, and had it been answered promptly, the court has no doubt that the applicant would have availed of such appeal as he was entitled to under the disciplinary procedures. The school chose not to reply to the letter of the 10th May until the 17th September 2015, more than four months later. The respondents' explanation for this delay is that the applicant had stated that he did not wish to receive correspondence during school holidays. The court considers this to be a spurious reason, particularly in circumstances where other correspondence had been handed to the applicant in his classroom as recently as the 13th March 2015. The letter of the 17th September is a two – line letter which states: -

“I refer to your letter of the 10th May 2015.

In accordance with Stage 3.4 of the complaints procedure, the decision of the Board of Management is final.

Yours Sincerely,

Martin Daly, secretary CUS Board of Management".

In this context too, the court observes that the letter of the 21st April 2015 notifying the applicant of the outcome of the disciplinary procedures does not strictly speaking conform with Stage 3 of the disciplinary procedures. Stage 3 provides that: -

"The teacher will be advised of his/her right to appeal against the disciplinary action being taken and the appeal process".

90. The applicant was merely told that his decision to appeal should be communicated to the secretary of the Board. He was not advised of the nature of the appeal process. The court notes that under the disciplinary procedures, in DES 60/2009, the appeal process against a Stage 3 (final warning letter) sanction is that the appeal will be heard by the Board of Management. Thus, the applicants' appeal from the disciplinary sanction imposed by the principal, Martin Daly and Mary McPhillips, nominee of the Board, would be to the very Board of Management that had unanimously already found him guilty of inappropriate behaviour and inappropriate language and of which both members of the disciplinary panel were members.
91. Following receipt of the letter of the 17th September, there was some further correspondence and some legal jousting between the solicitors representing each party. The respondent continued to maintain that the applicant was out of time to appeal the disciplinary sanction and the applicant's lawyer maintained the disciplinary procedure was not complete and he was still entitled to his appeals process. Eventually an application was made ex parte to the High Court on the 30th November 2015 and on Monday the 7th December 2015, by order of Humphries J., leave was granted to the applicant to apply by way of judicial review for the following reliefs: -
 - (i) An order of *certiorari* quashing the decisions of the respondent that the applicant engaged in inappropriate behaviour and language in relation to a student on the 8th of May and 9th of May 2014 and imposing a final written warning upon him.
 - (ii) An order of *certiorari* quashing the decision of the decision of the respondent refusing to permit the applicant to appeal against the decision that he had engaged in inappropriate behaviour and language in relation to a student which refusal was communicated to the applicant by letter dated the 17th September 2015.
 - (iii) An extension of time within which to challenge the decision at (D)(i) above.
 - (iv) A declaration that the disciplinary process conducted by the respondent was carried out in breach of the DES circular 60/2009 and in breach of the applicants' right to natural justice and fair procedures.
 - (v) A declaration that the decision to impose a final warning upon the applicant was disproportionate in all of the circumstances.

- (vi) An order restraining the respondent its servants or agents or any other person having notice of this order from communicating (or permitting to be communicated) to any third party a statement to the effect, or bearing the meaning, that the applicant engaged in inappropriate behaviour and language in relation to a student.
- (vii) Such further orders as this honourable court may deem appropriate in relation to the conduct of any disciplinary proceedings arising from the complaint in respect of the applicants' alleged conduct on the 8th of May and 9th of May 2014, including the conduct of any appeal pursuant to DES circular 60/2009.

Submissions on Behalf of the Applicant

92. The applicant states that the respondent school has failed to abide by the provisions of the Department of Education and Science Circular 60/2009 ("DES Circular 60/2009") in its implementation of a disciplinary process.

DES Circular 60/2009

93. The applicant argues that the board of management of the school is bound to act in accordance with current Ministerial policy pursuant to section 15(2) of the Education Act 1998 states in respect of a board of management of a school, that: -

"A board shall perform the functions conferred on it and on a school by this Act and in carrying out its functions the board shall –

do so in accordance with the policies determined by the Minister from time to time"

94. The DES Circular 60/2009 was brought into effect under the provisions of Section 24(3) of the Education Act 1998 which provides that: -

"(3) A board shall appoint teachers and other staff, who are to be paid from monies provided by the Oireachtas, and may suspend or dismiss such teachers and staff, in accordance with procedures agreed from time to time between the Minister, the patron, recognised school management organisations and any recognised trade union and staff association representing teachers or other staff as appropriate."

95. This Circular mandates that the drafting of disciplinary procedures must be done following a consultation period with all interested parties. The DES Circular 60/2009 also contains detailed provisions relating to disciplinary matters. It specifically makes reference to a right of appeal at all stages of the disciplinary process. As such, the applicant submits that there was a legal duty on the Respondent to afford the Applicant a right of appeal.

Procedures Applying to DES Circular 60/2009

96. Prior to the enactment of the DES Circular 60/2009 procedures in respect of disciplinary matters were dealt with by a "Disciplinary Procedure" run in conjunction with a "Complaints Procedure" both dated the 1st September 2000. These procedures were created by way of a bilateral agreement between the Secretariat of Secondary Schools and the Association of Secondary Teachers in Ireland.

97. The Complaints Procedure is comprised of a 3-stage process. Stages 1 & 2 are informal and provide for the consensual resolution of complaints. If these stages fail, stage 3 of the Complaints Procedure makes provision for a hearing before the Board of Management of the relevant school. The details of this process are set out at paragraph 3.2. Similarly Stage 3.2 of the Disciplinary Process provided for a disciplinary hearing convened by the board of management of a school. The two procedures share a great deal of similarities.
98. The relationship between the two procedures is set out at paragraph 3.5 of the Complaints Procedure, which states: -

"In the case of a complaint which is upheld the matter may be dealt with by the Board under the provisions of Stage 3 of the Agreed Disciplinary Procedures. In such circumstance, members of the Board who have acted as authorised representatives in the investigation of the complaint should not participate in the decisions of the Board relating to the application of the disciplinary action."

99. The Complaints Procedure states that the decision of the Board of Management "shall be final, except in respect of matters governed by appeals procedures in the Education Act 1998." It is also highlighted that paragraph 3.7 states that "The decision of the Board of Management shall be binding and final." The applicant argues that the system in the Complaints Procedure and the Disciplinary Procedure are in marked contrast to those provided for by DES Circular 60/2009.

The Procedures Provided for by DES Circular 60/2009

100. The DES Circular 60/2009 replaces the Disciplinary Procedure of 1st September 2000 in its totality. It states that "[t]his disciplinary procedure supersedes all existing local and national disciplinary procedures."
101. DES Circular 60/2009 makes no reference to, or provision for interaction with the Complaints Procedure. There has also been no amendment to the Complaints Procedure in light of the DES Circular 60/2009. Given that paragraph 3.5 of the Complaints Procedure still makes reference to the now obsolete Disciplinary Procedure, the applicant submits that the connection between the two processes has now been severed.
102. Under the current framework, the teacher is entitled to exercise a right to appeal at all stages. This is repeatedly stated throughout the DES Circular 60/2009. It is expressly stated at under the heading "General Principles" at page 2 of the DES Circular 60/2009, it states: -

"The essential elements of any procedures for dealing with disciplinary issues are that they be rational and fair, that the basis for disciplinary action is clear, that the range of penalties that can be imposed is well-defined and that an internal appeal mechanism is available."

Inappropriate Behaviour in Relation to a Student

103. The applicant argues that a finding of “inappropriate behaviour” in relation to a student has grave connotations. It is submitted that this finding was unjustified and was damaging to the Applicant’s student-teacher relationships.

Denial of Right to Appeal – Breach of DES Circular 60/2009

104. Given the right to appeal under the DES Circular 60/2009, the applicant submits that the Respondent in not allowing his appeal, has failed in their obligations.

105. The applicant argues that the Respondent did not facilitate his right to appeal. The applicant relies on the letter sent the 10th of May 2015 as evidence of his desire to appeal. The applicant submits that since the Complaints procedure had concluded they had moved into a set of procedures which was governed by the DES Circular 60/2009.

106. The applicant argues that his reference to the Complaints Procedure rather than the DES Circular 60/2009 in his letter of the 10th May 2015 should not be damaging to his case. The applicant received a response 4 months later to this letter on the 17th September 2015 denying his right to appeal under the Complaints Procedure.

