

**THE HIGH COURT**

[2021] IEHC 633  
[2021 No. 3615 P.]

**BETWEEN**

**EMER LALLY**

**PLAINTIFF**

**AND**

**BOARD OF MANAGEMENT OF ROSMINI COMMUNITY SCHOOL**

**DEFENDANT**

**JUDGMENT of Ms. Justice Butler delivered on the 4th day of October, 2021**

**Introduction**

1. The long-term effects of the COVID-19 pandemic and restrictions imposed on normal daily life to prevent the spread of the virus throughout the community will only become apparent in years to come. Undoubtedly one of the sectors most affected is education where time and educational experience lost to pupils through the closure of schools might never be recovered. It need hardly be said, particularly after the unprecedented lockdown in Spring of 2020, that everybody in the educational sector - schools, their management boards, principals, teachers, pupils and parents worked hard to ensure that the effects of any subsequent lockdown would be minimised through the effective use of remote teaching and learning platforms. A second lockdown was imposed in January of 2021 and schools remained closed save to specific groups of pupils until after Easter.
2. This case concerns disciplinary proceedings against a teacher arising out of differing interpretations of how so-called "*blended learning*" was to be delivered during the second lockdown in the school in which the teacher works. The principal of the school maintains that the teacher cancelled a large number of classes without notice to the school leading, inter alia, to complaints from parents. The teacher maintains that she taught an appropriate proportion of her classes live via the school's remote platform and set work for pupils to complete independently for the remainder of her classes while she was available remotely to answer questions and correct work. The school, through its principal, has commenced a disciplinary process against the teacher under DES Circular 49/2018 which contains agreed procedures for the suspension and dismissal of teachers and principals. The disciplinary process has been commenced at stage 4 of those procedures on the basis that the "*conduct issue is of a serious nature*". Presumably, a view has been taken by the principal that the issue was so serious it could not be adequately dealt with by a verbal or written warning or even a final warning under any of the earlier stages of the agreed procedures. It is undisputed that the ultimate decision as to whether there has been misconduct on the part of the plaintiff and, if so, the appropriate sanction to be imposed, is one to be made by the Board of Management.
3. The situation is complicated by the fact that the dispute underlying the allegations now made against the teacher originally surfaced as an industrial relations dispute. The teachers in the school are represented by two different trade unions. The majority are members of and are represented by the Teachers' Union of Ireland (TUI) and a minority, including the plaintiff, by the Association of Secondary Teachers of Ireland (ASTI). Following the first lockdown, the ASTI issued directives to its members effective from

November, 2020 not to cooperate with changes to work practices in schools unless there had been a consensus reached at a meeting of staff in respect of those changes and the changes were “*time neutral*” (i.e. they did not impose obligations on teachers which would take additional time). The school maintains that there has been no change in work practices. There was engagement between the ASTI in the school which was ongoing at the time that issue was first raised individually with a number of teachers, including the plaintiff, all of whom are members of the ASTI. It is also a feature of this case that teachers who are members of the other trade union, the TUI, co-authored a letter to the school in February, 2021 complaining that a number of their colleagues who were members of the ASTI were not teaching their fully timetabled hours. The authors of that letter included one of the teacher nominees on the Board of Management.

4. This is the plaintiff’s application for an interlocutory injunction to restrain the disciplinary process until her legal proceedings challenging that process have been determined. She takes issue, *inter alia*, with the legality of a comprehensive report prepared by the principal to commence stage 4 of the process; with whether the process has been properly carried out in accordance with DES 49/2018; with whether the Board of Management is now tainted by objective bias; and whether fair procedures are being applied. Subsequent to the institution of proceedings, the principal withdrew the comprehensive report and provided the plaintiff with an amended version which, the school’s solicitors have indicated, the Board of Management intends to consider once any restriction on continuing the disciplinary process has been lifted. The two versions of the comprehensive report will be referred to as the first comprehensive report and the second comprehensive report respectively. As the first comprehensive report has been withdrawn, the school argues that the case as originally pleaded by the plaintiff is moot and the school should be permitted to continue with a disciplinary process against her. In response, the teacher has brought a motion seeking both an interlocutory injunction and liberty to amend the plenary summons to reflect the fact that the first comprehensive report has been withdrawn and taking issue with the proposal to issue the second comprehensive report. The statement of claim which was issued just before the trial of the interlocutory application presumes such amendment and deals with the situation as it stood in July, 2021.
5. Clearly, this judgment cannot resolve the factual issues between the parties. A determination of whether the plaintiff has breached her obligations as a teacher through the way in which she discharged her duties during the lockdown period can only be determined through an appropriate disciplinary process. Thus, the only issues of concern to the court are the process itself and whether it has been shown that what has already been done and what is now proposed have departed sufficiently from DES 49/2018 or the rules of natural justice and fair procedures to warrant restraining the process until the litigation has concluded. I should observe at the outset that the threshold faced by the plaintiff is high. The settled case law makes it clear that in normal course an ongoing disciplinary process should be allowed to proceed unless it is clear that the process has gone irremediably wrong such that any conclusion reached adverse to the employee would be bound to be legally unsustainable (per Clarke J., as he then was, in *Rowland v.*

*An Post* [2017] IR 355). That said, there are also a number of cases in the education sector involving the application of these procedures (i.e. DES Circular 49/2018 or its predecessors) where the teacher concerned succeeded in establishing that the threshold had been reached. As each case depends on its individual facts, it will be necessary to look at the facts of this case in some detail.

6. Before doing so, however, I propose to make a number of general observations identifying some unusual features of this case which suggest that it is different in material respects from other cases in this field. Firstly, there is no history of a strained relationship between the parties – or at least none disclosed on affidavit – before the lockdown in January, 2021. It is frequently a characteristic of these cases that the issues the subject of the disciplinary process have been superimposed on a history of other complaints or of a tense working environment and even, at times, the complete breakdown of working relations. This is not the case here.
7. Secondly, the issues the subject of the disciplinary process are now historic and, indeed, were largely so at the time the first comprehensive report was provided to the plaintiff in April, 2021. The period covered by the report is 1st February to 26th March 2021 and as schools re-opened fully after the Easter holidays teachers were no longer required to teach remotely from April onwards. Whilst the possibility of another lockdown involving school closures and a reversion to on-line teaching and learning cannot be excluded, if this were to arise there would be an opportunity for the Department of Education and the school itself to give further guidance and/or instruction on how the school is to operate during any such period.
8. Thirdly, the plaintiff worked throughout the period during which the disciplinary process was both in contemplation and underway (I will return to the issue of whether the process has actually started below). The plaintiff continues to work in the school notwithstanding that she now faces a disciplinary process involving allegations of serious misconduct which, if established, might lead to her dismissal. Again, this is unusual as most cases in this sector seem to feature teachers who either have been suspended at the instigation of the school or who are absent on long term sick leave, often stress-related, thus obviating the immediate need for a suspension. It is somewhat unusual for an employee to be facing a disciplinary process commencing at a point where dismissal is immediately in prospect whilst remaining fully employed by the employer without any suggestion that a suspension might be warranted.
9. Finally, despite the historic nature of the issues and the fact that the plaintiff continues to be employed in the school, I acknowledge the importance of both the disciplinary process, and of these legal proceedings, to both parties. The plaintiff qualified as a secondary school teacher 22 years ago and has been employed by the school for over 19 years. It is not disputed by the school that she had never been the subject of any complaint from parents or pupils prior to these events. Unsurprisingly, she feels that not just her livelihood but also her professional reputation is at stake. The school, on the other hand, is a DEIS school serving a deprived catchment area in which children are at risk of

educational disadvantage. The school has a deep-seated commitment to its student body, a significant proportion of whom have special educational needs including, for historical reasons, a group of children with visual impairment. Consequently, ensuring that teachers maintained a consistent engagement with their pupils during periods of when the school was closed due to lockdown was a very important issue for the school.

