

THE HIGH COURT

[2023] IEHC 312

High Court Record Number: 2021/6198 P

Butler J.

BETWEEN

AILBHE DUNNE

PLAINTIFF

- AND -

**THE BOARD OF MANAGEMENT OF LITTLE ANGELS SPECIAL
SCHOOL**

DEFENDANT

Judgment of Ms. Justice Butler delivered on 12th day of June 2023

Introduction

1. This case concerns the principal of a national school who is facing a disciplinary inquiry into complaints made against her by the chairperson of the Board of Management of the school. The principal (or plaintiff) is seeking an interlocutory injunction to restrain a disciplinary hearing pending the conclusion of proceedings which she has instituted seeking to restrain the process in its entirety.
2. The plaintiff acknowledges that the Board of Management of the school is entitled to conduct a disciplinary investigation into her as their employee but contends that in this case the process has gone irredeemably wrong such that it is now incapable of reaching a legally

sustainable conclusion, no matter what that conclusion might be. The Board of Management (or defendant) disagrees arguing that no decision has yet been made and that the plaintiff will be afforded the full panoply of fair procedures at the intended disciplinary hearing. Separately, the defendant argues that insofar as many of the plaintiff's complaints concern what is termed a comprehensive report prepared by the chairperson and sent to her on 2 June 2021 and the decision to commence disciplinary action at stage 4 of the applicable procedures, she was already outside the time limit permitted under O.84, r.21 of the Rules of the Superior Courts when she instituted her proceedings on 9 November 2021.

3. Behind these legal arguments there lies what can only be characterised as a very difficult working relationship between the plaintiff and the Board of Management. That difficult working relationship is compounded by the fact that the school in question is a special school catering for pupils with moderate to severe and profound learning disabilities which presents its own challenges and the fact that much of the time-span covered by the chairperson's report coincided with the Covid 19 pandemic. The pandemic and the effect of the consequent measures taken for public health reasons, including a series of lockdowns, were particularly challenging for the education sector and no doubt all the more so in the case of a school catering exclusively to pupils with special educational needs.

4. It is not the function of the court when hearing an interlocutory injunction application to determine the disputed facts underlying the substantive proceedings much less to make any assessment of the merits of the allegations which will be in issue in the disciplinary process should it ultimately be permitted to continue. The task of the court at this stage is to decide whether the plaintiff has made out a sufficient case to merit the grant of an interlocutory injunction and whether the balance of justice lies in favour of or against such grant. The parties were agreed that the threshold the plaintiff must meet in order to justify the grant of such relief when challenging an ongoing disciplinary process in an employment

context is different to and higher than that which applies generally to interlocutory injunctions. I will return to the applicable legal standards in due course.

5. In this particular instance I must determine not only whether the threshold has been met but also whether the argument made by the defendant to the effect that the plaintiff is out of time to institute her proceedings is one which should be conclusively determined now. If the argument is accepted it would most likely preclude the grant of an injunction. However, if that issue is not to be conclusively determined until the substantive proceedings are reached it would remain something that should be considered in assessing the strength of the plaintiff's case.

6. In order to address these issues, I propose, firstly, to look briefly at the factual background against which the proceedings have been instituted bearing in mind that there is a substantial factual disagreement on many of the issues and the court cannot determine disputed facts at this interlocutory stage. I will also look at the Departmental Circular 0049/2018 under which any disciplinary process involving teachers and principals in recognised schools must take place. I will then outline the legal principles applicable to the case in order to identify the relevant threshold against which this application for an interlocutory injunction is to be assessed and, finally, I will apply those principles to the facts of this case.

Factual Background - General

7. The plaintiff is a qualified primary school teacher who from an early stage in her career became involved in the teaching of children with special educational needs. She moved to teach in a special school and obtained a post graduate qualification in the area. She then lectured to teachers on special educational needs and worked with the Department of Education in the design and delivery of professional development to teachers in this area.

She returned to the special school in which she had previously worked as deputy principal until the summer of 2018 when she was appointed principal of the defendant school, taking up that post in October 2018. The plaintiff has never been the subject of any disciplinary sanction during her teaching career. Undoubtedly, the plaintiff is someone who is seriously committed to the education of children with special needs and has both extensive experience and appropriate qualifications for the post to which she was appointed in 2018.

8. The school caters for in excess of 100 pupils with moderate, severe and profound learning difficulties of various types. Because of the nature of the school, it has a large staff cohort including some 21 teachers and 45 Special Needs Assistants (SNAs).

9. It is a feature of the education system in Ireland that although public schools are funded by the Department of Education, each school is privately owned and managed. Under Part II of the Education Act 1998 each primary school has a patron which, under s.8(6) is charged with carrying out the functions and exercising the powers conferred upon a patron under the 1998 Act. Whilst most primary schools are under the patronage of religious bodies, others such as Gaelscoileanna and Education Together schools operate under patron bodies established to promote their particular ethos. A smaller subset, including the defendant school, have a patron that is particular to the individual school. In this case the patron of the defendant school is a company limited by guarantee incorporated on the establishment of the school in 1984. Given the extent to which the inter-personal relations between the plaintiff and some members of the Board of Management feature in the factual background to this case, it is relevant to note that the school was founded by a group of people which included the current chairperson's father and, at the time this application was heard, both the chairperson and his father were directors of the patron company.

10. The defendant school is managed by a Board of Management pursuant to Part IV of the 1998 Act. Whilst the act permits some variation in the composition of a Board of

Management this one is typical in that it includes parent nominees, community representatives and a nominee of the patron. The plaintiff, as principal, is also a member of and acts as secretary to the Board of Management. The functions of the Board of Management are set out in s.15 of the 1998 Act and include the management of the school on behalf of the patron and for the benefit of the students and their parents and to provide an appropriate education for each student at the school. This is distinct from the “*day-to-day management of the school*” which, under s.23(1)(a) is a function conferred upon the principal.

11. In much the same way as I have acknowledged the commitment of the plaintiff, the commitment and input of the members of the Board of Management should also be acknowledged. Members of a Board of Management such as this one serve in a voluntary capacity and in doing so undertake time-consuming and difficult duties. As a Board of Management is intended to represent the community which the school serves, individual members may or may not have particular qualifications or experience in the field of education and may or may not have experience as employers. Instead, it is their cumulative experience as members of the community served by the school which informs the way in which they carry out their role. The difficulties arising from the interplay between a Board of Management and the staff of a school were acknowledged by O’Malley J. in *Kelly v. St. Josephs National School, Valkeymount* [2013] IEHC 392. She stated:

“151. However, it is a model that does place burdens on those involved. The voluntary members of the board will often be people without any particular experience in the range of matters, from budgeting to health and safety to management of staff, for which they must take responsibility. It is necessary for the board to respect the expertise of its staff, while ensuring that it does not abdicate its responsibilities.

152. Equally, it is incumbent on the staff to respect the voluntary effort of the board members, to accept that the board has the job of management and in particular to respect the role of the board as their employer.”

Significantly, for the purposes of the issues in this case, the Board of Management is the employer of the staff in the school including the plaintiff as principal.

12. Although the plaintiff commenced her employment in the school in October 2018, the issues now raised against her seems to date from August 2019 onwards. I do not propose to set out the chairperson’s complaints nor the plaintiff’s response in full in this judgment, but it will be necessary to touch on some of these issues when examining the plaintiff’s claim that the comprehensive factual report prepared by the chairperson is unfair and incomplete.