107. The applicant submits that the case had already moved into the remit of the DES Circular 60/2009 and given that there is no right to appeal under the Complaints Procedure, it was clear that he meant the DES Circular 60/2009 as it was the only line of appeal available to him.

108. The right to appeal is an essential element for the procedure for dealing with disciplinary issues. Therefore, the respondent’s refusal to allow such an appeal is in breach of the Applicant’s right to fair procedures as provided for by the Circular. Furthermore, the applicant argues that the Respondent could have easily sought clarification as to whether he meant the appeals procedure under the DES Circular 60/2009. Furthermore, the respondent’s delay in responding was also in breach of their obligations to facilitate the appeals process.

109. The applicant cites the judgement of Hardiman J in *Dellway v NAMA* [2011] 4 IR 1. When discussing the duty to act fairly Hardiman J states at paragraph 299: -

“Dealing with the present position De Smith’s internationally used work on Judicial Review of Administrative Action (6th ed., 2009, Sweet & Maxwell) by Woolf, Jowell and Le Sueur has this to say at p. 356, para. 7-003:-

“The term ‘natural justice’ has largely been replaced by a general duty to act fairly which is a key element of procedural propriety. On occasion, the term ‘due process’ has been invoked. Whichever term is used, the entitlement to fair procedures no longer depends upon the adjudicative analogy, nor whether the authority is required or empowered to decide matters analogous to a legal action between two parties. The law has moved on; not to the state where the entitlement to procedural protection can be extracted with certainty from a computer, but to where the courts are able to insist upon some degree of participation in reaching most official decisions by those

whom the decisions will affect in widely different situations, subject only to well established exceptions"

110. At paragraph 301 Hardiman J continued and stated:

"I agree with the De Smith formulation and would be prepared to adopt it as a statement of the position in Ireland."

111. The applicant states that the Education Act 1998 (where the DES Circular 60/2009 derives from) has been considered, albeit in different circumstances, by the Supreme Court in *The Board of Management of Scoil Molaga's National School v The General Secretary of the Department of Education and Science* [2010] IESC 57. In her judgement Denham J considered the word "appeal". At paragraph 29 she stated that the word "appeal":

"... has a plain meaning in relation to procedures. The concept of an appeal is a full hearing on the merits with the jurisdiction to make a determination on the issues raised."

112. The applicant argues that in line with Denham J's position, that as a matter of procedural fairness, the right to appeal enshrined under the DES Circular 60/2009 had to be upheld.

Fundamental Misunderstanding and Misapplication of DES Circular 60/2009

113. The applicant submits that the respondent misunderstood the disciplinary process that it was bound to apply. This assertion is based on the respondent's reference to the now obsolete Disciplinary Process of 1st September 2000 rather than the DES Circular 60/2009, in a letter dated 26th February 2015. The respondent advised the Applicant that *"In accordance with Section 3.5 of the Complaints Procedure, the Board has directed that the matter will now be dealt with under the provisions of Stage 3 of the Disciplinary Procedures."*

114. Given that Stage 3 of the DES Circular 60/2009 is described as *"Stage 3 – Final Written Warning"* while stage 3 of the Disciplinary Procedure, which is referenced at Section 3.5 of the Complaints Procedure, allows for a range of punitive measures to be considered, the applicant submits that there has been a clear misapplication.

115. The applicant points to the range of mistakes seen in the letter dated 21st April 2015. The letter received stated: -

"You have raised as an issue the absence of any like or cross reference in the Parent's Complaints Procedure to the current Disciplinary Procedures. As you are aware there was such a link in the previous disciplinary procedure. In particular clause 3.5 of the Complaints Procedure states that "in the case of a complaint which is upheld the matter may be dealt with by the Board under the provisions of Stage 3 of the agreed disciplinary procedures."

The previous disciplinary procedure was replaced in 2008 with a new disciplinary procedure. Stage 3 of the old disciplinary procedure dealt with how a Board of Management deals with a disciplinary issue and this has in effect been replaced with Stage 4 of the new disciplinary procedure. However, the decision was taken that in case of the current complaint Stage 4 would not be appropriate as the normal sanction at Stage 4 is dismissal. Accordingly, it was decided to proceed by way of Stage 3. However, as the Board had already reached a conclusion in relation to the complaint there would have been no point in discussing whether the complaint was or was not well founded at Stage 3."

116. The applicant submits that this letter contains many significant errors. Firstly, it is submitted that Stage 4 of the DES Circular did not effectively replace Stage 3 of the Disciplinary Procedure. Stage 4 of the DES Circular is the final part of a 4 stage disciplinary process, in which at each stage teacher is entitled to a disciplinary hearing to challenge all evidence against them and to exercise a subsequent right of appeal.

117. Secondly, the applicant argues that it is extraordinary for the chairman of the Board of Management to suggest that the normal sanction at Stage 4 is dismissal. Stage 4 states:

"If it is decided to take disciplinary action, the board of management may avail of any of the following range of sanctions:

- a) Final written censure*
- b) deferral of an increment*
- c) withdrawal of an increment or increments*
- d) Suspension (for a limited period and/or specific purpose) with pay*
- e) Suspension (for a limited period and/or specific purpose) without pay*
- f) Dismissal.*

The board of management will act reasonably in all cases when deciding on the appropriate disciplinary action. The nature of the disciplinary action should be proportionate to the nature of the issue of professional competence."

118. Thirdly, the letter dated the 21st of April 2015 demonstrates that in reality the Respondent had no regard to the basic requirements of DES Circular 60/2009. This is based on the fact that the board stated that it had already "reached a conclusion". This meant that the position taken by the board was that irrespective of the DES Circular 60/2009 that it had already made a decision which, in effect, made the rest of the process redundant.

No Disciplinary Hearing Convened Pursuant to DES Circular 60/2009 – No Opportunity to Challenge Factual Allegations

119. The applicant submits that the respondent did not conduct a disciplinary hearing as required by DES Circular 60/2009 and as mandated by the essential requirements of procedural fairness. The Circular specifically provides at pages 2 and 3 (general principles) that: -

"No decision regarding disciplinary action can be made until a formal disciplinary meeting has been convened and the employee has been afforded the opportunity to respond to the allegations raised"

And

"that the teacher concerned has the right to examine and challenge all evidence available and call witnesses or persons providing such evidence for questioning"

120. The specific provisions of Stage 3 DES Circular 60/2009 state that:

"The teacher will be given an opportunity to respond and state his/her case fully and to challenge any evidence that is being relied upon for a decision and be given an opportunity to respond. Having considered the response the Principal and the nominee of the board of management will decide on the appropriate action to be taken. Where it is decided that no action is warranted the teacher will be so informed in writing within five school days. Where it is decided that disciplinary action at this stage is warranted the teacher will be informed that he/she is being given a final written warning."

121. In this case the hearing convened pursuant to Stage 3 of the DES Circular 60/2009 took place in circumstances where, as appears from the letter of 21st April 2015, the Board of Management had already decided that a final written warning would be imposed.
122. The applicant argues the opportunity to examine and challenge all evidence was not provided. Instead, the hearing proceeded on the basis that a factual determination of *"inappropriate behaviour and language"* had already been made against him pursuant to the Complaints Procedure.
123. At the hearing convened pursuant to the Complaints no provision was in place for testing the version of events advanced by AB. In fact, AB, who as the complainant in the case, was not called to be present. His parents were present at that meeting, as appears from exhibit PD11 to the Applicant's First Affidavit. However, the process put in place by the Respondent provided no practical way in which the Applicant could have challenged the allegations made against him. In addition, the only other purported witness to the alleged events, a student referred to as CD, was not called to be present for the hearing convened pursuant to the Complaints Procedure. As a result, it is submitted that the hearing convened pursuant to the Complaints Procedure, such as it was, never had the potential to vindicate the Applicant's legal entitlements.
124. Thereafter the disciplinary meeting convened pursuant to Stage 3 of DES Circular 60/2009 was one at which the conclusions reached under the Complaints Procedure were

treated as findings of fact and where the sanction to be applied had already been decided upon by the Board of Management.

125. Accordingly, it is submitted that the Respondent acted in breach of the Applicant's legal entitlements by failing to convene a disciplinary meeting of the type mandated by DES Circular 60/2009 and by well-established tenets of procedural justice.