### **Chronology**

10. The lockdown in March, 2020 which resulted in the closure of all schools nationally came as something of a surprise. By the time the country was facing into a second lockdown in January, 2021, the experience gained from the first lockdown had allowed significant lessons to be learned. Schools, including the defendant's school, had invested time and resources in training teachers in the use of remote platforms and related technology and in ensuring that teachers and students had the equipment necessary to use these platforms. Teaching a class over a remote platform from the teacher's own home is necessarily a different exercise to teaching the same class face to face in a classroom. This gave rise to certain industrial relations issues, particularly if the preparation for and presentation of a class on a remote platform was significantly more time consuming for the teacher. As noted previously, in November, 2020, one of the major teaching unions in Ireland, the ASTI, gave a directive to its members that they should not cooperate with changes to work practices unless the changes had been agreed at a staff meeting and were "time neutral".
11. Irish schools were able to open for the Autumn term in 2020. However, as COVID-19 infection rates in the community rose over Christmas, 2020, it became apparent that schools would not reopen after the Christmas holidays. The Government initially announced a three-day extension to the Christmas holidays but then announced that schools would not reopen at all as the State went into a level 5 lockdown. The formal guidance on Emergency Remote Teaching and Learning issued by the Department of Education to post-primary schools in November, 2020 included the following under the heading "Required Features of Provision":-
  - *Regular engagement with students: Teachers should, as far as possible, engage with students as per the normal school timetable.... The assignment of tasks to be completed is not, of itself, sufficient because students need direct teaching inputs from their teachers in order to feel connected to the school, to stay motivated, and to make progress in their learning.*
  - *A blend of guided and independent learning tasks/experiences: Teacher-student engagement should involve both direct teaching by the teacher and the assignment of independent learning tasks for completion by the students. Teachers should ensure, as far as practicable, that direct instruction is provided for aspects of learning that require it, using a variety of approaches, for example video, audio, presentation software and written instructions. Regular engagement with students when they are out of school will also help them to reintegrate when they return to school."*

12. On 8th January, 2021, the school sent an email to staff saying that “*all classes to be taught online*” from 11th January. A virtual staff meeting was held on the morning of 11th January at which concerns were expressed at the imposition of a requirement that all classes be taught online. Queries were raised as to whether this required teachers to provide face-to-face teaching for all timetabled classes or whether “*blended learning*” permitted a teacher to set students work to be completed during some of the scheduled classes. In the plaintiff’s view, these concerns were not adequately dealt with by the principal and deputy principal, although it seems that the principal did confirm that, in accordance with advice received from the Association of Community and Comprehensive Schools (the ACCS), teachers were not required to teach “*lecture style*” for entire classes and could assign students work whilst being available to assist and answer questions online.
13. At this point, on 12th January 2021 the Department of Education issued a letter to the parents and guardians of school pupils in relation to remote learning during the lockdown. That letter summarised the guidance previously provided to schools indicating that in the post-primary context “*teachers should, as far as possible, engage with students as per the normal school timetable*”. It then went on to state:-

*“A blend of guided and independent learning tasks/experiences: teacher-pupil/student engagement should involve both direct teaching by the teacher and the assignment of independent learning tasks for completion by the pupil/students.”*

14. Some teachers remained concerned and, subsequently, members of the ASTI held a meeting in the school. Their local representative wrote to the principal on 20th January explaining that members found the requirement to prepare for and teach their full timetable on-line time consuming and exhausting. She queried the school’s interpretation of the Department’s guidance and, in particular, whether the concept of blended learning required teachers to login to a live class during periods where work had been set for students to undertake independently. Although, for reasons explained below, the nature of the allegations against the plaintiff are not entirely clear, it seems that this is the crux of the issue. Given that the principal and the school accepted that all on-line classes did not have to be taught lecture-style by a teacher (although clearly a proportion should be), the area of disagreement centres on whether the teacher must be logged in to a live class supervising work students are undertaking independently and remotely or whether it is sufficient that the teacher be available in the sense of receiving and replying to queries from students sent in the form of emails or perhaps “*live chat*” but without being logged into a virtual classroom for the entire duration of the class. Allied to this is the issue of how and when a teacher should take the roll for a class which is being taught in this manner. Obviously, from the school’s perspective, since it is of the view that a teacher should be virtually present for the class even if the students are working independently, there should be no difficulty taking an accurate roll. The plaintiff disagrees, pointing out that quite often students do not login when working independently and even when in class do not always put on their cameras or microphones.

15. The engagement between the school and the ASTI was not productive. The principal replied to the shop steward's letter on 22nd January confirming the advice from the ACCS that *"full timetables should be taught as normal"*. Further, he stated that the reference in the Department's guidance to teachers engaging with students per the normal timetable *"as far as possible"* was intended to cater for exceptional circumstances rather than *"normalising alterations to the normal school timetable"*. He reiterated that teachers could give students work to do independently whilst being available to assist and answer questions. A further meeting of the ASTI members employed in the school was held on 28th January, 2021, this time with an outside ASTI official in attendance. On 29th January, the ASTI wrote to both the principal and the chairperson of the Board of Management identifying the concern of members *"that they were required to teach their full timetable face-to-face on-line"* and stating that this constituted a change to work practices within the school which could only be introduced by consensus and if it were *"time neutral"*. As teaching remotely is unavoidably different to teaching a class in person, it seems that the change referred to is a change from the practise which had pertained during the first lockdown. Finally, the letter advised the school that the ASTI members had been instructed not to co-operate with these changes as per the ASTI direction of November, 2020. A reply dated 3rd February, 2021 was sent jointly from the principal and the chairperson of the Board of Management disputing the contention that there had been any change in work practices and stating that the school was following the guidance issued by the Department of Education.
16. As can be seen from this account, until February, 2021, the question of exactly what blended learning required of teachers was dealt with solely on a collective or industrial basis as between the school and the union. In February, this changed. The plaintiff states that from 3rd February, she ceased teaching all of her scheduled classes via live face-to-face classes and, instead, engaged with students through a combination of on-line live teaching and independent learning. This included classes during which coursework assigned by her was carried out by students and the plaintiff was available to provide assistance or feedback but was not logged into the class for the scheduled period. Presumably, those of her colleagues who were also members of the ASTI adopted a similar practice. On 8th February, 2021, the other trade union representing teachers in the school, the TUI, wrote to the Board of Management expressing concern that the ASTI teachers were not adhering to the timetable and were limiting on-line engagement with their students. Individual teachers became the subject of complaints from parents.
17. The minutes of the Board of Management meeting held virtually on 9th February indicate that the principal outlined his dealings with the ASTI and that the matters were the subject of some discussion by the Board. In particular, the minutes note as follows:-

*"The Board were informed that verbal complaints were made by parents of students of 1st, 2nd, 3rd, and 4th year students stating that classes had been cancelled. Some teachers took the roll for these cancelled classes and others did not. This appears to be as a result of the ASTI letter. The Principal and Deputy Principal outlined the information they have to date regarding the parental complaints. This*

*was presented in an anonymised manner. A letter was received from the members of the TUI working in the school on 8 February 2020.*

*A discussion was had by the Board of Management regarding the issue. There was an acknowledgement of the good work being done by a large number of staff, in particular the student support team. It was noted that the actions of some staff to cancel or reduce classes, without informing management, as they had been instructed, was undermining the good work...*

*The Board of Management agreed that there had been no changes to working conditions. It was decided that the Board of Management, in consultation with the ACCS, that the Principal would send letters to the relevant staff asking for an explanation as to why they will not perform in their normal duties. There is a concern that teachers are engaged in unofficial industrial action."*

18. As a result of this meeting, on 10th February, 2021, an identical *letter "in relation to engagement with online learning"* was sent individually to a number of teachers, including the plaintiff, all of whom were members of the ASTI. The letter asked for an explanation as to why the plaintiff had cancelled classes and informed students that she would not be engaging with them as per the normal school timetable and why she had marked rolls for classes which did not take place. No specific timeframe was set for a reply. At this point, the plaintiff took advice from her trade union as she was concerned that complaints against her had been escalated to a meeting of the Board of Management without the issue having been brought to her attention first.
19. A letter issued from the ASTI to the school on 19th February, 2021. To a large extent, this letter rehearsed the existing battle lines but also stated that ASTI members were now engaged in lawful industrial action and asking the school to meet in this regard. However, the letter also referred to the letters which had been sent to ASTI members on 10th February indicating:-

*"The issuing of these letters to our members is unacceptable to the ASTI. Our members in Rosmini Community School have, therefore, been advised not to respond to these letters."*

This form of response is of some significance. The plaintiff avers that she was advised that she should not personally respond to the letter of 10th February and that the issue would be addressed on her behalf in a letter to be issued on behalf of all affected teachers by the ASTI. The letter issued by the ASTI does not actually respond to the principal's letter of 10th February, nor offer the requested explanations. The first confidential report prepared by the principal indicates that the plaintiff failed to respond to a written query by the principal on behalf of her employer, the Board of Management which is strictly speaking correct, but which does not take into account the ongoing correspondence from the trade union representing the plaintiff and other teachers in the same position.