Factual Background – Issues in Report

13. The first matter complained of concerns an allegation that the plaintiff sought to retrospectively change the interview score of a teacher following interviews conducted in August 2019. The teacher in question remained employed in the school in a temporary capacity but left for another position in early 2020. In the course of an exit interview conducted by the deputy principal at the chairperson’s request (and without the plaintiff’s knowledge until later), that teacher was critical of the plaintiff’s management of the school. The plaintiff denies ever suggesting that interview scores should be changed. Instead, she says she suggested that there should be a minimum score threshold (i.e. a minimum score that a candidate would have to obtain under each heading in order to be eligible for appointment) and that when the chairperson rejected this suggestion she did not mention it again. She expressly refutes the suggestion that she disliked the teacher in question. The plaintiff complains that the chairperson frequently crossed the line between the management of the school and the day-to-day management of the school and gives the direction to the

deputy principal to conduct an exit interview unknown to her as an example of this, pointing out that exit interviews are unusual in a primary school setting.

14. The second incident complained of concerns an anonymous complaint received by the school in September 2019 concerning the interactions between a SNA and a child. The chairperson complains that when questioned directly by him the plaintiff did not give the Board of Management full information in relation to this SNA. The information allegedly not provided by the plaintiff related to concerns raised on an earlier occasion in relation to the same SNA. Those concerns had arisen at a time the plaintiff was on leave but which were discussed on her return between herself and the deputy principal. Apparently, they concluded that the concerns were not sufficiently serious to warrant the taking of further action but that they would keep an eye on the SNA in question. The chairperson is of the view that when a complaint was subsequently received, this earlier concern should have been brought to the attention of the Board of Management. He is also concerned that although the plaintiff rang Tusla in connection with the matter and Tusla confirmed that the threshold for a child protection concern had not been reached, this confirmation was given without Tusla being aware of the earlier concern. Further, I note that a parent nominee on the Board of Management had independently witnessed an incident involving the SNA in question but had not formally reported this to the school nor to any other authority. Relations between the plaintiff and this parent nominee are very poor which is of some relevance to another of the chairperson's complaints. The issue of the SNA appears to have been repeatedly raised between the chairperson and the plaintiff and, despite the chairperson acknowledging in his own notes that the information available did not constitute a child protection referral issue, he seems to be of the view that it goes to the plaintiff's lack of openness and transparency.

15. The third complaint (listed as No. 4 in his report but there is no No. 3) involves an incident which occurred on 20 January 2020 when a group of children were on a school

outing at a local swimming pool. One of the children was left unattended in the water and got into difficulties but, fortunately, was rescued. The plaintiff was not present at the incident. The chairperson's concern is that when the matter was discussed at a Board of Management meeting, which coincidentally was taking place the following day, the plaintiff misrepresented the staff to pupil ratio at the pool. There is some confusion as to what the ratio the plaintiff said was in place. The chairperson's notes (apparently made on 21 January 2020) say that she said the ratio was 1 teacher to every 2 pupils whereas the minutes of the Board of Management meeting of February 2020 say that she presented information to the effect that the ratio was 2 teachers to every 3 pupils. It seems that the actual ratio at the time was 1 teacher to 1 pupil.

16. The plaintiff's account of this meeting in her affidavit is quite different to the detail in the complaint now made against her. She states that there was no mention of rumours about the incident around town and that she had not already compiled a report on the incident (which had occurred just over 24 hours earlier) with the class teacher and other members of staff. She states that she was directed by the chairperson to tell the Board of Management about the incident and that she was uncomfortable in doing so in advance of a formal investigation. She was also uncomfortable because the spouse of one member of the Board of Management was a member of staff who had been present at the incident and, consequently, she omitted reference to that person from her account.

17. Again, this is a matter to which the chairperson repeatedly returns in his meetings with the plaintiff. Despite the fact that she was not present at the incident and, on the plaintiff's account, no formal investigation into the incident had been carried out at the time the Board of Management met the following day, she is described by him in his notes as having withheld information and of being responsible for non-disclosure and omission. Further, despite the fact that the correct ratio became known to the chairperson on the same day

(according to his notes dated 21 January 2020) and was discussed at the February 2020 Board of Management meeting less than a month after the incident itself, many months later the chairperson seemed to have regarded it as necessary to report to the school's solicitors (with a view to preparing for its insurer's investigation) that "*the principal had not been forthcoming...with accurate information*".

18. The fourth complaint made by the chairperson concerns what is known as "July provision" in the summer of 2020 and the failure of the plaintiff to show leadership on this issue. The Department of Education funds an extended school year for children with special educational needs during the summer holidays in order to prevent education regression and to maintain continuity for those children. Prior to 2020, this scheme was restricted to children with autism and profound learning disabilities but in 2020 it was extended to include all children in special schools and classes – i.e. a significantly increased cohort of children were eligible to participate in the scheme. Attendance at July provision is not compulsory and equally it is not compulsory for the staff in a school to commit to working during July. Therefore, the organisation of July provision can be a substantial task as it is necessary to ensure the availability of adequate number of teachers and SNAs (who may have to be recruited from outside the school) to safely care for the number of children who wish to attend. As might be anticipated, the task was commensurately more difficult in the summer of 2020 when there were still significant public health restrictions in place which impacted, *inter alia*, on the availability of staff. A number of meetings of the Board of Management were held before a decision was made to proceed with July provision at the defendant school. The chairperson complains that "*some [Board of Management] members repeatedly challenged*" the plaintiff's "*stance*" and he questions the "*lack of leadership*" shown by the plaintiff during this period. Once a decision was taken to proceed with July provision in

2020 that decision was implemented by the plaintiff and July provision successfully took place.

19. The issue of July provision is also relevant to the sixth complaint made by the chairperson (listed as No. 7 in the report but there is no No. 3). That concerns what is described as an incident involving the parent nominee on the Board of Management. The particular incident concerns the identity of a person who “*leaked*” information to a local radio station relating to the holding of meetings in the school regarding July provision. The parent nominee believes that the plaintiff accused them of being responsible for the leak. The plaintiff denies this. Moreover, she asserts that at a subsequent Board of Management meeting in July 2020 the parent nominee, without prior notice, read out a statement of complaint against the plaintiff. The plaintiff believes that this was inappropriate and in breach of procedure and that the chairperson should have intervened to prevent the parent nominee continuing but didn’t and instead encouraged them to elaborate.

20. It is evident from both the plaintiff’s affidavit and the chairperson’s notes that relations between the plaintiff and this parent nominee are particularly poor. The chairperson’s notes record the plaintiff as having been told by the parent nominee that they and the former principal were “*disappointed*” and “*dismayed*” when the plaintiff was appointed as principal. It is not clear if the objection was to the plaintiff personally or if there was another candidate within the school whom they would have preferred. Either way, if this was said by the parent nominee to the plaintiff it would seem entirely inappropriate, indicative of a negative attitude on the part of the parent nominee towards the plaintiff from the outset and would have made it very difficult for the plaintiff to establish a good working relationship with the plaintiff nominee.

21. In addition to the complaint read out at a Board of Management meeting, the plaintiff regards herself as having been the subject of harassment and attack by the parent through

persistent questioning nominee at the Board of Management meetings. The parent nominee on the other hand has made a formal complaint against the plaintiff which complaint process was ongoing when the interlocutory injunction application was heard by the court. The plaintiff reports having been told by a different parent that the parent nominee approached them to encourage them to make a similar complaint against the plaintiff.