Failure to notify Applicant of any Charge of Inappropriate Behaviour

126. Under the heading "Scope" at page 12 DES Circular 60/2009 provides that "This procedure relates to work and conduct issues and matters other than professional competence and applies to all teachers other than those serving in a probationary capacity"

127. Under the heading "*Informal Stage*", also on page 12, the Circular states:

"Where a teacher's work or conduct does not meet the required standards despite informal intervention as set out above the matter will be dealt with under the following disciplinary procedure."

128. That procedure then provides for a 4 stage process: Stage 1: Verbal Warning, Stage 2: Written Warning, Stage 3: Final Written Warning and Stage 4.

129. In this case the Applicant was requested to attend a meeting of the Board of Management pursuant to the Complaints Procedure on 24th February 2015 at which he was invited to make a formal presentation of his case. The Applicant declined to attend for reasons which are set out in his letter dated 23rd February 2015. At the meeting of the Board of Management held pursuant to the Complaints Procedure it was determined that the Applicant had engaged in "*inappropriate behaviour and language in relation to AB*".

130. This determination came as a significant shock to the Applicant as he had never been accused prior to the meeting of the Board of Management the Applicant of "*inappropriate behaviour*" in relation to a student, an allegation which had no foundation whatsoever as a matter of fact and which carries with it the most damaging of connotations. As appears from Exhibit 'PD3' the Applicant was accused of name calling in respect of AB. According to the complaint filed by AB's parent the response of the student was to accuse the Applicant in class of being "a coward". No allegation of "*inappropriate behaviour*", as distinct from inappropriate language has ever been made against the Applicant.

131. It is axiomatic that a person is entitled to know the specific charge alleged against him or her in disciplinary proceedings. This entitlement applies *a fortiori* where the allegation is one of misconduct which may impact upon the reputation of a professional person, such as the Applicant in this case.

132. In *Mooney v An Post* [1998] 4 IR 288 Barrington J held at page 298 that:

"Certainly the minimum he is entitled to is to be informed of the charge against him and to be given an opportunity to answer it and make submissions."

133. Similarly in *Flanagan v University College Dublin* [1988] 1 IR 724 Barron J held in respect of an allegation of plagiarism at page 731 that:

"The applicant should have received in writing details of the precise charge being made and the basic facts alleged to constitute the alleged offence"

134. More recently, in *McMahon v the Law Society* [2009] IEHC 339 Herbert J held at page 18 that:

"The applicant, as a matter of the most basic fair procedures, was entitled to be expressly informed of the precise nature of the investigation being conducted by the Committee"

135. This obligation to specify the precise charge made is reflected in DES Circular 60/2009 which specifically provides that:

"The employee will be advised in writing in advance of a disciplinary meeting of the precise nature of the matters concerned and will be given copies of all relevant documentation"

136. In this case the substance of the allegation made against the Applicant was that he used inappropriate language in respect of a student. At no time was it suggested that he engaged in *"inappropriate behaviour"*. This precise charge, or anything reasonably approximating it, was not made against him. Inexplicably, having failed to charge the Applicant with inappropriate behaviour the Respondent proceeded to find him guilty of inappropriate language and inappropriate behaviour. This finding was therefore reached in breach of a fundamental precept of fair procedures, the outcome of which is that the Applicant's good name and reputation has been unfairly traduced. Accordingly, it is submitted that this finding cannot be permitted to stand.

137. In light of the serious issues raised in these submissions to date, it is respectfully submitted that the reliefs claimed at paragraphs D (i), (ii), (iv) and (vi) of the Statement of Grounds are appropriate.

Proportionality

138. In addition, and without prejudice to all the foregoing, DES Circular 60/2009 demands that there be proportionality between the wrongdoing and the punishment imposed. Under the heading 'General Principles Underpinning these procedures' at page 3 the circular states:

"where a decision is taken to impose a disciplinary sanction, the sanction imposed will be in proportion to the nature of the conduct/behaviour/performance that has resulted in the sanction being imposed."

139. In this case it is submitted that the wrong alleged against the Applicant in the written complaint submitted by the parents of AB does not mandate a final written warning. In

this regard, it is apposite to note that DES Circular 60/2009 states at page 11 in relation to issues of conduct in schools that:

"It is also the case that any such process must recognise the reality that such matters are often of a transient nature and may have their origin in issues of a personal or professional nature which are of relatively short time duration. Isolated issues or omissions of a minor nature will where possible be dealt with informally."

140. In *Kelly v Board of Management of St Joseph's School* [2013] IEHC 392 O'Malley J noted at paragraph 107 that:

"It is an express requirement that the Board act reasonably in all cases when deciding on appropriate disciplinary action. The nature of the action should be proportionate to the conduct issue that has resulted in the sanction being imposed."

141. At paragraph 164 the Court concluded as follows:

"Finally, I am firmly of the view that the sanction imposed was unfair and irrational in the sense that it was disproportionate. I do not think that the Board understood that the Circular was to be read as a whole. They saw the reference to failure to comply with an instruction and saw that such behaviour could result in dismissal. They therefore considered that they were being fair to the applicant in mitigating that penalty down to demotion. They did not consider the fact that the Circular envisages that even stage 4 proceedings do not necessarily require a heavy sanction."

142. In this case, it is submitted that the Respondent fell into a similar error as the respondent school in *Kelly*. As is abundantly obvious from the letter from the Chairman of the Board dated 21st April 2015 the Respondent was erroneously under the impression that the normal sanction at Stage 4 was dismissal. In common with the respondent school in *Kelly* the respondent in this case has failed to understand that the Circular is to be read as a whole and that the provision dealing with matters of a "*transient nature*" is the most relevant and appropriate to the situation that arose in this case.

143. In this context, it is submitted that the combined effect of the finding and sanction imposed upon the Applicant has been entirely out of kilter with the wrong alleged and that the Court ought, in those circumstances, grant the relief sought at paragraph D(v) of the Statement of Grounds.

Respondent Submissions

144. The respondent argues that the applicant is out of time having regard to the amended terms of Order 84 and no proper basis has been advanced for the grant of an extension of time. The respondent also submits that these proceedings do not warrant the High Court's intervention with regard to the legal maxim *de minimis non curat lex*. The respondent argues that the applicant has been guilty of unreasonable and unconscionable delay in commencing the within proceedings.

145. The respondent argues that the Applicant is seeking to quash a decision made pursuant to the complaints procedure rather than one governed by the DES Circular 60/2009. The respondent submits that the decision to impose a final written warning upon the applicant was reasonable and proportionate in all of the circumstances. Given that the imposition arose directly from the contract of employment between the applicant and the Respondent it is not amenable to judicial review.

Application of Judicial Review

146. The respondent submits in the instant case that the issue in dispute between the parties herein is an issue arising from and governed by the Contract of Employment between the parties and accordingly it is not amenable to be Judicially Reviewed.

147. In *Murphy v the Turf Club* [1989] 1 IR 171 Barr J, dealing with a case relating to the revocation of a horse trainers licence put the matter in the following terms: -

"The root issue in the present case is whether the respondent is a "legal authority" as postulated by Lord Atkin and whether its decision to revoke the applicant's licence is one which may be quashed by this court as having been made by the respondent in excess of its legal authority. It is well settled that for this purpose "legal authority" generally means statutory authority. 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 member."

148. Barr J, at page 174 went on to make his finding in that case as follows: -

*"I have no doubt that the relationship between the applicant and the respondent derives from contract and that the statutory provisions relating to the respondent to which I have been referred by Mr. de Bruir are not relevant to the issue before me. I am also satisfied that the respondent's duty to regulate the sport of horse-racing in Ireland, though having a public dimension, is not a public duty as envisaged by the Court of Appeal in *Reg. v. Take-over Panel, ex p. Datafin Plc.* [1987] Q.B. 815 and in purporting to revoke the applicant's training licence the respondent was not exercising a public law function. On the contrary, its decision was that of a domestic tribunal exercising a regulatory function over the applicant, being an interested person who had voluntarily submitted to its jurisdiction."*

149. The decision of the Supreme Court in *Geoghegan v The Institute of Chartered Accountants in Ireland & others* [1995] 3 IR 86 deals, *inter alia*, with whether or not the decision of the disciplinary committee of the Institute might be subject to judicial review. Denham J dealt with this aspect of the case at page 130 as follows: -

"On appeal before this Court, the Institute submitted that the learned trial judge was correct in his view and emphasised that there is not sufficient public element in the affairs of the Institute to make it amenable to judicial review. The applicant, on the other hand, distinguished this case from those situations relating to sport and

submitted that judicial review in the form set out in O. 84 of the Rules of the Superior Courts, 1986, did run to the Institute.