20. Despite correspondence having issued to individual teachers, discussions between the school and the ASTI continued and a meeting was held between the ASTI and the principal and chairperson of the school on 2nd March, 2021. As it happens, the plaintiff attended that meeting, not specifically in a personal capacity but as a member of the ASTI. The plaintiff was not identified as one of the teachers to whom the correspondence had been sent.
21. In the course of the meeting, the ASTI official expressed concern that parental complaints which had resulted in letters being sent to seven ASTI members had not been processed through a procedure agreed between ACCS and both the ASTI and the TUI for dealing with complaints by parents against teachers. He contended that the school was victimising ASTI members. In response, the chairperson indicated that the parental complaints against the teachers concerned had already been considered at two meetings of the Board of Management. Although the concerns were initially raised against a group of seven teachers, the group was now closer to four in number and she produced statistics as to the level of engagement by those teachers, one of whom was the plaintiff. At this point, it became apparent that, unknown to the plaintiff and to the ASTI, an investigation had already taken place which had given rise to a report from which these statistics were drawn. In his affidavit, the principal confirms that he was asked to conduct an audit of cancelled clauses in preparation for the meeting with the ASTI and that he did this as regards all of the teachers in respect of whom complaints had been made by examining the Google Meet audit report and comparing it with the VSWare rolls for those teachers.
22. According to the plaintiff, the chairperson then indicated that the school could inform parents that certain teachers were not teaching due to industrial action by the ASTI, that it could invite the inspectorate into the school and that it could seek legal advice as to disciplinary action against certain ASTI members. The chairperson also expressly stated that the actions of the teachers concerned were "*not acceptable*" to the Board of Management and that those teachers were not doing their job. The balance of the discussion focused on the industrial relations aspects of the dispute, on whether lawful industrial action was being taken and on the ASTI's request that a staff meeting be held to reach a consensus as to what the provision of on-line teaching in the school should be.
23. The minutes of a meeting of the Board of Management held virtually on 5th March indicate that a detailed account of this meeting was given by the chairperson to the Board of Management during which the teachers concerned were described by her as the teachers "*that had reduced their timetable*". Those minutes also record that the Board of Management discussed the information provided, with a view being expressed that "*it is about not doing a job that they are expected and directed to do*". The Board of Management resolved to reply to the ASTI refusing the request for a staff meeting; to write to parents informing them of the situation and to seek legal advice. A letter was duly sent to the ASTI dated 10th March, 2021. Central to the Board of Management's refusal to countenance a meeting of staff to consider delivery of on-line teaching was the view that no change in work practices had taken place. The letter concludes by stating

that the ASTI had undermined the authority of the principal and of the Board of Management and should not be using its directive to instruct its members not to engage in their timetabled hours.

24. Following the meeting with the ASTI on 2nd March and the ensuing correspondence on 10th March, there was no further correspondence between the school and either the ASTI or the plaintiff for over a month. During this period, the gradual reopening of schools commenced nationally with the return of special classes from 22nd February followed by the return of Leaving Certificate students for a three-day week. However, unknown to the plaintiff, following the end of the school term, the principal completed an audit of what he describes as "*the records of Ms. Lally's engagement with online learning*". Again, this audit involved using the Google Meet audit function and comparing it with the school's VSWare administrative system. In his affidavit, the principal states:-

*"I was of the opinion that the results of this audit could constitute serious or gross misconduct on the part of Ms. Lally and that the conduct in question warranted the commencement of the disciplinary process at stage 4 [of the relevant procedures]."*

He goes on to say that "*based on this information, I prepared a comprehensive report on the facts of the case for the Board of Management pursuant to the provisions of Circular 49/2018*". The resulting report, the first comprehensive report, was sent to both the plaintiff and the Board of Management on 13th April, 2021.

25. Based on this account – and there is nothing in the papers which suggests it is inaccurate – the decision to launch a disciplinary process against the plaintiff at stage 4 of the agreed procedures was one made by the principal alone. The principal does not suggest that in making this decision he had regard to any factor other than the fact that the conduct in question was capable of constituting serious or gross misconduct. Whilst the comprehensive report was completed after the school term had finished, the principal does not suggest that he consulted any additional records other than the Google Meets audit and the VSWare administration system already examined prior to the meeting of 2nd March nor that he considered any additional material in drawing up his report save perhaps information on two incidents from the deputy principal. Thus, the material on which his decision was based and which forms the basis of both comprehensive reports is largely the same material which formed the basis of the report from which the chairperson quoted at the meeting with the ASTI and which, in turn, was discussed by the Board of Management at their meeting of 5th March.
26. A meeting of the Board of Management took place virtually on 15th March. The minutes of that meeting record the following:-

*"The Chairperson notified the Board of Management that she has received a report from the Principal, Mr. Darrell D'Arcy, who has initiated disciplinary procedures at stage 4 of Circular Letter 49/2018 in relation to Ms. Emer Lally. The BOM considered the matter and requested the Chairperson to seek the views of Ms. Lally in writing on the comprehensive report referred to the BOM and to afford her an*

*opportunity to make a formal presentation of her case at a meeting of the BOM. A date was set for Ms. Lally's meeting...*

*The Board were reminded that they would not receive the full reports until the day of the meetings affording the teachers the opportunity to make a presentation of his/her case."*

The minutes record that the plaintiff's meeting was scheduled for Monday, 10th May, 2021 at 4:00pm. Whilst other parts of the exhibited minutes have been redacted, it seems that similar decisions to hold disciplinary hearings were made in respect of at least two other teachers at the same meeting.

27. Following this meeting, the chairperson sent the plaintiff an email on 16th April attaching a copy of the first comprehensive report, of DES Circular 49/2018 and a letter from the chairperson also dated 16th April. That letter introduced the disciplinary process as follows:-

*"I am writing to you formally in my capacity as Chairperson of the Board of Management of Rosmini Community School. The Principal, Mr. Darrell D'Arcy, has initiated the disciplinary procedures at stage 4 of the disciplinary procedures in relation to work and conduct issues of a serious nature. I enclose a copy of the comprehensive report on the facts of the case which the Principal has referred to the Board of Management. I understand from the principal that he also provided you with a copy of the report.*

*The Board of Management met online on 15th April 2021 and considered the matter. I have been requested by the Board to seek your view in writing on the comprehensive report referred to the Board. A special meeting of the Board of Management has been arranged, online, for the 10th May 2021 next at 4pm. You are requested to attend the meeting. As it will not be possible to run an actual meeting on that date in line with public health guidelines the meeting will be conducted via Google Meet.*

*The purpose of the meeting on 10th May 2021 is to give you the opportunity to make a formal presentation of your case to the Board of Management. The Board meeting will be a formal disciplinary hearing at stage 4 of the procedures which could give rise to the imposition of disciplinary sanctions against you as provided for in the disciplinary procedures up to and including your dismissal. The specific nature of the allegations against you are as set out in the report of the Board of Management."*

28. The letter went on to summarise the allegations made against the plaintiff including the cancellation of 67 classes without notice to the principal in breach of the Department's directives and the policy of the Board of Management, thereby undermining the authority of the principal and the Board of Management; that 38 of the cancelled classes were special classes where the students had returned to school following the partial reopening

in February but were still accessing teachers remotely; that the plaintiff had marked two rolls for classes which did not take place and incorrectly marked a total of 41 class rolls for classes which did take place. It is specifically alleged that the marking of rolls for classes which did not take place amounts to the deliberate falsification of school records and the incorrect marking of rolls amounts to serious negligence (both capable of amounting to gross misconduct); that the actions of the plaintiff have let her students down, undermined the work of the student support team and the work of the DEIS coordinator. The letter then concludes:-

*"At the disciplinary meeting on 10th May 2021 next you will be given the opportunity to respond in full to the allegations made against you, to state your case fully and to challenge the evidence that is being relied upon for a decision. You are entitled to be accompanied at the meeting by your trade union representatives or by a colleague subject to a maximum of two persons. As the issues before the Board are very serious and if substantiated could amount to serious misconduct I would strongly advise you to take appropriate independent advice."*

Finally, the plaintiff was advised that as the principal was the complainant in the matter, he would not participate in the Board's decision-making processes.

29. This prompted an exchange of correspondence between the solicitors acting on behalf of each of the parties. That correspondence initially dealt with the proposed disciplinary hearings in relation to three additional teachers against whom similar complaints were made. Injunction proceedings were threatened on behalf of the teachers. The school defended its right to institute disciplinary procedures at stage 4 in the manner in which it had done and maintained that it was under no obligation to follow the complaints procedure when a decision had been made to embark on a disciplinary process. I do not propose to set out the correspondence in detail but some aspects of it are of significance for the issues the court has to decide.
30. From the outset, the plaintiff made a number of complaints. She complained that the comprehensive report did not clearly set out the allegations against her nor the evidence on which they were based. She had not been given the dates and times of classes allegedly cancelled nor the dates and times of the rolls allegedly inaccurately marked. She had not been given copies of all relevant documents underlying the allegations against her. Specifically, she had not been given the complaints made by parents which had triggered the initial investigation. Further, the report purported to make findings of facts adverse to her in circumstances where she had not had an opportunity of commenting on the issues raised. The solicitor also raised concerns as to whether the Board of Management as a whole was now biased by virtue of its previous consideration of the matter on at least two occasions, the statements made on behalf of the Board critical of the conduct of ASTI members and the extent to which it had already taken a view and directed action (including an investigation) against those individuals.
31. In reply, the school contended that the complaints received from parents were irrelevant to the disciplinary process. The principal's investigation had been commenced on foot of

those complaints, but the comprehensive report was based on his investigation and not on the complaints themselves. In implicitly refusing to furnish the plaintiff with any more detail of the allegations against her or of the material on which it was based, the solicitors' letter dated 6th May 2021 stated:-

*"The fundamental point about the allegations against Ms. Lally and the factual matters as set out in the Principal's report is that they all concern Ms. Lally's timetable and they all relate to matters which are within Ms. Lally's own knowledge. Ms. Lally continues to have access to the relevant school software and can check the record if she so wishes in relation to her own timetabled classes."*