22. The chairperson acted as the “*facilitator*” at the meeting between the plaintiff and the parent nominee held in May 2021 in an attempt to resolve their differences. Given the chairperson’s attitude towards the plaintiff (which is discussed further below) it seems to me that he was not a suitable person for this role. Most of the discussion at that meeting concerned the alleged leak referred to in complaint no. 7. Notably, when the plaintiff offered the parent nominee an apology, the parent nominee refused to accept it.

23. The fifth (at No.6 in the report) complaint relates to a grievance procedure instigated by the deputy principal against the plaintiff, the detail of which is not set out save the deputy principal feels that she is not consulted on critical decisions by the plaintiff but is told after the decision has been made. That grievance procedure was also ongoing at the time the injunction application was heard. However, for the purpose of the disciplinary complaint, the chairperson’s issue appears to be a “*lack of engagement from [the plaintiff] in relation to the grievance of the deputy principal*”. It is not clear if this is intended to refer to a lack of engagement with the grievance procedure (which would seem to be the case from the submissions made by counsel for the defendant) or a lack of engagement with the grievance itself as the form of the “*lack of engagement*” is not specified in the chairpersons’ report.

24. The final complaint is that the plaintiff did not bring tenders for a cleaning contract to the attention of the Board of Management. The chairperson states that it was brought to his attention at a Board of Management meeting on 25 March 2021 that a company which claimed to have put in lower bids had not been contacted by the school. In her affidavit the

plaintiff believes that the chairperson's reference to a cleaning contract is erroneous and that the issue, raised by another member of the Board of Management, concerned the purchase of personal protective equipment during the pandemic. She states that the original supplier reduced its prices to match those of the rival supplier and that she could have brought evidence of the decreased costs to the Board of Management if the matter had been on the agenda. As there is very little information about this complaint set out in the chairperson's report it is difficult to know if the plaintiff's reply is actually dealing with the same issue. The report does not set out the procedure through which such tenders are dealt with or the point (whether in terms of timing, cost or ongoing commitment) when Board of Management approval is required.

25. In addition to responding to each allegation, the plaintiff's affidavit makes a number of more general points. I will consider one of these, the notes kept by the chairperson, in more detail below. The plaintiff acknowledges that she may have made mistakes particularly since this was her first role as principal. She also indicates that for a significant period from late 2019 into 2020 she was experiencing stress due to personal circumstances unconnected with the school environment. That personal issue is referred to in passing in the chairperson's report as having been raised by the plaintiff at a meeting with him in November 2019 when the SNA issue was discussed. No consideration is given by the chairperson as to whether or the extent to which that issue might have impacted upon the plaintiff in the discharge of her duties at the time it was current – which coincides with 4 if not 5 of the matters complained of.

26. The plaintiff feels that the chairperson dealt with many things directly, including management decisions in relation to the school, and was not forthcoming with relevant information which made her day-to-day management of the school difficult. She describes her experience at Board of Management meetings as humiliating and demoralising. She

feels that the questioning of her at Board of Management meetings, particularly by the parent nominee, put her under intense pressure. On another occasion, she describes being questioned at a Board of Management meeting by the chairperson for such a period of time that she became stressed and could not process what was happening and felt very humiliated. She states that at one point when asked specifically by the chairperson if she felt unsupported by him, she was so intimidated that she did not have the courage to say that she actually felt she was being bullied by him. As events progressed, the plaintiff felt isolated and that she lacked the support of the Board of Management.

27. There were a number of issues between the chairperson and the plaintiff regarding the way Board of Management meetings were run. One of these concerned which of them was responsible for preparing the agenda for Board of Management meetings. The plaintiff believes that this is part of the chairperson's role but as the chairperson did not contact her in advance of Board of Management meetings, she undertook the task. The chairperson complains that as secretary to the Board of Management, the plaintiff did not circulate the agenda and the minutes of the previous meeting sufficiently in advance of meetings. The upshot of this is that the plaintiff perceives the chairperson as raising issues without notice to her under the "*Any other business*" heading, questioning her on those issues without her having the chance to prepare her answers and then accusing her of being evasive and dishonest if her answers are incomplete or incorrect.

28. All of this, of course, is just one side of the case. It may be that the plaintiff found Board of Management meetings stressful and difficult not because of the way in which they were handled by the chairperson, or indeed the parent nominee, but because she was not dealing adequately with the management of the school in between those meetings. These issues cannot be resolved on this interlocutory application. In opposing the application for an injunction, the defendant relies on an affidavit sworn by the chairperson. He deliberately

does not engage with the factual elements of the plaintiff's affidavit save insofar as they relate to the conduct of the disciplinary process itself, treating these as matters for the Board of Management to consider in the disciplinary process. Whilst this is undoubtedly legally correct, it has the consequence that in considering whether the plaintiff has reached the threshold required for the court to grant interlocutory relief, the only substantive evidence before the court is that provided by the plaintiff.

Circular 0049/2018

29. In order to put the plaintiff's allegations in context, it is necessary to understand the disciplinary process which the chairperson instigated by sending his report to the Board of Management and copying it to the plaintiff. The disciplinary proceedings applicable to the suspension and dismissal of teachers and principals are contained in a circular issued by the Department of Education, the current version of which is Circular 0049/2018 ("*the circular*"). The relevance of a circular issued by the Minister is reflective of the fact that although the teaching staff in a school are employed by the Board of Management, the terms and conditions governing their employment are determined by the Minister (s.24(3) of the 1998 Act). In a similar manner, a Board of Management may only suspend or dismiss a principal or a teacher in accordance with the procedures "*determined from time to time by the Minister following consultation with bodies representative of patrons, recognised school management organisations and with recognised trade unions and staff associations representing teachers or other staff*" (s.24(11)). Consequently, the circular has a quasi-statutory status and compliance with it is mandatory if a decision to dismiss a principal or a teacher is to be reached in a legally valid manner.

30. The circular is divided into two parts representing separate and independent strands of the process. These are Appendix 1 which deals with teachers and Appendix 2 which deals

with principals. Each appendix is again divided into two parts, one dealing with professional competence issues and the other with discipline and the maintenance of appropriate standards of work and conduct. The disciplinary procedures in each appendix are similar but not identical as the principal will play a role in the disciplining of a teacher which they cannot play in relation to themselves. Instead, the chairperson of the Board of Management plays a central role in the disciplinary process as it applies to principals.

31. The procedural steps set out in this circular are preceded by a number of more general statements. At the outset, it is noted that although the range of circumstances which might give rise to the initiation of disciplinary proceedings is indefinite, they are likely to relate to *“conduct, a threat to the health and safety of students and/or sustained failure to perform adequately the professional duties and responsibilities expected of a principal”*. Equity, justice and the maintenance of good industrial relations are described as general principles underpinning the procedures. Consequently, the essential elements of the procedures include that they are *“rational and fair”* and that *“the basis for disciplinary action is clear”*. Notably, the procedures state:

“Early intervention at the appropriate level to address perceived inappropriate behaviour is desirable for all parties.”

The procedures allow a principal to be placed on administrative leave with full pay pending an investigation.