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 applicant 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:—

- (a) This case relates to a major profession, important in the community, with a special connection to the judicial organ of Government in the courts in areas such as receivership, liquidation, examinership, as well as having special auditing responsibilities.*
- (b) 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.*
- (c) The functions of the Institute and its members come within the public domain of the State.*
- (d) The method by which the contractual relationship between the Institute and the applicant 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.*
- (e) The consequences of the domestic tribunal's decision may be very serious for a member.*
- (f) 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 O. 84 of the Rules of the Superior Courts, 1986."

Judicial Review in the Education Sector

150. In *Mary Becker v Board of Management St Dominicks's Secondary School Cabra* [2005] IEHC 169 the issue which fell to be considered was whether or not judicial review lay against the Board of the school in relation to the application of a disciplinary sanction on the applicant who was a teacher. The applicant in the case sought to rely on the decisions in *Rafferty v Bus Eireann* [1997] 2 IR 424 and in *Geoghegan*. The respondent sought to rely, *inter alia*, on *Murphy v the Turf Club*, *Rajah v Royal College of Surgeons of Ireland* [1994] 1 IR 384 and *Murtagh v Board of Governors of St Emer's School* [1991] 1 IR 482. Peart J set out his conclusions as follows: -

"I have set out these matters in some detail in order to highlight the extensive public nature of education. However, it is not sufficient for the applicant simply to

show that the nature of the job she performs is of such importance to the advancement and development of society as a whole in order to bring her present claim within the reach of judicial review. There is a distinction to be drawn between the wider aspects of education, and the statutory provisions, such as those to which I have referred, and the narrower aspects of this particular case, such as the employer/employee relationship between her and the respondent which is based, as has been pointed out, solely on a contract of employment entered into between the parties. The decision sought to be impugned in this case, namely one to give her a written warning, is one made by her employer as part of a disciplinary procedure applicable in the school. The applicant has a grievance in relation to that decision to issue a warning letter. The merits of that dispute are not in issue in this case at this stage. What is at issue is simply whether the applicant is confined to a purely private law remedy, rather than remedy by way of judicial review. Let us suppose that she had been dismissed, and not simply warned in writing. In such a situation, would the decision to dismiss her be amenable to judicial review or must she rely on her private law remedy? The answer must be that the dispute is not amenable to judicial review, as lacking that public law element which is essential to judicial review relief.

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

Simply because a school may be established, and its functions and obligations set forth, in an Act of the Oireachtas, is not of itself sufficient to bring every dispute emanating from the school's activities within the reach of judicial review. Simply because s.15(2) is couched as it is, does not mean that everything which the Board, or the Principal duly appointed, does in relation to the management of the school is amenable to judicial review."

151. In *Kelly v Board of Management of St Joseph's National School, Vallymount, Co Wicklow* [2013] IEHC 392 O'Malley J came to a different conclusion but that was in relation to the demotion of a principal of the school effected under the disciplinary procedures mandated by the Minister under the Act. In her judgement she referred to *Geogheghan; O'Donnell v Tipperary (South Riding) County Council* [2005] ILRM 168; *Beirne v Commissioner of An Garda Siochana* [1993] ILRM 1; *Tobin v Mayfield Community School*, unreported Kearns J, 21 March 2000; *Campiagn to Separate the Church and State v Minister for Education*, Unreported Costello J; and *Mary Becker*. She noted that *Becker* was considered and distinguished in *Brown v The Board of Management of Rathfarnham NS* [2006] IEHC 178.

She also referred to *Hand v Ludlow*, unreported O'Keefe J, 18 December 2009 and *McSorley v Minister for Education and Skills*, unreported Hedigan J, April 2012. Having considered all of the foregoing case law the Learned Trial Judge adopted the analysis of Quirke J in *Brown* as to the public importance of the teaching profession and as to the statutory source for procedures within the sector and at paragraph 137 she made the following observation: -

"I do not wish to be taken as saying that every aspect of school disciplinary procedures is a suitable matter for judicial review. There is a very significant difference between, for example, the giving of an oral or written warning, as in Becker, and the appointment, demotion or dismissal of a principal. This is so partly because of the profoundly more serious consequences for the individual concerned, but also because of the wider, public implications for the whole school and the community which it serves.

I therefore conclude that the applicant is entitled to seek judicial review in this matter."

152. In the recent case of *Conroy v Board of Gorey Community School* [2015] IEHC 103 the Court dealt with a dispute which arose in relation to the employment of a school Chaplain. Baker J adopted the analysis of O'Malley J in *Kelly* when at paragraph 31 of the judgement she stated: -

"I adopt the analysis of O'Malley J. in Kelly v. Board of Management of St. Joseph's National School and in particular note that the combination of the provisions in the trust deed and the statutory provision has the effect, as she described it, of incorporating the procedures from the Act into any disciplinary process engaged in by the school. As O'Malley J. said at para. 134:-

"Every aspect of the procedure which must be followed derives its authority from statute rather than from contract."

153. Baker J then went on to refer to *inter alia*, *Catholic University School v Dooley*, unreported 20 July 2010; and *Blackrock College v Mary Brown* [2013] IEHC 602 and then also to *Brown*. Baker J then concluded that the decision to remove a person as a Chaplain to a school is not one amenable to judicial review but that the decision to employ a person as teacher of religion in school is one with a sufficient public law element to attract review.
154. The foregoing cases show that there is no absolute position in respect of teachers who are typically appointed pursuant to provisions of the Education Act, are paid by the State and who undoubtedly perform duties which are mandated by Statute and not merely the contractual provisions relating to their employment. However, applying the Becker and Kelly line of authority, it is submitted that in circumstances where the sanction imposed was merely a final written warning, to remain on file for a period of two years (now expired), these proceedings are not amenable to Judicial Review.

155. The fact that the Respondent's powers may initially derive from statute is removed and indirect to the consideration of the instant case.
156. In all circumstances it is respectfully submitted on behalf of the Respondent that the jurisdiction of the Board of Management to impose a disciplinary sanction under the Disciplinary Procedure, was directly related to a matter covered by the Contract of Employment between the parties and in those circumstances, being a private law matter, is not amenable to judicial review.

Delay

156. Rule 21 of Order 84 provides that an application for leave to apply for Judicial Review shall be made within three months from the date when grounds to the application first arose. It is clear from the affidavits in this case and the facts as summarised heretofore that the application herein was long out of time.
157. It is respectfully submitted that the rules relating to the extension of time are mandatory and that in circumstances where, as in the instant case no cogent reasons are offered that this Honourable Court should dismiss the application on this basis alone. The time limit for Judicial Review is regarded as akin to a statutory time limit. This issue was considered by Clarke J giving the judgement of the Supreme Court in *Shell E & P Ireland Limited v McGrath and ors* [2013] IESC 1. At para 57 he stated as follows:

"The rules of court are, of course, a form of secondary legislation. They are made with the authority of the Oireachtas in the form of the enabling provisions of the Courts of Justice Acts 1924-36 and the Courts (Supplemental Provisions) Act 1961 ("the Courts Acts"). That does not, of course, give the rules-making authority carte blanche. It is possible that an argument might be made that measures adopted in the rules go beyond the legitimate delegated powers of rules-making authorities. It might also be, as the trial judge correctly pointed out, that limitations, whether to be found in legislation or in the rules, which affect the ability of a party to maintain or defend proceedings in a reasonable way, might amount to a breach of the rights of such party either to access to the court or to the fair conduct of proceedings (as to the distinction between which see Farrell v. Bank of Ireland [2012] IESC 42)."

158. He went on to say at paragraph 59 that the Rules have the force of law: -

"On that basis the rules have the force of law and have the same status as time limits to be found in primary legislation except, of course, that the rule-making authorities do not have the power to depart from those time limits which are specified in primary legislation. It is, of course, the case that the type of legislation which has been adopted in recent times in the planning and immigration fields, for example, not only imposes a statutory time limit for the commencement of proceedings but also prevents any question as to the validity of relevant measures being raised save by judicial review. There is no similar provision in respect of challenges outside those fields which have been the subject of specific legislation. No such restriction applies to a challenge in respect of measures such as the CAOs

and the consent which are at the heart of these proceedings. However, it remains the case that a judicial review challenge to those measures would be required, as a matter of law, to be taken within the time limits specified in the rules of court or in such extended time as the court might provide. It seems to me to necessarily follow that permitting such a challenge to be brought in a manner which would entirely circumvent those rules would amount to permitting rules which have the force of law as secondary legislation to be circumvented in an inappropriate way. It seems to me to follow that a valid exercise by the rule-making authority of its power to impose, by rule of court, time limits for the bringing of judicial review applications necessarily implies, by analogy, that those rules are applicable to such challenges in whatever way, as a matter of procedure, the challenge concerned may be brought."