Insofar as clarity was provided as to what was meant by the cancellation of classes, the letter states:-

*"We are instructed that if classes are held in the normal manner they show up on Google Audit. If the classes are not held, if they are cancelled, for whatever reason, they do not."*

32. In relation to the suggestion of bias, two points were made. Firstly, the Board of Management were first made aware of the principal's comprehensive report and of the initiation of disciplinary proceedings against the plaintiff at the meeting on 15th April when *"the Chairperson informed the Board of the report received from the principal"*. Interestingly, the language used is slightly different to that used by the same solicitors in a similar letter in relation to one of plaintiff's colleagues in which it is stated in respect of a similar report *"the Chairperson brought it to the attention of the Board in compliance with the disciplinary proceedings"*. Secondly, it is reiterated on a number of occasions that the Board of Management has not made any decision or come to any findings as regards the allegations made against the plaintiff by the principal.
33. As the school refused to undertake not to conduct the scheduled disciplinary hearing, the plaintiff instituted legal proceedings and, on 7th May, 2021, obtained an *ex parte* injunction on an interim basis preventing the conduct of any disciplinary or investigation process in respect of the plaintiff. I will deal further with the legal proceedings below. The solicitors' correspondence continued as the proceedings were progressed. Significantly, on 30th June, the solicitors on behalf of the school wrote to the solicitors on behalf of the plaintiff advising that the principal had withdrawn the comprehensive report in respect of the plaintiff. The letter went on to say that he had prepared a new report which he was referring to the Board of Management. A copy of that report was attached to the letter. A follow-up letter issued the next day clarifying that until the High Court order was varied, the Board of Management would not be meeting to consider the second comprehensive report which, by then, presumably had been furnished to the Board by the principal the previous day. The solicitors for the plaintiff immediately objected and contended that the preparation of a new comprehensive report by the principal was a breach of the High Court order which restrained the conduct of any disciplinary or investigation process in respect of the plaintiff.

34. In a further letter of 6th July, the solicitors for the school confirmed that in light of the concerns expressed by the plaintiff in her affidavits, neither the chairperson nor the teacher nominee who had co-authored the TUI letter to the Board of Management in February would take part in what was then described as *"any consideration of the revised comprehensive report and/or the disciplinary process that may be initiated against your client"*. In essence, the school took the view that the disciplinary process commenced on 15th April had been concluded by the withdrawal of the first comprehensive report. Although a second comprehensive report had been forwarded by the principal to the Board of Management, it had not been provided to the members of the Board, no reliance had been placed on it to date and no step had been taken by the Board of Management in respect of a second process. A letter from the school's solicitor dated 6th July clarifies the position of the Board of Management as follows:-

*"A consideration of the terms of the relevant circular will disclose that the investigation by the Board of Management of any disciplinary matter at stage 4 and the possible imposition of any sanction can only arise once a Board of Management receives and considers a report from the Principal. The Board on foot of that report may decide to take no further steps and so no disciplinary investigation commences."*

35. Needless to say, the plaintiff did not accept that the school's actions had met her concerns such that the legal proceedings could be struck out. In a further exchange of correspondence, the school's solicitor contended that the issues regarding the original investigation were moot and pointed out that the plaintiff had not sought to issue a fresh motion or to amend the existing motion to contend that any future disciplinary process should also be enjoined. Again, the solicitors' letter of 14th July, 2021 sets out aspects of the envisaged process (such as the exclusion of the chairperson and the TUI representative from the Board of Management to determine the issues) and concludes:-

*"...Should the Board of Management, on foot of the revised report from the Principal, commence a disciplinary process, your client would be afforded all her rights and entitlements to natural justice both as specifically provided for in Circular 49/2018 and otherwise."*

36. The plaintiff accepted that she could be made subject to a disciplinary process but did not accept that her existing proceedings were moot on the basis that most of the complaints made by her continued to apply to the second comprehensive report. Her solicitor made proposals in respect of the conduct of any future disciplinary process including the preparation of an entirely new comprehensive report, the recusal of all existing members of the Board of Management and their replacement for the purposes of any disciplinary hearing and that an independent legal assessor should sit with the Board of Management. These proposals were rejected by the school. In a replying letter dated 20th July, the solicitors set out the envisaged process as follows:-

*"The next stage of the anticipated process, unless enjoined by the Court, will involve the Principal referring the revised report to the Board of Management (not*

*including the Chairperson and Mr. Gueret). It is up to the Board of Management under the relevant procedures to decide whether to proceed to a disciplinary hearing. If the Board decides to proceed, then clearly your client is entitled to fair procedures and to the procedures provided for by way of circular. If the Board of Management decide to proceed and notifies your client of that fact, it is of course open to your client to draw to the Board's attention any issue regarding a lack of clarity or a want of sufficient detail so as to allow your client adequately defend herself. Upon receipt of a copy of the report from the Board (if the Board decides to go down the disciplinary route), it is open to your client or indeed your good selves on behalf of your client, to request further documentation which your client may believe is in the possession of the school. Ultimately it will be up to the Board in the conduct of a disciplinary process (should it decide upon such) to deal with such matters."*

### **Legal Proceedings**

37. The basis on which legal proceedings have been instituted and on which they are being defended should be apparent from the detailed account of the facts set out above. The plaintiff issued a plenary summons on 7th May, 2021 and, on the same date (a Friday), made an *ex parte* application to the High Court for an injunction to restrain the holding of the disciplinary hearing scheduled for 10th May (the following Monday). The plenary summons looks for a number of reliefs, some of which are directed to the first comprehensive report (declarations that it contains findings of fact and has been compiled in breach of natural justice). However, the other reliefs sought are more general and include allegations of breach of fair procedures and of DES Circular 49/2018; declarations directed at the alleged bias and prejudgment of specific members of the Board of Management and of the Board of Management as a whole; declarations regarding the non-implementation of the code of practice for the processing of complaints by parents. The *ex parte* docket looked for interim orders restraining the conduct of any disciplinary or investigation process in respect of the plaintiff and restraining the plaintiff's dismissal.
38. The High Court granted an interim order on 7th May which has since been continued from time to time. That order restrained the Board of Management, its servants or agents from dismissing the plaintiff and also from the conduct of any disciplinary or investigation process in respect of the plaintiff. An issue has been raised in correspondence as to whether the revision of the comprehensive report by the principal and the sending of that report to the plaintiff and the Board of Management constitute a step in a disciplinary or investigation process taken in breach of the court order. Although the plaintiff's solicitors have apparently served copies of the order with a penal endorsement, no further step was taken and a contempt motion has not been brought. The plaintiff has argued that no reliance can be placed on the second comprehensive report because it is issued in breach of a court order. However, in circumstances where the plaintiff has not formally pursued the issue, I do not propose to make any definitive findings on the point. Certainly, the school was skating on very thin ice when the principal issued a second comprehensive report under the relevant procedures at a time when the Board of Management and its

servants or agents (of which the principal is one) were restrained from conducting any investigation process in respect of the plaintiff.

39. However, in circumstances where the second comprehensive report is now before the court and where, as it happens, the differences between the two reports are minimal, I think it is more beneficial to the parties and a more efficient use of court resources to proceed to examine the issues on the basis of what is now proposed to be done by the school rather than to ignore the existence of that report. In particular, I think that the two reports are so similar that, with the exception of complaints specifically directed at the formal finding of facts in the first comprehensive report, the case made by the plaintiff cannot realistically be said to be moot. The main difference between the two reports is that an editing exercise has been conducted in which all categoric statements in the first report have been changed using various formulae. The word "*facts*" has been replaced with "*materials*", the phrase "*there is evidence that*" or "*evidence appears to indicate*" has been inserted before what were, in the first comprehensive report, statements that the plaintiff had done or failed to do something. A statement that what the plaintiff did was a deliberate falsification of school records is now qualified by the inclusion of the phrase "*the behaviour may amount to*" such deliberate falsification. The conclusions in the report are now couched in terms of their "*appears from the results of the audit*" and the allegations of misconduct are qualified as being the views of the principal rather than statements of fact. The only substantive addition is that where the first comprehensive report includes two references to the plaintiff having been witnessed arriving at school at a particular time, the second comprehensive report identifies the deputy principal as the witness. Strikingly, no change or addition has been made to the report in response to any of the matters set out in the plaintiff's affidavits of 7th May or 17th June, both of which predate the issuing of the second comprehensive report. I will return to this issue.
40. I think it follows that the plaintiff should be granted liberty to issue an amended plenary summons in the form exhibited in her affidavit of 21st July, 2021. That plenary summons includes additional relief in the form of declarations that the school should be prohibited from relying on the second comprehensive report and that the second comprehensive report (and its preparation) breached the plaintiff's right to fair procedures. As noted, the plaintiff has already issued a statement of claim which, although not formally including the additional relief, includes the issuing of the second comprehensive report and complaints in relation to it as part of the narrative of the plaintiff's case.
41. In her affidavits, the plaintiff makes a number of points regarding the complaints against her insofar as they can be deduced from the comprehensive report. As there is no real difference between the substantive content of the two reports, the points made by the plaintiff continue to apply notwithstanding the re-framing of the report in terms of allegations rather than as facts found. A significant number of these complaints relate to the way in which the allegations put by the principal arise from an audit of Google Meet and a comparison with the school's VSWare administrator system. The plaintiff states that the audit does not appear to include other elements of the Google Suite such as Google Docs, Google Sheets, Google Drive, Google Forms, Google Slides and Gmail, all of which

can be used by teachers to create, distribute and mark assignments, to monitor as student's revision history and to communicate with students. Consequently, the plaintiff contends that the audit does not fully reflect her engagement with her students during the relevant period and no explanation has been offered by the school as to why these additional elements of the Google Suite were not included in the audit.