32. The principles of natural justice apply to any disciplinary process instigated pursuant to the circular and are set out in detail in 13 bullet points. The first of these is that there is a presumption of innocence and that no decision in respect of disciplinary action can be taken before a formal disciplinary meeting has been held and the principal afforded the opportunity to respond. Under the second bullet point, the principal is to be informed in advance of *“the precise nature of the matters concerned”* and to be given *“copies of all relevant*

documentation". At a later stage it is specified that the principal has a right to a fair and impartial examination of the issues being investigated. The confidentiality of the process is emphasised.

33. The second strand of the procedure deals with conduct issues as distinct from professional competence. The introductory part of this section concludes:

"It follows that the approach to dealing with matters of work and conduct should involve a number of stages moving from informal stages to formal stages which may at the end of the process have recourse to disciplinary action (up to and including dismissal). Although disciplinary action will normally follow the progressive stages the procedure may be commenced by the school at any stage of the process if the alleged misconduct warrants such an approach."

34. This passage is of some significance and is relied on by both parties. The report submitted by the chairperson has instigated a disciplinary process against the plaintiff at the final and most serious stage, stage 4, in which dismissal is a potential sanction. The Board of Management relies on the entitlement of the school to commence the process at any stage and on the view of the chairperson that the alleged misconduct of the plaintiff warrants this approach. The plaintiff on the other hand focusses on the intention behind the procedures that the approach to any disciplinary issue should involve a number of stages before the final stage - including the potential for dismissal - is reached. She believes that she has been deprived of the benefit of these earlier stages particularly because most of the allegations against her date back a year or more before the process was initiated. She contends that if these issues merited disciplinary action, they should have been dealt with as they arose so that she would be afforded the chance to improve rather than have issues stored up and presented cumulatively as warranting her dismissal.

35. Before the formal stages of the procedure are reached, there is an informal stage. The circular states that problems regarding work and conduct should be “*resolved, where possible, through informal means.*” Thus, where a Board of Management feels that there are issues with a principal’s work or conduct, they should be discussed with the principal and the principal should be informed of the required improvements. Guidance and support should be offered and “*due attention*” should be paid to whether the shortcoming is due to “*personal, health or domestic circumstances*”. It is a feature of this case that the plaintiff was experiencing difficult personal circumstances for reasons entirely unrelated to her employment over an extended period in 2019/2020 which coincides with the date of many of the allegations which she now faces. Finally, a plaintiff should be advised that unless the necessary improvement is made, the matter may proceed to a more formal disciplinary procedure. As the informal stage was not invoked in this case, the plaintiff had no notice of possible disciplinary action against her until she received the chairperson’s letter in June 2021.

36. The first formal stage of the disciplinary procedure refers to a “*Verbal warning*” which may be issued after a formal disciplinary meeting has been convened by the chairperson of the Board of Management. Notice of such meeting should set out the complaint and the principal should be afforded an opportunity to respond and to challenge any evidence relied on. Having reconsidered the response, the chairperson decides on the action to be taken, if any. If a verbal warning is given, it should state clearly the improvement required and a timescale in which it is expected to be achieved. The principal has a right of appeal to a nominee of the Board of Management. If the improvement is achieved, then the verbal warning expires after six months and is removed from the principal’s file.

37. The second formal stage has potential to lead to a “*Written warning*”. It generally arises where, following a verbal warning, the chairperson perceives the principal’s conduct

to be less than satisfactory. The formal meeting in this instance is between the principal and the chairperson accompanied by a nominee of the Board of Management. Again, notice is required including a clear statement of the areas in which the conduct is perceived as unsatisfactory, and the principal has an opportunity to respond and challenge evidence relied on. The chairperson and the nominee of the Board of Management then consider the appropriate action to be taken, if any. A written warning, like a verbal warning, must clearly state the improvement required and the timescale within which it is expected. The principal has a right of appeal to the Board of Management. A written warning remains active on a principal's file for nine months.

38. If a chairperson perceives a principal's conduct remains unsatisfactory despite a written warning or there is an occurrence of a more serious offence, the third stage of the procedures provide for a "*Final Written warning*". A similar process applies with written notice setting out the specific complaint, the principal being afforded the opportunity to respond and a disciplinary meeting being held with the chairperson and a nominee of the Board of Management. The chairperson and nominee of the Board of Management decide on the appropriate action which may include a final written warning which, as in earlier stages, must set out the improvement required and the timescale within which it is expected as well as the possibility of further disciplinary action if there is no improvement. Again, there is a right of appeal. A final written warning remains on file for twelve months.

39. The fourth stage of the procedures is reached either when the poor work or conduct continues after a final written warning or "*the work or conduct issue is of a serious nature*". As the earlier stages of the procedure were not invoked in this case, the chairperson has relied on the work or conduct in issue being of a serious nature. This is disputed by the plaintiff. Disciplinary proceedings are initiated at the fourth stage by the chairperson preparing a "*comprehensive report on the facts of the case*", forwarding it to the Board of

Management and giving a copy to the principal. The plaintiff takes issue with the nature of the report prepared by the chairperson and whether it meets the requirements of the circular of being a “*comprehensive report on the facts of the case*”. Whilst there are issues as to the level of detail in the report, the main complaint advanced by the plaintiff is that the report is unfair, unbalanced and prejudicial to her.

40. Having received the report, a Board of Management then seeks the views of the principal in writing on the report. The principal is also offered an opportunity to make a formal presentation of their case at a meeting, notice of which is to state the purpose of the meeting and the specific nature of the complaint. Any supporting documentation is to be furnished to the principal. Although the text of the circular does not specifically state that the disciplinary meeting is to be a meeting of the Board of Management, it does state that having considered the principal’s response, the Board of Management will decide on the appropriate action to be taken. The range of disciplinary action that may be taken is set out and includes suspension with or without pay, demotion and dismissal. The Board of Management is obliged to act “*reasonably*” in deciding on appropriate disciplinary action which should be “*proportionate*” to the nature of the issues that have resulted in a sanction being imposed. There is a right of appeal from a sanction imposed under State 4 of the process to a Disciplinary Appeal Panel appointed by the Board of Management. However, the opinion and recommendation of the panel is not binding on the Board of Management.

41. The circular then contains a section headed “*Gross Misconduct*” which commences by saying that in the case of “*serious misconduct*” a principal can be dismissed without recourse to the previous stages. However, the immediately following paragraph suggests that it is only stages 1-3 which are disregarded and not stage 4. It is somewhat unclear whether a work or conduct issue of a sufficiently serious nature to warrant the institution of disciplinary action at stage 4 is the same thing as the serious misconduct referred to under this heading.

Whilst acknowledging that there is a view that gross misconduct and serious misconduct are not the same, counsel for the defendant school was, in my view, appropriately cautious about the correctness of this proposition. Certainly, a less serious matter can be escalated to stage 4 through the failure of a principal to achieve the improvement required in warning issued at the earlier stages of the procedure, but in order for a work or conduct matter to warrant the institution of the process at stage 4 it must be, or come close to being, gross misconduct. An illustrative but not exhaustive list of the type of conduct that might constitute gross misconduct is provided. The chairperson has not identified that the conduct referred to in the complaint against the plaintiff come within any of these categories. Instead, the report states that: *“Some issues immediately appear serious, others may appear less serious when viewed initially, but when viewed in context they too amount, in my view, to conduct issues that are serious and warrant action at Stage 4 of the Procedures”*. The report does not identify which of the 7 issues raised are supposedly immediately serious and which require to be viewed *“in context”* nor what that context might be although it might implicitly be taken to be the fact that 7 separate complaints are made. In cases of an allegation of serious misconduct a principal can be suspended on full pay pending an investigation. In this case the plaintiff has not been suspended. There was some dispute between the parties as to the significance or lack of significance of this especially in light of the fact that many of the complaints pre-date the report by a year or more.