159. It is submitted that the Applicant has been guilty of inordinate and inexcusable delay and in the circumstances, this Honourable Court should not extend the time for the Applicant to appeal against any decision made pursuant to the Complaints Procedure or otherwise.

The Complaints Procedure

160. It is submitted by the Respondent that the decision made that the Applicant had engaged in inappropriate behaviour and language in relation to a named pupil on the 8th and 9 of May 2014 was made by the Respondent in accordance with the nationally agreed Complaints Procedure.
161. The relevant Complaints Procedure has been set out earlier in this judgement.
162. It is submitted by the respondent that Complaints Procedure expressly provides that the decision of the Respondent in such matters is final. The applicant at no time sought to appeal any decision which was made pursuant to the provisions the Disciplinary Procedure and, in fact, the only appeal lodged by the Applicant was against the original decision of the Board of Management made pursuant to the Complaints procedure.
163. In such circumstances, where no appeal lies pursuant to the provisions of the Complaints Procedure against a decision of the Respondent, it is respectfully submitted that it is not open to this Honourable Court to quash such a decision merely because of the alleged denial of an appeal.
164. Furthermore, it is submitted that the Disciplinary Process conducted by the Respondent was carried out in conformity with DES Circular 60/2009 and the Applicant's right to natural justice and fair procedures. In any event, it is respectfully submitted, decisions made pursuant to the Complaint Procedure, which Complaints Procedure is not a procedure governed by or effected by the provisions of Circular 60/2009, are not amenable to judicial review.
165. It is submitted on behalf of the Respondent that the matters of complaint in relation to the behaviour of teachers towards pupils properly fails to be adjudicated upon pursuant to

the Nationally agreed procedure dealing with complaints, that being the Complaints Procedure referred to herein.

166. For the purpose of clarity, it is submitted on behalf of the Respondent that insofar as Circular 60/2009 had any application in the within matter, there was full conformity therewith in circumstances whereby the Applicant was invited, on or about 13 March 2015 to attend a meeting on 27 March and was advised that the purpose of that meeting was to discuss what, if any, disciplinary action was warranted in light of the Respondent's decision to substantiate the claim made on or about the 8 June 2014 pursuant to the Complaints Procedure and the Applicant was advised of all of his rights in relation to the said meeting. The applicant acquiesced in and did not object to the procedure followed and cannot now raise any issue in that regard.

De Minimis Non Curat Lex

167. It is respectfully submitted that these proceedings do not warrant the intervention of the High Court by way of Judicial Review having regard to the legal maxim *de minimis non curat lex*.

168. The imposition of a final written warning, to remain on the Applicant's file for a period of two years, is not a matter that should trouble the High Court, in particular in circumstances whereby the period for which it was to remain on his personnel file has now, in fact expired.

169. The dicta of Hederman J in *Murtagh* is instructive in this regard where he stated:

"A three day suspension of a pupil from a national school either by the principal or the Board of Management of that school is not a matter for judicial review. It is not an adjudication on, or determining of any rights, or the imposing of any liability. It is simply the application of ordinary disciplinary procedures inherent in the school authorities and granted to them by the parents who have entrusted the pupil to the school.

A three day suspension for an admitted breach of discipline would be no more reviewable by the High Court, than for example, the ordering of a pupil as a sanction to stay in school for an extra half hour to write out lines, or to write out lines while he is at home."

168. Similarly, in the instant case, the warning imposed was warranted in the circumstances. It was to remain on the Applicant's personnel file for a period of two years, which has now expired and therefore, applying the maxim *de minimis non curat lex*, ought not be the subject of Judicial Review proceedings.

Applicant's Replying Submissions

169. In the Respondent's Statement of Opposition it is alleged that the Applicant is disentitled to relief on a number of grounds, which include the following:

- The dispute relates purely to a contract of employment and is not therefore amenable to Judicial Review;
- The proceedings do not warrant the intervention of the Court having regard to a legal maxim referred to *de minimus non curat lex*;
- The applicant delayed in bringing these proceedings;
- Circular 60/2009 does not apply to all disciplinary issues and does not apply to adverse findings made against teachers pursuant to the Complaints Procedure.

It is proposed to deal with each of these contentions in turn.

Amenability to Judicial Review

170. At paragraph 1 of the Respondent's Notice of Opposition it is asserted that the dispute between the parties relates solely to a contract of employment between the Applicant and the Respondent and is not therefore amenable to judicial review.

171. The board of management of the school is a body corporate established pursuant to the provisions of section 14 of the Education Act, 1998. In this regard, section 14(6) of the Act provides that:

"The Minister, with the agreement of the patron, national associations of parents, recognised school management organisations and recognised trade unions and staff associations representing teachers, shall prescribe matters relating to the appointment of a board."

172. As noted earlier in these submissions, pursuant to section 15 of the Education Act 1998 the board of management is obliged to act in accordance with Ministerial policy as determined by the Minister for Education and Science.

173. DES Circular 60/2009 was brought into effect by the Minister for Education and Science in September 2009. This Circular was issued under the provisions of s.24(3) of the Education Act, 1998, which mandates the drafting of disciplinary procedures following a consultation procedure involving all the parties in the education sector.

174. Having regard to the foregoing, it is respectfully submitted the introduction of Des Circular 60/2009, the effect of which was to supersede all pre-existing disciplinary procedures, was the culmination of a process which was statutory in nature.

175. In *Beirne v The Commissioner of An Garda Siochana* [1993] ILRM 1 the Garda Commissioner contended that the contract of the Applicant, a trainee Garda, was purely a matter of private law and was therefore not amenable to judicial review. In rejecting this submission, and ultimately granting an order of *certiorari* Finlay CJ made the following observations in relation to scope of the remedy at page 3:

"The principle which, in general, excludes from the ambit of judicial review decisions made in the realm of private law by persons or tribunals whose authority

derives from contract is, I am quite satisfied, confined to cases or instances where the duty being performed by the decision-making authority is manifestly a private duty and where his right to make it derives solely from contract or solely from consent or the agreement of the parties affected.

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

176. The nature and character of DES Circular 60/2009 has recently been considered by O'Malley J in *Kelly v Board of Management of St Joseph's National School* [2013] IEHC 392. That case concerned the demotion of a primary school principal pursuant to the provisions of DES Circular 60/2009. In her judgment O'Malley J referred with approval to the judgement of Quirke J in *Brown v The Board of Management of Rathfarnham National School* [2008] 1 IR 70. In that case Quirke J considered the following factors to be relevant:

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

177. At paragraphs 133 and 134 of her judgement O'Malley J reached the following conclusions:

"I am satisfied that the dispute between the parties meets the criteria set out in Beirne and O'Donnell and cannot in any reasonable sense be described as arising solely out of a private contractual relationship.

I adopt the analysis of Quirke J. in Brown as to the public importance of the teaching profession and as to the statutory source for procedures within the sector.”

178. While the judgement of the Court in *Kelly* related to the demotion of a teacher, it is respectfully submitted that the reasoning derived from *Beirne* and *Brown* applies with equal force to the imposition of a final written warning such as arises in this case. DES Circular 60/2009 was the outcome of a statutory process and it derived from Ministerial policy which superseded on a compulsory national basis all pre-existing disciplinary procedures. Accordingly, it cannot be said that the matters in issue in these proceedings stem entirely from a private contract of employment.
179. In this regard it will be noted that in the earlier case of *Becker v Duggan* [2009] 4 IR 1 the High Court considered the nature and effect of DES Circular 5/98, a circular which predated the enactment of section 24 of the Education Act, 1998. In that case O'Neill J granted *certiorari* to an applicant for a teaching position by reason of procedural breaches on part of an appeals board established pursuant to DES Circular 5/98. The Court reiterated the test established in *Beirne* that, for a decision making process to be excluded from the scope of judicial review on the basis of the contractual relationship between the decision maker and the person affected, the contract had to be the sole source of the power exercised.
180. In rejecting the argument made on behalf of the nominee of the appeals board O'Neill J had to say in relation to DES Circular 5/98 at paragraphs 43 to 47 inclusive:
- “[43] 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 the A.S.T.I., the joint management board 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.*
- [44] Secondly, the provisions of the circular are not confined to the applicant but affect all of the thousands of secondary school teachers in Ireland. Thus, its provisions apply to a very large professional group throughout Ireland.*
- [45] All secondary school teachers have a personal and public interest in the proper discharge by the respondent of his duties as provided for in para. 4 of the circular.*
- [46] 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 para. 4 of the circular.*
- [47] Fourthly, whilst circular 5/98 was promulgated shortly before the enactment of s. 24 subss. (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, subss. 5 and 6 of s. 24 of that Act. Thus, in my opinion, always material to the matters in issue in these proceedings, the source of the provisions of this circular was statutory or as was perhaps more accurately expressed by Shanley J. in Eogan v. University College Dublin [1996] 1 I.R. 390 where he says at p. 398: -

"[W]hither 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."