42. Although the principal in his affidavits has said the plaintiff has access to the school's Google platform and to VSWare, the plaintiff complains that she does not have access to the "back end" of these systems. Consequently, she claims she cannot ascertain a number of potentially relevant matters such as cross-referencing her activity with her students' user activity or identifying when she was logged into and out of the system due to connectivity issues or problems with a device freezing. Apparently, these types of problems caused the plaintiff to use multiple devices and she wishes to ascertain whether all of her activity, including when she used her personal device, has been correctly recorded. In relation to the taking of rolls, the plaintiff states there were continuous technical problems with the VSWare system, some of which she had identified to the school. In particular, there were difficulties getting the system to properly save rolls for double classes or class groups she had twice on the one day. She also states that the school gave no specific guidance on how rolls were to be taken for remote teaching periods.
43. In addition, the plaintiff complains that in his replying affidavit, the principal raises new allegations that do not appear in the comprehensive report. These relate firstly to two incidents on 4th February and on 4th March when the plaintiff is alleged to have marked rolls for classes which did not take place. The plaintiff provides a detailed explanation for both of these dates in her second affidavit – both involved double classes and VSWare replicating the roll marked for the second class and attributing it to both classes. Notwithstanding the plaintiff's complaints as to the way in which the comprehensive report was apparently compiled and her specific response to these additional allegations, none of these issues are dealt with by the principal or by the chairperson in any subsequent affidavit.
44. Perhaps of most concern is an allegation by the principal in his first affidavit (confirmed on affidavit by the chairperson) that on 30th April, 2021, the plaintiff informed her second year French class via Google Classroom that she was cancelling a Wednesday class due to a staff meeting and that the class would be changed due to a staff meeting every Wednesday from then on. The principal states that there was no staff meeting on that date and had been no staff meeting since 11th January, 2021. In reply, the plaintiff exhibits the relevant communication which is dated 30th April, 2020 and not 2021. She confirms that she did in fact have a conflicting staff meeting on 30th April, 2020. Notwithstanding this very clear contradiction of his averment backed up by documentary evidence, the principal simply does not address the issue in either of his two subsequent affidavits. It might be expected that if the principal accepted the plaintiff's correction, he would acknowledge his error and perhaps even apologise to her. On the other hand, if the

correction was not accepted, one might expect that, at the very least, this would be expressly stated.

45. It is extremely unsatisfactory that when a response is provided to a serious and specific allegation made on affidavit, it is simply met with silence. I acknowledge that in a case of this nature, the underlying disciplinary issues cannot be resolved on affidavit and nor should a court attempt to do so. However, in this case, three specific factual examples which are not mentioned in the comprehensive report were given on affidavit, their truth averred to by the principal and the chairperson. When issue was taken with their factual accuracy and no response at all is provided, it necessarily raises doubts about the integrity of the proposed disciplinary process. These three instances may have been intended as examples of the broader allegations contained in the comprehensive report. It may be that the principal has not replied because he does not want to become embroiled in a dispute on affidavit concerning what he sees as matters properly referable to the disciplinary process – although that would beg the question why he introduced the material in the first place. However, he has not even indicated that this is the position he is taking. It is, in any event, open to question whether in the context of litigation concerning a disciplinary process an employer can make additional factual allegations on affidavit and then decline to deal with these additional matters which the employer has introduced into the litigation because of the existence of an actual or intended disciplinary process.

#### **Disciplinary Process**

46. In the course of oral argument, counsel for the school contended strongly that there was no disciplinary process yet in being. That contention was based on the fact that the first comprehensive report was withdrawn by the principal and that although a second comprehensive report had been sent by the principal to the Board of Management and to the plaintiff, because of the existence of the High Court order, the Board of Management was precluded from making any decision as to whether a disciplinary process will actually be commenced against the plaintiff. Counsel's characterisation of the process is that although the principal has sent a comprehensive report to both the teacher and the Board of Management there is no disciplinary process yet in being. The process will only commence if the Board of Management thinks that there is a sufficient concern raised, in which case the Board of Management will send the comprehensive report to the teacher – presumably the same comprehensive report she has already received from the principal. Consequently, he contends, in effect, that all of the plaintiff's arguments regarding the failure to furnish her with copies of the complaints made by parents against her, the failure to particularise the allegations against her and the failure to provide underlying material are premature. He states that if the Board of Management decide to instigate a disciplinary process, all of the material relied on will then be furnished to the plaintiff. As he frames it, the issue is one of timing.
47. I have considerable difficulty with this argument. Firstly, it is not consistent with the approach taken on behalf of the school in the principal's affidavits which have been verified by the chairperson of the Board of Management. Those affidavits, and indeed the

earlier solicitors' correspondence on behalf of the school, strenuously maintain that the plaintiff was not entitled to copies of the parental complaints as they were irrelevant to the disciplinary process. They also maintained that she had sufficient information from the comprehensive report and the material attached to it and because she had access to the school's Google Meet platform and VSWare to identify the classes which she allegedly cancelled and the rolls which were allegedly marked incorrectly. Certainly, there is no suggestion in the affidavits that she would be entitled to access the material underlying the audit or the school's IT system more broadly at some later stage in the disciplinary process.

48. Secondly, and more importantly, I do not believe this characterisation of the disciplinary process is consistent with DES Circular 49/2018. Although the circular itself refers to s. 24(3) of the Education Act, 1998, it would seem that in fact it represents procedures determined by the Minister following consultation with bodies representative of patrons, recognised school management organisations and recognised trade unions and staff associations. Under s. 24(11), a board of management may suspend or dismiss a teacher who is paid out of public funds in accordance with these procedures and, by necessary inference, a board may not do so other than in accordance with these procedures. The school does not dispute that these procedures must be followed.
49. The procedures are divided into four sections dealing separately with teachers and with principals and with professional competence issues and with matters relating to work and conduct which are not competence issues. There are some general principles underlying all of the procedures including a presumption of innocence; a requirement that the employee be advised in advance of a disciplinary meeting of "*the precise nature of the matters concerned*" and given "*copies of all relevant documentation*" including "*the source and text of the complaint as received*" and the teacher's right to a fair and impartial examination of the issues being investigated.
50. The disciplinary procedures for teachers are intended to follow an approach moving through a number of stages from an informal to a formal context with a potential for disciplinary action, including dismissal, at the end of the process. The circular acknowledges that the procedure may be commenced by the school at any stage of the process "*if the alleged misconduct warrants such an approach*". The circular does not require all disciplinary procedures in relation to serious misconduct to be commenced at stage 4. Presumably, there must be some consideration given not only to the conduct involved but also to the circumstances in which it arose and the teacher's history including any past disciplinary action, before a decision is made to start the process at the final stage.
51. The formal stages include provision for a verbal warning (stage 1), a written warning (stage 2), a final written warning (stage 3) before the possibility of a disciplinary hearing leading to dismissal is reached at stage 4. It may be useful to set out the relevant text of stage 4 in full:-

*"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 a representative, normally 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;..."*

A range of possible sanctions are then listed starting with the deferral of an increment and leading, through suspension, to dismissal. The text then continues:-

*"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."*

52. The earlier stages of the disciplinary process are handled either by the principal alone or by the principal with a nominee of the Board of Management. Stage 4 is the first stage at which the Board of Management is fully involved. However, there is nothing in the text of the circular to suggest that the Board of Management decides whether the disciplinary process under stage 4 is to be initiated. Although the language used in the first sentence is neutral ("*if it is perceived...*"), in fact when the procedures are read as a whole it is logical that the principal, who is responsible for initiating each of the previous stages, also takes the decision to initiate the process at stage 4 either because poor conduct has continued after a final written warning or because the issue of such a serious nature that it warrants such an approach.
53. The disciplinary process at stage 4 is commenced by the preparation of a comprehensive report by the principal and the forwarding of that report to the Board of Management and the teacher concerned. Once the report is received by the Board of Management, its function is to seek the views of the teacher both in writing and by affording him or her an oral hearing at which he or she can present their case. There is no intermediate stage

where the Board of Management considers whether the comprehensive report raises sufficient concerns to warrant the initiation of a disciplinary process. The process has already been initiated. There is no further requirement for the Board of Management to forward another copy of the report to the teacher. The report has already been provided to the teacher by the principal. Instead, the function of the Board of Management at this stage is to conduct the disciplinary process which has been initiated by the principal and, ultimately, to make its decision based on all of the evidence contained in both the report and in the teacher's submissions. Therefore, I think the school is operating under a fundamental misapprehension in assuming, notwithstanding the receipt by the Board of Management of a second comprehensive report from the principal, that there is no disciplinary process in being. This in turn leads to a significant misapprehension as to the significance of the step already taken by the principal and as to the consequences of that step, in terms of the plaintiff's entitlement to be advised of the precise nature of the matters alleged against her and to have access to all relevant material concerning those matters as set out in Circular 49/2018. As previously indicated, I do not propose to make any findings on the plaintiff's complaint that the school has acted in breach of the High Court order but I do note the school's misunderstanding as to when the process commences.