42. If the investigation upholds the allegation of serious misconduct according to the circular *“the normal consequence will be dismissal”*. Although counsel for the school was careful to emphasise that at this stage the plaintiff is presumed innocent of the allegations against her and that the Board of Management has not yet considered the issues or heard from the plaintiff, the logic of the chairperson instituting proceedings at stage 4 is that, if the

allegations are upheld, the plaintiff can expect to be dismissed from her employment with the defendant school.

Legal Principles – Interlocutory Injunctions and Schools

43. The dismissal of a school principal by a Board of Management is governed by the terms of the circular discussed in the preceding section of this judgment. The role of the court in any disciplinary process, much less in one governed by a circular with quasi-statutory authority, is limited. However, circumstances can and do arise where a court is asked to intervene, and it is necessary to consider the criteria which differentiate the generality of cases where such intervention is not appropriate from the more exceptional case where it is. Further, in this case, the plaintiff seeks the intervention of the court not in respect of the outcome of the disciplinary process but in order to prevent that process continuing until the issues raised in her substantial proceedings have been determined by a court after a full trial. In looking at the applicable legal principles it must be borne in mind that the relief the plaintiff seeks is very much at the exceptional end of the spectrum but is nonetheless relief which may be granted in an appropriate case.

44. The principles applicable to the grant of an interlocutory injunction were recently restated by the Supreme Court (O'Donnell J.) in *Merck Sharp & Dohme v. Clonmel Health Care* [2020] 2 IR 1. That judgment emphasised the inherent flexibility of the remedy and that the overarching consideration for a court must be to ascertain where the least risk of injustice lies when deciding to grant or refuse interlocutory relief which would be operative until the trial of the action. This may require the court to take account of the likelihood of the matter proceeding to trial if an injunction is granted, or alternatively, refused. *Merck Sharp & Dohme* also reassesses the point in the process at which a court should consider the adequacy of damages for the party adversely affected if it should transpire at the conclusion

of the case that that party was either precluded from doing something which they were lawfully entitled to do or required to do something which they could have lawfully declined to do. As this case concerns the employment of the plaintiff by the defendant and thus, on the one hand, the plaintiff's reputation and livelihood as against, on the other, what the defendant perceives to be required for the proper management of the school for the benefit of its pupils, damages have not really featured in the argument and therefore the adequacy of damages will not be addressed in any detail in this judgment.

45. The principles applicable to the grant of interlocutory injunctions are summarised by O'Donnell J. at para. 65 of his judgment, although he is careful to emphasise that these are general principles rather than inflexible legal rules. I do not propose to set these principles out in full partly because they do not all apply in every case and partly because they are, by now, well known. Instead, I will refer to three elements which appear to be of particular relevance to this case. These are firstly the need to consider whether, if the plaintiff succeeds at trial, a permanent injunction might be granted. The defendant argued strongly that it would not be, and that this precluded the grant of an interlocutory injunction in this case. Secondly, the requirement on a plaintiff to establish a fair question to be tried and the extent to which, as both sides agreed, that threshold is raised by virtue of the fact that this application seeks an injunction to restrain an on-going disciplinary process. Thirdly, in the event the plaintiff establishes a fair question to be tried where the balance of convenience or the least risk of injustice lies as between the parties pending the determination of the substantive proceedings.

46. Returning to the first of these matters, the defendant argued that the plaintiff would not be granted injunctive relief at trial and that this is dispositive of her application for an interlocutory injunction. The basis for this argument is not entirely clear. It appears to be based in part on the assertion (for which no evidence was provided) that only a small

minority of actions like the current action proceed to trial and in part on contending that as an alternative to proceeding to plenary trial the plaintiff could engage in the process provided for by the circular. In my view neither of these arguments really establish that the plaintiff would not be granted interlocutory relief at trial.

47. As I noted in my judgment in *Lally v. Rosmini Community School* [2021] IEHC 633 an employee could never obtain injunctive relief to prevent an employer from taking any disciplinary action such that a grant of a permanent injunction restraining any disciplinary action or investigation is extremely unlikely. The issue is necessarily a narrower one. The real question is whether a permanent injunction might issue to restrain disciplinary action on foot of this report as prepared by the chairperson in these particular circumstances. In my view a permanent injunction could issue in the circumstances. For reasons which will become evident later in this judgment, I am of the view that very serious issues have been raised by the plaintiff regarding the manner in which the chairperson has approached this disciplinary process leading up to, and including, the preparation of his report such that if the plaintiff were to succeed in establishing that these steps were unlawful she could obtain an injunction to prevent any process being conducted on foot of the report. This is not to prejudge whether the plaintiff will succeed in this regard, merely to find that the case made by her is such that if it were to succeed there was a real legal possibility that the disciplinary process in its present form would not be permitted to continue.

48. I do not see the fact that the plaintiff could choose to engage with the process in its current form as taking away for this finding in any way. The plaintiff has articulated reasons why she alleges the process as currently structured is inherently unfair and prejudicial to her. She risks serious reputational damage if she is required to participate in a flawed process with the potential to lead to her dismissal, which damage might not be capable of remediation after the event.

49. Nor do I take the view that the existence of a significant statistical probability that the case will not proceed to trial if interlocutory relief is granted as precluding the grant of such an injunction. There are undoubtedly circumstances in which the grant of an interlocutory injunction coupled with the passage of time will result in the substantive proceedings becoming moot before they ever come to trial – as instead was the case in *Merck Sharp & Dohme* itself. There would also be cases – such as injunctions restraining picketing and other industrial action – in which the obtaining of interlocutory relief can be an end in itself such that once it is obtained the parties are unlikely to proceed to trial. However, I think the present case is materially different. This is not a case in which time is running on the validity of the process under challenge nor is it a case where the outcome of an interlocutory application can be regarded as being largely dispositive of the substantive proceedings.

50. It may be that the parties will resolve their differences bearing in mind the outcome of this interlocutory application but that remains a choice on their part rather than either a legal imperative or something which will occur by default. It does not seem logical or just to argue that an employee who has otherwise established an entitlement to an interlocutory injunction to restrain an ongoing disciplinary process should then be refused that injunction because the employer is statistically likely to take some action (whether by terminating the impugned disciplinary process or settling the proceedings or otherwise) which means that the case is unlikely to come to trial. That would be tantamount to saying that an employee must be required to submit to a disciplinary process which they have challenged because the challenge is sufficiently strong to as to make it likely that the employer will take alternative steps if the process is unacted.

51. Further, I note that O'Donnell J. in *Merck Sharp & Dohme* did not regard the likelihood that a case might not go to trial as something which reflected on the likelihood of a permanent injunction being granted. Rather, he saw it as something of which a court should be aware

in considering the balance of justice. Thus, even if I were to accept that only a small proportion of cases of this nature proceed to trial after the interlocutory stage, that is something which falls to be considered as part of the balance of justice (assuming there is a fair question to be tried) rather than something which automatically precludes the grant of an injunction such that these other issues are never reached.