181. Having regard to all the foregoing it is submitted that the applicant of a disciplinary process which results in the imposition of a final written warning, which is undertaken pursuant to Stage 3 of DES Circular 60/2009, is not something which could be described as arising solely from a private contractual relationship. Consequently, it is respectfully submitted that there is no basis whatsoever for the issue raised at paragraph 1 of the Notice of Opposition and that the issues arising in these proceedings are amenable to judicial review.

De Minimis non Curat Lex

182. At paragraph 2 of the Notice of Opposition it is alleged that the intervention of the Court is not warranted based upon the maxim *de minimis non curat lex*. This expression is defined in Murdoch's Dictionary of Irish Law as meaning "*the law does not concern itself with trifles*" and it is a principle which is generally understood to be of application in relation to statutory interpretation where it is argued that a slight deviation from the literal text may be permitted.
183. In this context, Henchy J had this to say in *Monaghan UDC v Alf-a-Bet Promotions* [1980] ILRM 64:
- "In such circumstances, what the Legislature has, either immediately in the Act or mediately in the regulations, nominated as being obligatory may not be depreciated to the level of a mere direction except on the application of the de minimis rule. In other words, what the Legislature has prescribed, or allowed to be prescribed, in such circumstances as necessary should be treated by the courts as nothing short of necessary, and any deviation from the requirements must, before it can be overlooked, be shown, by the person seeking to have it excused, to be so trivial, or so technical, or so peripheral, or otherwise so insubstantial that, on the principle that it is the spirit rather than the letter of the law that matters, the prescribed obligation has been substantially, and therefore adequately, complied with."*
184. Accordingly, it is submitted that rely on the *de minimis* rule would be necessary for the Respondent to demonstrate that the breach complained of was so trivial, technical, peripheral or insubstantial as to disentitle the Applicant to any relief. It is respectfully submitted that the invocation of this maxim is misguided on the part of the Respondent

and, that from the Applicant's perspective as a teacher, the issues arising in these proceeding could not possibly be characterised as trivial, technical or peripheral.

185. In *Corr v Director of Military Prosecutions* [2014] IEHC 631 a soldier holding the rank of private was charged with disobeying orders and absenting himself from his post without leave. It was found that the charges were proved and the soldier was fined two days' pay. Judicial review proceedings were brought in which the applicant sought to quash the findings made against him on the basis that the decision to charge the applicant had been made without jurisdiction. In contesting the applicant's entitlement to the reliefs sought the Respondents relied on the maxim *de minimis non curat let* on the basis that the punishment awarded was modest and the determination would not affect the applicant's service record (although this issue was disputed) and this no real prejudice accrued to the applicant.
186. In granting an order of *certiorari*, Noon J found that the charges of insubordination and absenting a post without leave had the potential to be very serious for an army private. Accordingly, the court concluded that *de minimis non curat lex* could not apply to such charges, irrespective of the relatively modest nature of the penalty imposed.
187. In *Bane v Garda Representative Association* [1997] 2 IR 449 the applicants were members of the Garda Representative Association ('GRA'). They were charged with misconduct arising from testimony given in earlier legal proceeding. The applicant's declined to attend the hearings convened against them and the charges were upheld in their absence. All applicants were then disbarred from holding office in, and expelled from, the GRA for varying period.
188. The applicants brought judicial review proceedings based *inter alia* upon an allegation of objective bias on the part of members of the GRA executive. The respondent argued that judicial review was an inappropriate remedy. At page 477 of the report this argument is explained in the following terms:
- "It is said that it would now be inappropriate to grant an order of certiorari to the applicants for the following reasons. First, they have departed from the first respondent and have no intention of ever rejoining. The question is, therefore, one of academic interest."*
189. Kelly J had no hesitation in rejecting this argument, holding at page 477 that:
- "...even though the applicants are no longer members of the first respondent, the fact remains that the record of that association contains findings of guilt concerning serious misconduct on their part. Even though they may have no intention of ever again becoming involved in membership of the first respondent, that mark remains against them."*
190. Accordingly, even though the applicant's sought relief in respect of an organisation in which they no longer had any intention of future involvement, the Court had no doubt

that it was appropriate to grant the relief sought due to the findings of serious misconduct that had been made against them.

191. In this case, it is submitted that there could be little doubt that a finding of "*inappropriate behaviour*" in respect of a student on the part of a teacher is anything other than a serious matter. It is plainly a serious issue for the Applicant. It is a finding which engages the most significant of reputational issues for a person who has spent his entire career working in the teaching profession with young people. The effect of this finding is illustrated by the exchange detailed at paragraph 44 of the Applicant's grounding affidavit, where he explains that a parent of a pupil in the Respondent school approached him to ask whether it was true that he had been found guilty of inappropriate behaviour towards a student.
192. At paragraph 33 of his grounding affidavit the Applicant further explains that if the finding is undisturbed his prospects of obtaining future alternative employment in another school would be remote. Notably, this averment does not appear to be contested in the replying filed on behalf of the Respondent. In addition to this the Applicant explains in his grounding affidavit that the finding has placed a serious strain on his well-being. Equally, it is noted that this averment is not contested in the affidavit filed on behalf of the Respondent.
193. In addition, the Applicant's affidavit explains at paragraphs 32 and 33 that he fears the potentially serious negative consequences that any further disciplinary issues may carry for him if the existing finding of inappropriate behaviour is not addressed. The response of the Respondent to this issue is limited to stating at paragraph 12 of the replying affidavit that "*subject to satisfactory service [the warning] will expire at the end of that 12 month period*". However, at this point in the proceedings the Applicant is not aware of whether his performance has been deemed satisfactory and has received no notification from the Respondent to confirm whether the warning has expired or not.
194. Notwithstanding this, even *if* satisfactory service were confirmed the mere expiry of the warning will not wash away the damaging finding of "*inappropriate behaviour*" against the Applicant. The Applicant is entitled to have his good name and reputation as a teacher vindicated irrespective of whether the warning is deemed to have expired. In addition, the mere expiry of the warning (if such were confirmed) would scarcely prove adequate to a prospective employer in another school and accordingly the continued existence of the finding, whether expired or not, is liable to adversely affect the Applicant's right to earn a livelihood in his chosen career.
195. In this context, it is respectfully submitted that the Applicant's constitutional rights are at issue. In this regard, Article 40.3.2 provides:

"The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen."

196. Furthermore, it is submitted that the Respondent cannot realistically suggest that the finding made against the Applicant is anything other than a serious one. In fact, by letter dated 17th November 2014 the Chairman of the board of management specifically characterises the issue as being serious in nature stating in the final paragraph that:

"We note that in your letter there is no reference to the serious complaints that have been made against you."

197. This characterisation of the issue is in keeping with the fact that a final written warning was imposed by the Respondent, rather than an oral warning or simply a written warning as provided for at Stages 1 and 2 of DES Circular 60/2009.

198. In all of these circumstances it is submitted that the *de minimis* principle has no application to the Applicant's case. Not only is the finding of inappropriate behaviour a very serious one for the Applicant, the entitlements which he seeks to assert pursuant to DES Circular 60/2009 could not possibly be described as trifling, trivial, technical or peripheral. Consequently *de minimis non curat lex* is not relevant in this case.

199. In addition to the foregoing, it is apposite to note that the pretext upon which the Applicant has been denied the right to an appeal – namely the disallowance of his notice seeking appeal – has all the hallmarks of technicality and triviality. In truth, the proximate reason for the existence of these proceedings stems from the Respondent's willing to resort to technicality as a basis upon which to deprive the Applicant of his rights under DES Circular 60/2009. Having created the necessity for these proceedings by doing so, the Respondent can scarcely complain that the Courts should not now interfere in its affairs.