54. Leaving aside for the moment the suggestion of prejudgment, in my view, the procedure adopted by the school in relation to the first comprehensive report was more reflective of Circular 49/2018 than that which is now proposed and, indeed, what is suggested in the more recent correspondence from the school's solicitor. The principal sent the plaintiff the first comprehensive report on 13th April, 2021. The Board met on 15th April and set a date for an oral hearing on 10th May. The chairperson then wrote to the plaintiff on 16th April advising that the principal had initiated a disciplinary process. She sought the plaintiff's views in writing on the comprehensive report and advised the plaintiff of the meeting scheduled for 10th May at which she was to be given an opportunity to make a formal presentation. This is what the procedure requires. Whilst it must always be open to a board of management to reject the allegations made in a comprehensive report either because they are not substantiated by the report itself or they are not sufficiently serious to warrant pursuing the process at stage 4, the teacher must still be allowed the opportunity to address the board of management in writing and orally before any decision is made. If it had been intended that the procedure before the Board of Management would comprise two stages, then no doubt those two stages would have been clearly set out in Circular 49/2018. Any such two-stage procedure immediately gives rise to issues such as those which have been addressed in more formal statutory contexts by the distribution of functions between preliminary investigation committees, fitness to practice committees and the boards or bodies with ultimate responsibility for the imposition of any sanction. This does not arise here because the procedure set out in Circular 49/2018 does not envisage that the Board of Management will actively consider the substance or merits of the allegations against a teacher, even on a threshold basis, before the teacher is afforded a right to be heard.

55. In passing, I note that the argument made by counsel in this regard is one that has already been rejected by this Court (Binchy J.) in *Joyce v. Colaiste Iagnaid* [2016] 27 ELR 140. As that case concerned disciplinary proceedings taken against a principal, the relevant procedure required the report to be prepared by the chairperson of the board of management and delivered simultaneously to the principal and the board. The judgment states at para. 78:-

*"78. There is no doubt that strict compliance with the procedures set out in Circular 60/2009 requires the chairperson to send his report to the principal at the same time that he sends it to the board. However, counsel for the defendant has submitted that it is necessary for the board to consider the report in the first instance in order to decide whether or not there is a prima facie case that merits proceeding any further with the matter. I do not think however that this is correct. There is no ambiguity about the procedure in this respect – it clearly envisages the chairperson delivering, simultaneously, his report to each of the board and the principal. As counsel for the defendant submitted in another context, these procedures were the subject of exhaustive negotiations and if it was intended that the board should be given the report in advance of the principal, then the procedures would have been worded accordingly. Even if a board determines that it does not wish to advance an investigation any further, after receiving a report from the principal, it seems to me that a principal would in any event be entitled to receive a copy and would most likely want to receive to [sic] a copy of the chairperson's report in case there are any adverse inaccuracies that a principal would not wish to see left uncorrected or in any way on the principals' record.*

*79. Furthermore, the detailed consideration and discussion of the report at meetings of the board (in this case on two occasions, disregarding the April meeting), in the absence of any response from the principal must inevitably lead to the possibility that by the time the board eventually receives the response of the principal, the board, or individual members of the board, will already have begun to reach conclusions, (based on the July report or its earlier drafts) notwithstanding whatever warnings may have been given to the board that it should not rush to judgment."*

**Legal Tests/ Standards to be applied**

56. Although it is relatively late in this judgment to be looking at the legal standard to be applied, it is nonetheless relevant to how the court should approach the issues raised by the facts set out above and in the context of Circular 49/2018.
57. The plaintiff is seeking an interlocutory injunction. The principles relating to the availability of such interlocutory relief have recently been re-stated by the Supreme Court in *Merck Sharp and Dohme v. Clonmel Healthcare* [2019] IESC 65. In particular, the court should seek to ascertain where the risk of least injustice lies in deciding whether to grant or to refuse interlocutory relief which will be operative until the trial of the action which may take some time. Further, in light of that judgment the court should no longer treat the adequacy of damages as a matter to be considered in advance of, and separate to,

the balance of convenience making the availability of damages potentially determinative of the outcome of any application regardless of the impact the granting or withholding of an interlocutory injunction might have on the proceedings or the parties.

58. O'Donnell J. summarised the principles to be applied at para. 64 of his judgment in that case, whilst emphasising the inherently flexible nature of the remedy such that these principles should not be regarded as unbendable rules of law. I do not propose to set out those principles in full as they are, by now, well known. Three elements appear to be of particular relevance to this case. Firstly, he suggests that at the outset the court should consider whether a permanent injunction might be granted to the plaintiff if she succeeds at trial on the basis that, if not, then it is unlikely to be appropriate to grant an interlocutory injunction in the same terms. Although this is generally a relatively straightforward matter, it does pose some difficulty in employment cases. Clearly, an employee cannot preclude an employer from ever taking disciplinary action making the grant of the permanent injunction restraining any disciplinary action or investigation unlikely. Indeed, in correspondence the plaintiff's solicitors have acknowledged that the plaintiff can legitimately be the subject of disciplinary action taken by the school as her employer. What is really in issue in the case is whether a permanent injunction can issue to restrain disciplinary action on foot of the comprehensive report prepared by the principal and sent to the Board of Management.
59. Having given the matter some thought, I am satisfied that a permanent injunction could issue in this case. As discussed above, there is no substantive difference between the first and second comprehensive reports. An editing exercise has been carried out so as to reframe what were arguably findings of fact as allegations based on the views of the principal or as conclusions which are suggested by the materials examined. However, the material examined remains the same and the allegations remain identical. Consequently, all of the complaints made by the plaintiff - except her complaint that the facts have already been found against her - remain live and are equally applicable to the second report as they were to the first. Significantly, the comprehensive report is largely based on an examination of identical material to that which formed the basis of an earlier report generated by the principal at the request of the chairperson of the Board of Management. That report was relied on by the school at the meeting with the ASTI on 2nd March which was in turn the subject of detailed discussion at the meeting of the Board of Management on 5th March. The plaintiff is making the case that because of the involvement of the Board of Management in the earlier industrial engagement with the ASTI, the discussions had at the Board of Management and the views attributed to it (especially in the chairperson's letter to ASTI dated 10th March), the current members of the Board are objectively biased. If the plaintiff succeeds in establishing this, then it follows that the Board of Management as currently constituted could be enjoined from conducting any disciplinary process involving her. I will return to these issues below.
60. Secondly, O'Donnell J. then suggests that the court should look at whether it has been established that there is a fair question to be tried. In many employment cases, including a number of the authorities cited to the court, a different test is applied, namely that

articulated by Fennelly J. in *Maha Lingham v. HSE* [2006] 17 ELR 137. That replaces the fair question test with a higher standard when a plaintiff is seeking a mandatory interlocutory injunction. In such cases, it is necessary for the plaintiff to show that he has a strong case which is likely to succeed at the hearing of the action. In this case, counsel for the plaintiff specifically argued that the *Maha Lingham* test did not apply because no mandatory relief was being sought. The plaintiff remains in her employment with the school and the interlocutory relief seeks only to restrain the disciplinary process until the litigation has been determined. This does not appear to be disputed by the defendant although I note that in *Joyce v. Colaiste Iagnaid*, a case with many factual and procedural similarities to this one, it was accepted by the plaintiff that she was seeking a mandatory injunction and that the *Maha Lingham* standard applied. However, as the matter has not been placed in issue in this case, I am satisfied that the legal onus on the plaintiff is to establish that there is a fair question to be tried.