52. The second element, a fair question to be tried, is one which I also addressed in my judgment in *Lally*. I was conscious on the one hand that the fair question to be tried threshold is not a particularly onerous one but, on the other, that the jurisprudence relating to the restraint of ongoing disciplinary processes has consistently held that the grant of an injunction in those circumstances is exceptional. In *Rowland v. An Post* [2017] 1 IR 355 Clarke J. (dealing with the grant of an injunction at the substantive rather than the interlocutory stage of proceedings) indicated that if the challenge was on the grounds of procedural errors which could be corrected before the process concludes, then the process should be allowed to continue as there is a significant margin of appreciation afforded to an employer as to the precise procedures to be followed. Thus, it was only if the challenge raised issues which suggest that the process has gone irremediably wrong such that the ultimate conclusion is unlikely to be sustainable having regard to the principles of constitutional justice, that an injunction should be granted. In an attempt to synthesise these stricter standards with the more general fair question to be tried test I stated as follows in *Lally*: .

“This is not, however, the end of the matter because separate to the jurisprudence concerning the standard applicable to the grant of interlocutory injunctions, 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.”

I also cautioned (at para. 63) that as the application remains one for an interlocutory injunction, a plaintiff is not required to establish that she must succeed in her case once the *Rowland* criteria are applied, merely that she has raised a fair question to be tried by reference to this standard.

53. I note from one of the judgments relied on by the defendant in this case that Clarke C.J. himself took a somewhat different approach as to how the *Rowland* standard impacted on the criteria for a grant of an interlocutory injunction to restrain a disciplinary process. In *McKelvey v. Iarnrod Eireann* [2020] 1 IR 573 at para. 49 he stated that in his view consideration of the *Rowland* criteria forms part of the consideration of the balance of convenience going to the overall assessment of where the least risk of injustice lies. He notes that the orderly conduct of employer/employee relations could be negatively impacted by the regular halting of disciplinary processes merely because an arguable case has been made out that something had gone wrong. Equally, requiring a process to continue if it is

almost inevitable the result would have to be set aside creates a real risk of injustice for the employer. I anticipate that there may be little difference to the outcome of a case based on whether the *Rowland* criteria are considered initially as part of the threshold a plaintiff must meet in establishing a fair question to be tried or at a later stage as part of the balance of convenience and I do not think it is necessary to resolve the differences between *Lally* and *McKelvey* for the purposes of deciding this case. Either way what is important is that in considering the grant of an interlocutory injunction a court is live to the additional onus on a plaintiff seeking such relief to establish the fundamental nature of the flaws alleged in the disciplinary process and to the general preference of courts that such processes should be allowed to conclude unless there is a real prospect that any conclusion will be legally unsustainable.

54. I do not propose to discuss the balance of convenience at this stage but will do so in the course of my analysis of particular issues raised by the parties. At this point it is sufficient to observe that the balance of convenience in any case will depend on the particular facts of the case and the broader context in which the dispute between the parties has arisen. In this case, the overarching circumstance is that the parties are employee and employer which entails both duties and obligations on both sides. That being so, the parties did not specifically address the balance of convenience in any detail focussing instead on the anterior issues of whether a permanent injunction would be granted; whether a fair question to be tried had been established and, in the case of the defendant, on whether the plaintiff is barred from seeking to challenge the chairperson's report and/or the commencement of the disciplinary process at stage 4 by reason of the time limit set out in O.84, r.21 for the seeking of *certiorari* in judicial review.

Legal Principles – Relevant Case Law

55. Before moving on to that latter issue, I propose to note some general principles emerging from the case law dealing particularly with the disciplining of teachers and principals under the circular and its predecessors. In *Kelly v. St Joseph's NS, Valleymount* (O'Malley J. [2013] IEHC 392) the principal of a national school was granted judicial review quashing the decisions of the Board of Management deciding that she was guilty of serious misconduct in, and demoting her from the position of, principal to ordinary teacher contrary to the recommendation of a Disciplinary Appeals Panel. There had been a long running dispute over a number of years between the principal and the Board of Management regarding the employment of another teacher. O'Malley J. decided initially that the issues raised by the principal were amenable to judicial review because the circular under which the disciplinary process was carried out "*derives its authority from statute rather than from contract*" (para. 134), a point relied on by the defendant for the purposes of its delay argument. She went on to grant the plaintiff an extension of time to challenge the Board of Management decision, notwithstanding that proceedings were not issued for over six months after that decision during which period of time the principal had appealed to the Disciplinary Appeals Panel.

56. The school argued that having appealed the Board of Management's earlier decision, the principal must be taken to have accepted its legal validity (presumably as distinct from its correctness) and could not now impugn it. O'Malley J. did not agree. She accepted the plaintiff's argument that a statutory process consisting of a number of stages is not analogous to a straightforward appeals process such as that from the District to the Circuit Court. She did not accept the school's argument that there was a public policy behind the time limit for judicial review (argued by the school to be that disputes should be dealt with when they are ripe) which obliged a party to litigate prematurely.

57. In the balance of her judgment, which acknowledged the general concerns behind both sides' positions on the underlying on the underlying issue, O'Malley J. was critical of the Board of Management for allowing matters to deteriorate over a considerable period of time before instituting disciplinary proceedings at the most serious stage – a concern which finds echoes in this case. She stated:

“160. The charges against the applicant were laid in such general terms that even now it is not possible to say whether it was contended that the applicant had refused to comply with more than one instruction.

161. The issue of misconduct regarding the general behaviour of the applicant became entangled in arguments about events of years gone by which had never been the subject of complaint at the time. It is not fair or rational to accuse an employee of serious misconduct and then go looking for evidence from people whose connection with the school had ceased and who had never made complaints at the time. It is not fair or rational to accuse an employee of serious misconduct on the basis of a pattern of behaviour that was never called into question even on an informal basis. Even when the Board finally had a minuted discussion of the issue on the 21st August, 2012, the only action proposed was to send her those minutes and to terminate future meetings in the event of further problems.”

58. In *Joyce v. Coláiste Iagnaid* [2016] 27 ELR 140 Binchy J. granted a principal an interlocutory injunction restraining the continuance of a disciplinary process under the previous circular pending the trial of her action. He held that the plaintiff had established a strong, arguable case in accordance with the standard set out by Fennelly J. in *Maha Lingham v. HSE* [2006] 17 ELR 137 – a standard the parties have not contended applies here. The case was that the report prepared by the chairperson upon which the process was to be based included remarks and comments which were highly prejudicial to the plaintiff and purported

to reach conclusions on some of the matters in issue. Crucially, although he accepted that a principal was not entitled to be consulted on or to participate in the preparation of a report under the circular, in his view it necessarily followed that such report could not contain any conclusions or findings precisely because the principal had not yet been afforded an opportunity to respond. If the report could include findings against a principal, then she would have to be afforded the opportunity to make submissions on it before it was forwarded to the Board of Management. Finally, Binchy J. addressed the manner in which a court should approach the construction and application of the procedures set out in the circular, noting as follows:

“Counsel for the defendant has submitted that in construing these procedures, the Court should not do so as though the circular was a statute and should look at the procedures in a flexible and purposive way and I agree with this submission. To apply standards of statutory interpretation to such circulars might well make them unworkable.”