Delay

200. At paragraph 3 and 4 of its Notice of Opposition the Respondent asserts that the Applicant has delayed in bringing these proceedings nor that the proceedings were commenced outside of the 3 month period provided for by Order 84, rule 21 as amended.

201. It is respectfully submitted that these objections are unmeritorious and opportunistic. While it is the case that the Applicant was advised of the finding of inappropriate behaviour and language towards a student by letter dated 26 February 2016 the matter then proceeded to Stage 3 of DES Circular 60/2009. The Applicant was notified of the decision reached at this stage of the process by letter dated 21 April 2015, which was received by post Monday 27th April 2015. The Applicant notified the Respondent of his intention to appeal by letter dated 10 May 2015. That letter received no response for over 4 months – until the Respondent replied by letter of 17 September 2015. During this period, the Applicant was entitled to believe that he invoked an appeal process. He was not notified that his request for an appeal had been declined until he received the letter of 17 September 2015. Accordingly, this is the point from which time began to run.

202. The applicant sought the leave of the Court to bring these proceedings on 30 November 2015 as appears from the Applicant's *ex parte* docket. The Order granting leave is dated

7 December and the Order provides, to the extent necessary, that the time for making an application be extended to and until that date. Without prejudice to the foregoing it is clear that the Applicant sought leave of this Honourable Court well within the 3 Month period provided for by Order 84, rule 21.

203. If the Applicant had sought to bring judicial review proceedings prior to 17 September 2015 his application could properly have been met with the objection that his proceedings were premature. Having requested the facility of an appeal, as he was entitled to do, on 10 May 2015 the Applicant had no further control over the process. In these circumstances, the delay of over 4 months which subsequently elapsed could not be attributed to the Applicant. Accordingly, it is submitted that the objections raised in paragraphs 3 and 4 of the Notice of Opposition are without substance.

204. In *Kelly v Board of Management of St. Joseph's National School* the respondent took an objection to alleged delay on the part of the applicant in similar terms to those raised in this case. In rejecting that objection O'Malley J held as follows at paragraphs 143 and 144:

"143. The applicant submits she engaged in a statutory process which involved a number of stages. Had she moved for judicial review after the first stage she would have been met with the argument that she had an alternative remedy. In any event, the time taken by the appeal process and the remittal of the decision back to the Board was a matter that was not within her control.

144. I agree with the submission on behalf of the applicant. The process under consideration is not analogous to, for example, an appeal from the District Court to the Circuit Court. A person who is convicted after a flawed hearing in the District Court has the option of appealing or taking judicial review. If he or she appeals, and is then convicted after a proper hearing in the Circuit Court, there is no point in challenging the District Court hearing. However, the process engaged in by the parties in the instant case is quite different. If the principal appeals, there will be at least two stages after the original decision by the Board. As the Dap recommendation is not final the matter will always have to be remitted to the board, for either reconsideration in the light of the recommendation or the implementation of the proposed sanction. The process may well take more than three months to reach the conclusion of the third stage, as it did in this case. That is not a matter within the control of the applicant. Furthermore, I do not consider that the policy behind the time limits for judicial review (which, as counsel for the Board argues, is to ensure that public law disputes are dealt with when they are ripe) should be understood to incentivise parties to litigate prematurely."

205. It is respectfully submitted that this aspect of the judgement in *Kelly* is on all fours with the situation which arises in this case and accordingly the objections taken by the Respondent on grounds of delay and/or Order 84, rule 21 of the Rules of the Superior Courts must be rejected.

Circular DES 60/2009 Does not Apply to All Disciplinary Issues and Does Not Apply to Adverse Findings Made against Teachers Pursuant to the Complaints Procedure

206. It is respectfully submitted that this proposition is deeply misconceived and, in many respects, stems from the fundamental misunderstanding on the part of the Respondent as to the nature of the DES Circular 60/2009. In this regard, the discussion of that fundamental misunderstanding, as set out at paragraphs 46-54 above are repeated.
207. It is submitted that DES Circular 60/2009 is clearly a self-contained process designed for dealing with all disciplinary and competence issues, from the most trivial to the most serious. The Circular is of statutory origin and is stated to supersede all pre-existing disciplinary procedure. In this context there is no room for a shadow or parallel disciplinary procedure of uncertain scope to continue to exist. While not exactly comparable, the observations of Clarke J in *Mavior v Zrko* [2013] 3 IR 268 are relevant. Clarke J cited the judgement of Murray CJ in *G McG v W* [2000] 4 IR 1 and had this to say at paragraph 17 of his judgement:

"It seems to me that what Murray J. cautioned against in the passages cited was the creation of parallel jurisdictions for resolving much the same area of controversy, founded on, on the one hand, existing law and, on the other hand, an asserted inherent jurisdiction."

208. In this case the comparable "*existing law*" referred to by Clarke J is that provided for pursuant to DES Circular 60/2009. Where such a legal framework exists by way of DES Circular 60/2009 it is not permissible for an alternative or parallel system to exist in tandem.
209. Notwithstanding the obvious correctness of this position, the Respondent has erroneously interpreted Circular 60/2009 as being capable of partially co-existing with an alternative disciplinary process which it contends at paragraph 12 of the Statement of Opposition continues to apply to "*some disciplinary issues*". No explanation is advanced as to how this might operate, nor is there any justification for this proposition to be found in DES Circular 60/2009. Furthermore, this contention is illogical in circumstances where the Applicant's case plainly moved out of the Complaints Procedure and into DES Circular 60/2009, thereby undermining any argument that DES Circular 60/2009 did not apply. Consequently, it is respectfully submitted that this proposition, which is confusing and uncertain in scope, must be rejected.

Decision

210. This case provides ample illustration of how unwise it is to alter one element of established procedures without ensuring that it dovetails with other established procedures. As of the 1st September 2000 by agreement between the teachers' union and the Board of Management, there were clear, concise and cogent procedures for dealing with complaints by parents and/or eligible students about the conduct of teachers as well as clear and cogent procedures for the laying of charges against a teacher.
211. The two procedures dovetailed in that where a complaint made by a parent or student was upheld by a board of management, that complaint could form the basis of a charge of

misbehaviour or misconduct against a teacher to be dealt with pursuant to Stage 3 of the disciplinary procedures. In the event that a complaint was upheld by the Board of Management, a discretion was conferred on it to lay a charge of misconduct against a teacher pursuant to Stage 3 of the disciplinary procedures. If a charge of misconduct were laid on the basis of the facts as found it was open to the teacher to argue that the facts as found did not constitute misbehaviour or misconduct or inappropriate behaviour. The charge was to be determined by the Board of Management, but those who had investigated the complaint could not participate in the determination of the charge.

212. The procedure also provided that the principal could not sit on the Board of Management when determining the charge but could if required, give evidence. The Board would decide whether the charge was upheld and if so upheld would decide on the appropriate penalty ranging from an oral warning to dismissal. Both the complaint procedure and the disciplinary procedure of September 2000 as agreed by the teachers' union and the management formed part of a teachers' contract with the Board of Management. The procedures were specifically made subject to a teachers' right to have recourse to law to protect his employment.
213. In 2009, as part of a policy called "Towards 2016" new disciplinary procedures were agreed. The new procedures are expressed to be made pursuant to s. 24(3) of the Education Act 1998. The statutory underpinning of the new disciplinary procedures which are contained in a Department of Education and Science circular 60/2009, brings the new disciplinary procedures out of the private law area and into the public law area.
214. While the procedures are stated to supersede all disciplinary procedures in existence prior to the agreement, they do not in the courts' view, oust or override the nationally agreed complaints procedure of the 1st September 2000. That procedure is a separate and distinct procedure whereby parents or eligible students can make a complaint about a teachers' behaviour. This leads to a most unsatisfactory situation in which the complaints procedure for parents and eligible students is a matter of private law agreed on behalf of teachers with management, and which forms part of the contractual obligations and rights of teachers, while the disciplinary procedure is a matter of public law which is potentially reviewable by the courts.
215. It is indeed regrettable that neither management nor unions appears to have adverted to the need to review the complaints procedure to ensure that it dovetailed with the new disciplinary procedures as it had with the 2000 disciplinary procedures. It appears to the court that the only section which required review was s. 3.5 of the complaints procedure. It could for example have been revised to provide that in the event that a complaint is upheld if the conduct the subject matter of the complaint is conduct of a serious nature which might give rise to a finding of inappropriate behaviour, then the matter can be transferred by the Board to Stage 3 of the disciplinary process to have the matter dealt with as an allegation of a serious offence. Were that to occur, it would be open to the teacher within the disciplinary process to argue that the conduct giving rise to the complaint which had been upheld was a trivial matter, or a transient event and something

which did not warrant the imposition of a warning. As I say, unfortunately, neither management nor the unions addressed this issue and the complaints procedure continues to mandate a referral to the agreed contractual disciplinary procedures of September 2000.