61. This is not, however, the end of the matter because separate to the jurisprudence concerning the standard applicable to the grant of interlocutory injunction, there is a line of case law relied on by the school to the effect that a court should not intervene in an ongoing disciplinary process unless it is clear that the process has gone irremediably wrong and it was more or less inevitable that any adverse conclusion reached against the plaintiff would be unsustainable in law. If the plaintiff cannot establish that the case reaches the standard, then the disciplinary process should be allowed to continue to its natural conclusion (see *Rowland v. An Post* [2017] 1 IR 355). This means that in establishing a "fair question to be tried", it is not sufficient for the plaintiff simply to show that she has a stateable case on fair procedures or a breach of Circular 49/2018 or objective bias on the part of the decision maker. She must show that she has raised issues which suggest that the process has gone irremediably wrong and that any conclusion ultimately reached against her will be legally unsustainable. Whilst the fair question threshold has often been described as a light one, it becomes a more exacting threshold in a case of this nature by virtue of the fact that it must be applied to legal proceedings which themselves attract a specific and higher standard for the grant of a permanent injunction.
62. The judgment in *Rowland v An Post* was given in the substantive proceedings, interim and interlocutory injunctions having been granted at an earlier stage. Thus, the legal test under discussion by the Supreme Court was that to be applied to the question of whether the party in the position of the employer (strictly speaking it was not an employment case), should be permanently enjoined from continuing with a disciplinary process for the reasons advanced. However, in light of the fact that generally an interlocutory injunction should not be granted if a permanent injunction is unlikely to issue, for the reasons discussed in the preceding paragraph the legal test for the grant of a permanent injunction becomes relevant to the issue as to whether the plaintiff has established a fair question to be tried. In looking at that test as regards disciplinary procedures, Clarke J. (as he then was) stated starting at para. 11 of that judgment:-

"11. ...In many cases the proper approach of a court when called on to consider the validity of a disciplinary-like process is to look at the entirety of the procedure and determine whether, taken as a whole, the ultimate conclusion can be sustained having regard to the principles of constitutional justice. Many errors of procedure can be corrected by appropriate measures being taken before the process comes to an end. Decision makers in such a process have a significant margin of appreciation as to how the process is to be conducted (subject to any specific rules applying by reason of the contractual or legal terms governing the process concerned). Thus the exact point at which parties may become entitled to exercise rights such as the entitlement to know in sufficient detail the case against them, the entitlement in appropriate cases to challenge the credibility of evidence and the right to make submissions are, at least to a material extent, matters of detail to be decided by the decision maker in question provided that the procedures adopted do not, to an impermissible extent, impair the effectiveness of the exercise of the rights concerned.

12. Precisely because procedural problems can be corrected and because there may well be a significant margin of appreciation as to the precise procedures to be followed it will, in a great many cases, be premature for a court to reach any conclusion on the process until it has concluded.

13. However, the practical consideration which leans against a court interfering with an ongoing process may point in the opposite direction in a limited number of cases where the conduct of the process, up to the point when the court is asked to review it, is such that it is clear that the process has gone irremediably wrong. In such a case, rather than the practicalities pointing to letting the process come to its natural conclusion and, if necessary, being reviewed by a court thereafter, those same practicalities point to stopping the process and thus saving all concerned from engaging in what must necessarily turn out to be the fruitless exercise of continuing a process whose conclusions if adverse are almost certain to be quashed."

The school also relied on the judgment of Ní Raifeartaigh J. in *Sheehy v. Killaloe Convent Primary School* [2019] IEHC 456 which is to similar effect, although I note that the proceedings in that case were taken by way of judicial review and some of the observations made by Ní Raifeartaigh J. are made specifically in the context of judicial review.

63. Obviously, sight should not be lost of the fact that this remains an application for an interlocutory injunction; the plaintiff is not required to show that she must succeed in her case once the *Rowland* criteria are applied. Rather she must show that she has raised a fair question to be tried, taking into account the high standard by reference to which that question will be judged at the substantive hearing.

64. Finally, if the plaintiff establishes that there is a fair question to be tried, the court must then consider the balance of convenience of which adequacy of damages is an important element but not the only one nor necessarily a defining element. As it happens the

parties in this case have not made detailed submissions on this issue. Instead the focus of the argument has been on the anterior issue of whether a fair question has been established in light of the *Rowland* criteria. I will consider both of these issues further below.

#### **Application to the Facts of this Case**

65. In this particular case, the principal has purported to rectify the comprehensive report prepared by him to meet the plaintiff's complaint that adverse findings had been made against her before any process had taken place. It is clear from both the correspondence received from the school's solicitors and the affidavits sworn on behalf of the school in these proceedings that it is intended that this amended report should form the basis of a disciplinary process to take place before the Board of Management, albeit that the school erroneously assumes a two-stage process before the Board of Management. Instead, there is a disciplinary process in being which has been commenced by the sending of the comprehensive report to the plaintiff and to the Board of Management and that is the process the plaintiff now seeks to restrain.
66. The question which the court must decide is whether the issues raised by the plaintiff in her proceedings are such that she has raised a fair question taking into account the high threshold arising from *Rowland v An Post*. The issues raised can be broadly grouped under four headings – firstly the fact that the school did not invoke the complaints procedure in relation to the complaints made by parents; secondly the manner in which the comprehensive report was compiled and in particular the fact that the plaintiff was not aware of its compilation nor afforded any opportunity to comment on it; thirdly complaints of breach of Circular 49/2018 and of fair procedures generally and finally objective bias on the part of the Board of Management. I accept that the plaintiff's complaints regarding the fact that the first comprehensive report purported to make findings of fact against her are now moot by virtue of the withdrawal of that report, although the fact that that report was discussed by the Board of Management at its meeting of 15th April remains relevant to the question of bias, given the similarity between the substance of the two reports.
67. I think the first issue raised can be disposed of relatively simply. Whilst the plaintiff argued that the complaints procedure should have been followed, Circular 49/2018 does not make the exhaustion of the complaints procedure a pre-condition to the invocation of the disciplinary procedure by a school, particularly in circumstances where the principal takes the view that serious misconduct is involved. The plaintiff has not advanced any particular authority for the proposition that the complaints procedure was not just preferable, but mandatory in the circumstances. Consequently, I do not think that she has established that there is a fair question to be tried on this point, capable of meeting the *Rowland* test. That may not be the end of the matter however as I do not think it is possible to separate the complaints from the disciplinary process in the stark way which the school purports to do. Even if there is no obligation to follow the complaints procedure, the fact that complaints were made about the plaintiff prompted an investigation into her electronic record and ultimately the initiation of a disciplinary

process against her. In my view this means that the parental complaints have continuing relevance to the allegations now made and form part of the underlying material to which the plaintiff can seek access in the context of the disciplinary process.

68. The issue concerning the compilation of the comprehensive report is complicated by the fact that there are now two reports, the second having been prepared after the institution of this litigation and after the ventilation by the plaintiff of her complaints on affidavit. At the outset, I accept the point made on behalf of the school that a teacher does not have the right to be heard on the preparation of a comprehensive report by a principal. A disciplinary process must start somewhere. Under Circular 49/2018 in the case of teachers the process will normally start informally and will only escalate through the formal stages where completion of the earlier stages has not led to a satisfactory outcome. The commencement of the process at stage 4, involving a disciplinary hearing and the possible imposition of sanctions including dismissal, should be exceptional even in cases of conduct that is capable of amounting to serious misconduct. Nonetheless, the Circular expressly envisages that the process can be started at this point and does not require that the teacher be informed of or consulted on the issues before it is commenced. This was expressly recognised by Binchy J. in relation to the companion procedures relating to principals in *Joyce v Colaiste Iagnaid* [2016] 27 ELR 140. Therefore, the plaintiff's general complaint that she was not consulted or afforded the opportunity to comment on the preparation of the comprehensive report (whether through the complaints procedure or otherwise) do not, in my view raise a fair question to be tried having regard to the *Rowland* test.
69. That said, however, there is an obligation on a principal in preparing such a report to act fairly. In this case, I have serious concerns as to whether the principal has acted fairly in the preparation of the second comprehensive report. A number of serious issues were raised by the plaintiff on affidavit in relation to the first comprehensive report. These included whether the audit on which the report is based fairly reflects her level of engagement with her students other than through the Google Meet platform and the VSWare roll system. The principal prepared his second report after the plaintiff's first two affidavits had been delivered and with the knowledge of these concerns but does not address them in any way. Given that the plaintiff is being accused of having "cancelled" classes, it is I think relevant for the Board of Management to know whether she engaged with her students through other elements of the Google Suite platform provided by the school during those periods she is alleged to have cancelled classes. There is a significant difference in terms of the seriousness of what is alleged between a teacher who simply cancelled classes and made no provision at all for her students during those periods and a teacher who did not conduct all classes remotely by maintaining a live presence throughout the class period but who distributed and assigned work in a structured way for students to do independently, who made herself available to assist and answer questions from students and who corrected and returned work done by students during these periods. Similarly, the plaintiff had identified difficulties with the VSWare roll system and, particularly, as regards taking the roll for double classes. Given the allegation is that the plaintiff took the rolls inaccurately, it would be important for the Board of Management to

know whether any inaccurate rolls were caused by the system the school provided to the plaintiff rather than by the plaintiff's deliberate actions. One might have expected the second comprehensive report to at least identify that the plaintiff was asserting technical difficulties and perhaps to identify how many of the 41 rolls allegedly inaccurately taken by her related to this type of double classes.

70. In light of the knowledge the principal must have had of these issues through his engagement in these proceedings, a serious issue arises as to whether he acted fairly in simply re-presenting the first comprehensive report subject to the editorial changes identified above.