This observation is potentially relevant to the plaintiff’s complaint that as the chairperson was, in effect, the complainant against her he should not have prepared the report that was sent to the Board of Management to instigate the procedure as he was not an independent or impartial person. The response on behalf of the defendant was that the procedures under the circular require such report to be prepared by the chairperson. In my view, if the operation of the procedures strictly in accordance with the terms of the circular is capable of giving rise to a breach of fair procedures, then the circular ought to be read in a flexible and purposive way as suggested by Binchy J. In those circumstances arrangements can and should be made to give effect to its provisions in a manner which does not breach fair procedures.

59. There are two more recent judgments of the High Court both concerning the treatment of teachers under the disciplinary process set out in the circular. One of these is my own judgment in *Lally*, the other is a more recent judgment of Dignam J. in *QQ v. Board of Management of a School* [2023] IEHC 302 which was delivered subsequent to the hearing of this case. In its written submissions the defendant argued that the plaintiff's reliance on *Lally* was misplaced in part because I held (agreeing with Binchy J. in *Joyce*) that a teacher did not have an entitlement to have an input into the principal's report before it was sent to the Board of Management. This is, of course, correct but subject to the important proviso that the report must state the facts in a balanced way and not purport to make findings or draw adverse conclusions against the person who is the subject of it.

60. Further, as the procedures under the circular applicable to the respective disciplinary processes concerning teachers and principals are similar, albeit not identical, there are many aspects of the judgment in *Lally* which are of potential relevance to this case. Once such element is my observations at para. 50 of the judgment:

“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.”

61. It is a feature of this case that from the very outset the plaintiff's trade union representatives specifically took issue with the instigation of the disciplinary processes at stage 4 without matters having been addressed at any earlier stage in the process and sought clarification as to why stage 4 was considered appropriate. Notwithstanding that this question was asked on a number of occasions, the only answer provided was that the circular allowed the school to commence the process at any stage in the procedure if the alleged misconduct warranted such an approach and that this was exclusively a matter for the school. Even when solicitors became involved and the plaintiff's solicitor sought clarity as to which of the seven issues raised amounted to a conduct issue of such a serious nature as to warrant commencement of the process at stage 4, the answer provided went no further than saying the chairperson was of the view the conduct issues were serious and warranted action at stage 4 of the procedure. Thus, at no stage either in the report itself or in the subsequent correspondence has an explanation been provided as to why the complaints now made, many of which pre-date the report by a year or more, are considered to be of such a serious nature that they warrant the institution of the process at stage 4. Therefore, it is not apparent what, if any, consideration was given to the commencement of the process at an earlier stage and why it might have been deemed inappropriate to do so.

62. The need to ensure that the report which commences the disciplinary process at stage 4 is fair and balanced is explained at para. 74 and 75 of *Lally* as follows:

“74....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....

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.”

63. In *QQ v Board of Management of a School* Dignam J. granted a teacher an interlocutory injunction restraining a disciplinary process based on a report prepared by the principal. He accepted that she had established a fair question to be tried that the report was defective because it made concluded findings and was unfairly prejudicial to the teacher. In do so he acknowledged that although such a report should not be held to the same standard as one prepared by someone with legal qualifications, its “*contents, tone and effect must be taken as a whole*” (para. 50). Interestingly for the purposes of this case, when considering the language used in the report Dignam J. was critical of the description of certain of the teacher’s statements as “*false*”, “*false and misleading*”, and of the teacher is having “*wilfully misled*” certain officials on the matters underlying the complaints against her. He regarded these as not just findings which had been made in the report but as ones “*expressed in prejudicial terms*”.

64. Dignam J. also took account of the fact that the language used in later portions of the report (which was a far lengthier document than here running to in excess of fifty pages) was more moderate with matters being “submitted” and “alleged”. But nonetheless went he on to observe:

“55. I am not convinced that the use of phrases such as “It is alleged” or “It is submitted” necessarily means that what follows should not be read as a finding or, indeed, that their absence means that a finding is being made (it will depend on the particular circumstances and the overall contents and tone of the document) but it is undoubtedly arguable that in this case this language goes some way to mitigating the language used elsewhere in the report (some of which is set out above) and goes some way to clarifying that the principal was not making findings in those earlier sections. However, this will be a matter to be determined at trial....

56. I am also satisfied that when one considers the overall tone and approach of the Report there is a fair issue that it is not properly balanced and is unfairly prejudicial to the plaintiff. This is evidenced in a number of different instances but overall it is captured by the absence in the Report of matters which might stand to the plaintiff’s credit or even of any indication that a particular matter which is referred to could be interpreted in different ways. For example, it is common case that the plaintiff has an unblemished disciplinary record for twenty-five years but there is no reference to this in the Report. Nor is there acknowledgement of the air of uncertainty that pervaded society in the weeks and months of March/April 2020 as the country entered and came to grips with the public health measures directed at containing the spread of Covid or of the challenges for all sectors in society in coming to grips with, and having to adjust to, alternative arrangements and new ways of doing things. Neither of these things

could render the Report unfair, not least because the plaintiff could bring them to the Board of Management's attention, but the absence of any acknowledgment of them is arguably indicative of an overall approach which omits matters which might be relevant and favourable to the defendant."

65. Dignam J. returned to these matters later in his judgment, when concluding that the plaintiff had established a fair question to be tried taking account of the need to establish that the process had gone irremediably wrong on the basis of the report even prior to that report being considered by the Board of Management. He stated (at para. 85):

"85. The effect of much of the language in the Report would be to convey to the members of the Board that the Principal, who they entrust with running the school, has already found wrongdoing and, through the use of phrases such as "false" and "wilfully misleading", possibly serious wrongdoing on the part of the plaintiff. It is difficult to see how it could be said that they would be able to entirely set that aside. In those circumstances, I am satisfied that the plaintiff has established a fair issue to be tried taking into the account the need to establish at trial that the process has gone irremediably wrong on the basis of the Principal's Report even though the Board has not considered the contents of the Report."

66. Finally, Dignam J. has regard to the fact that the events covered in the report predated its preparation by seven months in respect of some events and up to some fourteen months in respect of others. In considering this delay he stated as follows (at para. 123):

"The Court has to have regard to the fact that the main events giving rise to the instigation of the process occurred in the March/June 2020 period. However, there were also some events in September and October 2020. Thus, the delay was a period of between 14 and 7 months. I am completely satisfied that this period is too long, particularly where the plaintiff was not told that such a report was being prepared. I

do not accept the claim that the report is “comprehensive” is sufficient to explain or justify the delay.

However, Dignam J. also accepted that unless the plaintiff could show prejudice arising out of this delay it would not necessary follow that the delay had irremediably damaged the process, particularly since on the facts most of the evidence relied on in the report was the contents of various e-mails, letters and texts. Here the delay is, in some instances, significantly longer (between 11 and 22 months) and the evidence relied on is largely the contents of accounts given verbally at meetings and in discussions between the parties. Consequently, the matter of prejudice to the plaintiff here may not be so clear cut particularly since it appears that the chairperson kept detailed notes of his interactions with the plaintiff from an early stage whereas the plaintiff, unaware that there were any disciplinary issues in contemplation, did not do so.

Legal Principles - Delay

67. The final set of legal principles to address are those underlying the defendant’s delay argument. The case made is that the employment of the principal pursuant to the Education Act, 1998 and the applicability of the circular to any disciplinary process gives her employment a public law dimension which both makes it amenable to judicial review and subject to the time limits applicable to judicial review. The defendant does not argue for procedural exclusivity – i.e. it is not contended that the plaintiff is precluded from issuing plenary proceedings. Rather the argument made is that notwithstanding the plaintiff’s choice to issue plenary proceedings, the time limits that would be applicable under O.84, r.21 to judicial review proceedings to challenge the same decisions must also apply to those plenary proceedings.