216. As stated earlier, the court is satisfied that the Board of Management exceeded its powers. It was entitled to hold as a matter of fact that the events of which AB complained had occurred. It was not however entitled to hold that that conduct amounted to inappropriate behaviour or inappropriate language. Such a finding could only be made following an allegation of such an offence being put to the plaintiff in a properly constituted disciplinary process.
217. The fact that the Board of Management overstepped its role in the complaints process by finding that the applicant had engaged in inappropriate behaviour and language, has knock on effects of the disciplinary process. While, as already stated, the court has very little evidence as to what precisely transpired at the disciplinary hearing, it does appear that that hearing was not an enquiry as to whether the conduct found to have occurred amounted to a serious offence, but rather proceeded on the basis that the applicant was guilty of inappropriate behaviour and inappropriate language. It appears that the applicant was afforded no opportunity to argue that the conduct complained of was a trivial matter or events of a transient nature as provided for in the introduction to the disciplinary procedures. The fact that he came before the disciplinary hearing already convicted of inappropriate behaviour and inappropriate language meant that he was deprived of all of the principles of natural justice set out at Chapter 2 of DES circular 60/2009. There was no presumption of innocence. There was no complaint that his conduct towards AB amounted to inappropriate behaviour and language. The hearing appears to have proceeded on the basis that all of that was established.
218. Another deficiency in the disciplinary hearing which arises from the skewed interaction between the complaints procedure and the new disciplinary procedure, is that the formal disciplinary hearing was conducted by two people who had formed part of the Board of Management who had already unanimously concluded that the applicant had engaged in inappropriate behaviour and language. To put it mildly, this does not meet the standards of an impartial inquiry.
219. Another notable deficiency in the disciplinary process engaged in by the respondent is that any appeal which the applicant might have is to the very Board of Management which had just found him guilty of inappropriate behaviour and language. All of these difficulties in the disciplinary process derive from two facts: -
 - (a) That the Board overstepped its mark in concluding in the Complaint's Process that he was guilty of a serious charge, and
 - (b) The Boards' misplaced attempt to shoehorn the upheld complaint of AB into the new disciplinary process.

Delay

220. The respondents maintain that the finding of the Board in relation to the complaints procedure is final, and unappealable as per the agreed procedures. They also maintain that it is non – reviewable being a matter of private law. Alternatively, they argue that any attempt to review is out of time, that decision having been taken on the 24th February 2015 and leave to seek judicial review not having been initiated until the end of November 2015.
221. In relation to the disciplinary hearing the respondents maintain that the applicant did not invoke his right of appeal from the disciplinary finding within the appropriate time or at all. For reasons set out below I am satisfied that the respondent is correct that the complaints procedure is not reviewable and that if reviewable, the time for such review pursuant to O. 84, r. 21 expired on the 23rd May 2015. Insofar as the application to judicially review the disciplinary sanction of a final warning letter, the court does not consider that the application is out of time for the following reasons.
222. The letter of the 21st April 2015 notifying the applicant of the imposition of a sanction informed him of a right of appeal, but he was not specifically notified, as required by the disciplinary procedures of 2009, of the appeal process. He is simply told to write to the secretary of the Board of Management. The procedure requires that he be told that pursuant to a sanction being imposed under Stage 3, that any appeal will be heard by the Board of Management - the same Board of Management that earlier found that he had engaged in inappropriate behaviour and inappropriate language. To set out the appeal process in writing would only highlight the deficiencies between the interaction of the complaints procedure and the new disciplinary procedures. It is certainly arguable that time to challenge the sanction imposed of a final written warning does not begin to run until he is told not merely of a right to appeal, but of the process of appeal.
223. Secondly, while the applicants' letter of the 10th May 2015 was in the courts' view directed to the unappealable complaints procedure and was for that reason directed to the chairman of the Board of Management, and while the court is not persuaded by the applicants' explanation that this was a mere slip, the letter does evidence an intention to appeal and the only matter capable of appeal was the sanction of a final written warning imposed on him on the 21st April and apparently notified to him on the 27th April. The school should have responded to this letter but did not do so for a period of four months.
224. Their explanation that the applicant in his correspondence had said that he did not wish to receive correspondence during holiday periods rings hollow. The 10th May was still within term time and on an earlier occasion the school had seen fit to hand deliver a letter to the applicant in his classroom. The school were at all material times aware of the applicants' desire to appeal and of the fact that an appeal lay from the imposition of the final warning letter sanction.
225. In these circumstances, the court is satisfied that the time for bringing judicial review of the disciplinary sanction runs from the letter of the 17th September 2015 when the attitude of the school to an appeal first became clear.

226. Turning then to the various reliefs claimed: -
- i. An order of *certiorari* quashing the decisions of the respondent that the applicant engaged in inappropriate behaviour and language in relation to a student on the 8th of May and 9th of May 2014.
227. The court does not propose to grant such an order. This was a finding made by the Board of Management following a hearing at stage 3 of the complaints procedure. The complaints procedure is part of nationally agreed procedures between teachers' unions and Boards of Management. As we have seen in his correspondence the applicant repeatedly refers to the agreed procedures. The complaints procedure is part of the contractual arrangement between the applicant and the respondent. It does not have a public law element capable of being judicially reviewed.
228. Were the court wrong in so holding and the complaints procedure were capable of being judicially reviewed, the court would still refuse to quash the order because of the applicants' conduct in and about the processing of the complaint.
229. The applicant was contractually obliged to engage with the complaints procedure. He did so at stage 1 and 2, but when it moved to stage 3 he engaged in extensive legalistic arguments as to why in his view the process was flawed. He threatened judicial review but did nothing. Instead of attending with his union representative or a colleague, and denying the substance of a complaint before the Board, he absented himself from the process. Those who do not participate in agreed procedures for the resolution of issues cannot later come crying to the courts because they do not like the outcome of the process. Even if the concerns expressed by the applicant were genuinely held, that was no bar to him attending at the board of management meeting to put his case which was apparently a denial that he had called AB "a little bitch". When the outcome of the complaints process became known, he took no action despite his repeated threats of having recourse to law to protect his employment. He allowed the findings of the Board to be processed through the disciplinary procedure without objection, merely reserving his rights in the situation. In these circumstances, even if this were a matter which were amenable to judicial review (which the court holds it is not) the court would hold that the applicant by his behaviour had disentitled himself to such relief.
- ii. An order of *certiorari* of the final warning letter sanction imposed pursuant to the disciplinary procedures contained in DES circular 60/2009.
230. As already head the respondent Board of Management fell into error, firstly, in concluding at Stage 3 of the complaints procedure that the conduct which it found the applicant to have engaged in, amounted to inappropriate behaviour and language. Thereafter, it erred in attempting to shoehorn that finding into the new disciplinary procedures which post – dated the agreed Complaints Procedure. This resulted in the applicant coming before the disciplinary process as a person found to have committed an offence rather than a person charged with an offence and furthermore placed him at a point in the disciplinary procedure different to that which had been agreed in the complaints procedure.

231. The net effect was that the applicant was denied a proper disciplinary process. The court is conscious that the applicant appears to have acquiesced in that procedure in that he entered it merely reserving his rights, however, that in the courts' view is not sufficient to validate the defective process which in fact occurred. The court will therefore grant an order of *certiorari* of the final letter of warning issued by the respondent on the 21st April 2015 on the grounds that the process which led to the issuing of the final warning letter was deficient for the reasons already stated. Having so found, it appears to the court that no further orders or declarations are required, but the court will hear the parties in relation to that finding.
232. Finally, the court would urge the ASTI and Boards of Management to amend the parents and students' complaints procedure to reflect the contents of the disciplinary procedure set out in DES circular 60/2009.