I reiterate my concern here is not that the plaintiff should have been involved in the preparation of the comprehensive report. The procedures do not envisage that a teacher will have any right of input into such report. Rather, the question is whether in preparing his report the principal can ignore serious issues of which he is aware which are potentially favourable to the teacher. Consequently in the particular circumstances of this case, given that the proceedings had intervened and that issues had been raised by the plaintiff in relation to the first comprehensive report, I think a serious question arises as to whether it was fair on the part of the principal to resubmit that report without revisiting the substantive complaints and ascertaining the extent to which the issues raised by the plaintiff might have a bearing on the allegations he makes against her.

71. The application of the legal standard set out in *Rowland v. An Post* is made more complicated by the school's misunderstanding of the stage 4 procedure under Circular 49/2018 and the assumption that there is to be an intermediate decision by the Board of Management instituting disciplinary proceedings. As I have set out above, that is not the case. Disciplinary proceedings have been instituted by the sending of a comprehensive report by the principal to the Board of Management and to the plaintiff, even though the Board of Management has not yet considered the report. The plaintiff is now entitled to be heard and consequently is entitled to be properly equipped to meet the allegations against her. Whilst counsel at the hearing of this case argued that she would of course be entitled to relevant information at the appropriate time, the affidavits sworn on behalf of the school make a different case, namely that she is not entitled to any more material than she has already received. Looking at these factors alone, it is not possible to say with confidence that the procedure which has already commenced is one which is being and will be carried out by the school in accordance with Circular 49/2018 and in accordance with fair procedures.

72. That said, central to the judgment in *Rowland* is the extent to which errors complained of can be corrected during the course of the process which is sought to be enjoined. The judgment of Clarke J. (as he then was) does not assume that every process will necessarily be carried out perfectly but recognises the scope for correction while the process is ongoing and, of course, the availability of a judicial remedy at the conclusion of the process. However, I do not read the judgment in *Rowland* as meaning that a court must assume that every disciplinary process can and will be rectified before it reaches a

conclusion, although it is probably fair to assume that regard will be had by the decision maker to any interlocutory judgment given in the case itself and steps taken to meet any substantive concerns. Nonetheless, there are clearly some errors which are of such a nature that if they occur, the process cannot be rectified.

73. At this point it is necessary to ascertain whether the errors complained of by the plaintiff are ones which, if borne out, are capable of rectification within the process. I think her complaints regarding a lack of access to material which she feels is relevant and necessary for her to defend herself are ones which can be rectified in the course of the process. In fairness, counsel for the school indicated that the plaintiff would be entitled to certain material if the Board of Management were to initiate a disciplinary process against her. As I have found that process to be in existence already, presumably the school will take appropriate steps to meet the plaintiff's request for information and documents.
74. The concerns noted above about the compilation of the second comprehensive report are more difficult to categorise. The report is a mandatory step in the process. In my view there is an obligation on the principal to act fairly in the preparation of a report, particularly one which is intended to start a disciplinary process at stage 4. This means that the facts set out in the report must be both ascertained and presented fairly. If there are facts or circumstances known to the principal which tend to disprove the allegations or to minimise the seriousness of what is alleged, these should be brought to the attention of the Board of Management in the report. There is certainly a fair question in this case as to whether the principal met these standards in the preparation of the second comprehensive report.
75. As against this, can any weaknesses in the report (by which I mean failure to include or address material favourable to the plaintiff) be rectified at a later stage in the process? The plaintiff will have a full opportunity to make submissions on the allegations against her under Circular 49/2018. However, in my view the obligation on the principal to act fairly in the preparation of the report is not met simply because the teacher will have a right of reply. The manner in which the allegations are put before the Board of Management by the principal can be significant and can serve to set the bar which the teacher must meet in order to exonerate herself. As the sending of the report is the step which both commences and frames the subsequent disciplinary process, on balance I would be inclined to the view that it is a step which cannot be rectified – certainly not easily rectified – as the process progresses.
76. Fortunately, I do not have to base my judgment on this conclusion alone. The final set of grounds raised by the plaintiff concern objective bias or prejudice on the part of the Board of Management and individual members of the Board. I think the complaints against individual members have been largely met through the acceptance from the outset that the principal would not sit with the Board since he is presenting the allegations and the offer in subsequent correspondence that the chairperson of the Board and the teacher nominee who co-authored the TUI letter to the Board would both recuse

themselves. That leaves the complaint that the Board itself has prejudged the allegations against the plaintiff. The plaintiff's solicitor has requested that all members of the Board of Management recuse themselves for the purpose of the disciplinary process and be replaced by individuals with no prior involvement. This request has been refused by the school.

77. To establish objective bias at the trial, the plaintiff will have to show that a reasonable person, knowing all of the relevant facts, would have a reasonable apprehension that the decision was vitiated by prejudgment (per McKechnie J in *Nurendale Ltd t/a Panda Waste Services v Dublin City Council* [2013] 3 IR 417 following *O'Neill v Beaumont Hospital* [1990] ILRM 419; *Orange Ltd. V Director of Telecoms (No.2)* [2000] 4 IR 159; *Bula Ltd v Tara Mines Ltd (No.6)* [2000] 4 IR 412 *et al.*). She does not have to show that the other members of the Board of Management were actually biased; it may be sufficient to show that by virtue of their prior dealings with the issues giving rise to the allegations against her, a reasonable person would be concerned that they could not approach her case with an open mind.
78. The plaintiff's case in this regard is based on a number of different matters. Firstly, there is the Board's treatment of the action taken by the ASTI and discussions of this action at its meetings of 9th and 25th February and 5th March. Although the teachers were not initially identified, the Board was told that a number of teachers had cancelled classes and reduced their timetables – which are of course the allegations now made against the plaintiff – and that an adverse view was formed by the Board of Management. Secondly, correspondence was sent on behalf of the Board of Management to ASTI on 10th March in which definitive statements are made both as to the Board's position on the underlying industrial dispute (i.e. whether there had been a change in work practise) and to the effect that ASTI had undermined the authority of the principal and the Board of Management – another of the allegations against the plaintiff. Thirdly, the first comprehensive report – which is substantively identical to the second such report – was sent to the Board of Management and discussed at its meeting of 15th April 2021. There is some variation in how this discussion is described in the affidavits and correspondence. It seems clear that at a minimum the Board was advised that a report had been received from the principal in relation to the plaintiff with a view to starting a disciplinary process under Circular 49/2018, the nature of the allegations were outlined to the meeting and there was some discussion of the issues and the intended process, albeit that the text of the report had not been made available to the members of the Board.
79. It is not for the court to make any assessment at this stage as to whether those grounds are likely to support a finding of objective bias at the substantive trial. It is sufficient that they raise a fair question to be tried, which in my view, they do. That in turn begs the question per Rowland as to whether the alleged bias, if proven, would constitute an error which is incapable of rectification during the course of the process. The identity of a decision-maker is something that cannot readily be altered once the process before that decision maker has commenced without re-stating the process from scratch. The plaintiff has requested, and the school has refused, to replace the current members of the Board

of Management for the purposes her disciplinary hearing. Therefore, I have to assume that the process is intended to be one carried out before the same Board of Management which has already considered the matter to the extent set out above and already reached the views reflected in the correspondence issued on its behalf. If the plaintiff succeeds in her claim that the Board of Management is biased, then any conclusion reached by it adverse to her will be legally unsustainable. Consequently, even when the higher *Rowland* criteria are factored into the "*fair question*" test, the plaintiff has met the relevant standard in respect of her bias argument and also, although less clearly so, in respect of her complaints regarding the preparation of the comprehensive report on which it is now intended to base the disciplinary process.

80. In circumstances where the plaintiff has met the preliminary thresholds, the court must now consider where the balance of convenience lies pending the trial of the action. As noted above, the plaintiff continues to work in the school and no immediate change is proposed in this regard. Therefore, the grant or refusal of an injunction will not alter the legal relationship between the parties; it will impact only on the disciplinary process itself. It is probably safe to assume that if an injunction is refused and the disciplinary process proceeds to an outcome adverse to the plaintiff which is ultimately set aside in the legal proceedings, then the school will be in a position to pay damages to the plaintiff. However, irreparable damage to the plaintiff's professional reputation will likely have been caused in those circumstances. In contrast, the school has taken no steps to suspend the plaintiff pending the outcome of the disciplinary process. The conduct of which she is accused does not reflect on her ability to teach nor not pose any immediate risk to the pupils whom she teaches. Whilst a pragmatic desire on the part of the school to progress a disciplinary hearing into matters capable of constituting serious misconduct is understandable, that desire is outweighed by the potential damage to the plaintiff's otherwise unblemished record as a teacher in the school. The balance of justice in this case would appear to favour the determination of the litigation whilst the *status quo* was maintained and before the disciplinary process is allowed to proceed.
81. In light of the foregoing I will grant the plaintiff an interlocutory injunction to restrain the conduct of any disciplinary process against her arising out of the manner in which she conducted her classes during the lockdown from January to March 2021.