68. In particular the defendant relies on O.84, r.21(1) which provides that an application for leave to apply for judicial review “*shall be made within three months from the date when grounds for the application first arose*”. Insofar as the plaintiff’s case impugns the legal validity of either the chairperson’s report or his decision to institute the disciplinary process at stage 4, it is contended that the grounds for any such challenge arose when the plaintiff was sent a copy of the chairperson’s report on 2nd June 2021. Order 82, r.21(3) allows for an extension of that time limit subject to the moving party establishing that there is good and sufficient reason for the extension and that the failure to apply within time was due to circumstances outside the control of the moving party or circumstances which could not have been reasonably anticipated by her. The defendant notes that the plaintiff has not actually sought an extension of time, much less establish that she comes within the scope of O.84, r.21(3).

69. The defendant relied on two judgments in support of this argument. The first and earlier in time is the judgment of Charleton J. in the High Court in *NAMA v. Bardon* [2013] 2 IR 28. Those proceedings came before the court by way an application for summary judgment in respect of amounts allegedly due on foot of various loans which had been acquired by NAMA. The defendant sought to advance a defence based *inter alia* on the assertion that the acquisition of the loans by NAMA was unlawful. In response NAMA contended that arguments as to its statutory competence made by a defendant under this heading could only be raised by way of judicial review. Charleton J. had some difficulty disentangling the various strands of Part 10 of the National Asset Management Agency Act 2009 which deal with the taking of proceedings against NAMA. However, he was satisfied that the plea sought to be raised by the defendant as to the plaintiff’s legal entitlement to enforce debts against him was “*classically the invocation of a public law remedy*”. He stated, and I quote initially from para. 19 of the judgment:

“...In the absence of a statutory declaration of procedural exclusivity in favour of judicial review, provided the time limits set by statute or by the Rules of the Superior Courts for the commencement of a judicial review remedy are abided by, a plenary summons may be issued in order to seek a public law remedy for an alleged administrative wrong; O'Donnell v. Dún Laoghaire Corp. [1991] I.L.R.M. 301.”

And, at a later stage (at para.21):

“21. Even supposing that decision to be incorrect, these arguments cannot be now raised. The time limit for the commencement of proceedings set out in the Act of 2009 would apply to both a judicial review application and to the issuing of a plenary summons.”

70. The same point is made in the more recent judgment of Hogan J. in the Court of Appeal in *Express Bus Ltd. v. National Transport Authority* [2019] 2 IR 680. The issue dealt with in the judgment concerns whether a plaintiff can maintain a claim for damages for breach of statutory duty and a claim for *Francovich* damages in respect of an alleged breach of EU law in plenary proceedings without having first challenged the validity of the administrative decision which is said to have given rise to the action for damages in the first place or whether, alternatively, the provisions of O.84 including its time limit applied by analogy to plenary proceedings instituted for that purpose. Applying the comments made by Clarke J. in *Shell E & P Ireland Limited v. McGrath* [2013] 1 IR 247 to the effect that *“a party cannot circumvent judicial review requirements by the device of commencing plenary proceedings or by mounting a counterclaim in such proceedings”*, Hogan J. concluded that the provisions of O.84 applied by analogy to the plenary proceedings which had been instituted in that case.

71. On the facts of the case the disputed decision approving alternations to the schedule of a rival bus operator was made in September 2014. Despite a meeting between the parties in February 2015 and subsequent correspondence, proceedings were not commenced until

October 2015 and not served until December 2015. The Statement of Claim was not delivered until May 2016. Hogan J. regarded the plaintiff as being “*by any measure well out of time to challenge the validity of that decision*”. As no application for an extension of time pursuant to O.84 had been advanced, he upheld the decision of the High Court to strike out the proceedings.

72. Counsel for the plaintiff did not seriously contest the proposition that her plenary proceedings would be subject to the three-month time limit applicable to judicial review. Instead, she contended that the clock could not have been running against the plaintiff during a period in which she was seeking basic information such as who had made the decision to institute the process against her and why that process had been instigated at stage 4. Further, the circular requires that supporting documentation be furnished to the principal by the Board of Management along with the chairperson’s report. No supporting documentation was sent by the Board of Management to the plaintiff to date. The only documentation provided to her was on foot of a data access request made on her behalf by her trade union. The papers do not indicate precisely when this documentation was furnished but it must have been some date after 3 August 2021 because correspondence from the school on that date stated that the chairperson was in the process of dealing with the request. I will return to the defendant’s delay argument in due course.

Chairperson’s Notes

73. There are a number of issues of concern arising from the documentation sent to the plaintiff pursuant to her data access request. I have looked at this material in some detail. It is not clear that the material is a complete response to the request made by the plaintiff’s trade union on 22 June 2021. It seems that only the chairperson was asked to respond although the request included any form of communication between members of the Board

of Management concerning the plaintiff. The material supplied is heavily redacted. In addition, although the request specifically asked for full unredacted copies of all communications between the chairperson and the parent nominee and the notes refer to the chairperson having written to the parent nominee and provided her *“with written information about her options in the event she was not satisfied with the principal’s response”* no correspondence between the chairperson and the parent nominee is included in the exhibited material. No doubt these are matters which may be pursued further by the plaintiff in due course.

74. The most striking fact evident from the disclosed material is that unknown to the plaintiff the chairperson kept a detailed record of all his dealings with her from at least September 2019. These notes are not simply a record of meetings and exchanges between the two in the nature of diary entries or something similar but comprise a critical and lengthy commentary on the principal’s actions and on her discussions with him over a two year period. It is, in my view, extremely concerning that an employer would keep these types of notes on an employee without their knowledge. That doing so in an employment context is generally considered inappropriate is evident from advice the chairperson himself gave on 28 October 2020 in relation to a situation concerning an SNA employed at the school. His own record of the advice he gave the plaintiff was that it was important there was a minute of a proposed meeting regardless of whether there was a complaint and that the plaintiff *“then writes to each individual & asked (sic) them if the minutes were a fair representation of the meeting or if there was anything they wanted to add or thought was not accurate”*. Whilst this is undoubtedly sound advice, it is advice that the chairperson did not follow in his dealings with the plaintiff.

75. Indeed, on one occasion, 6 March 2020, when the chairperson and the plaintiff met to discuss concerns which members of staff had communicated to the chairperson, he records

three times in his lengthy account of that meeting the fact that the plaintiff commenced making notes. At one stage he seems to say that because she started taking notes on how he was suggesting she might improve matters, he stopped outlining points even though these points were on a pre-prepared list he had brought to the meeting. At another stage, he seems to have drawn the plaintiff's attention to the fact that she was making notes "*acknowledging her right to do so*". The chairperson was clearly exercised by the fact that the plaintiff was making notes even though she was doing so quite openly. It is very difficult to see why he would "*acknowledge her right*" to do something she was openly doing unless he was trying to discourage her from doing so. Meanwhile he was keeping very detailed notes himself and doing so unknown to the plaintiff.

76. The notes of this particular meeting, although lengthier than the others, are fairly typical of the type of notes the chairperson kept. Presumably, they are also indicative of how he conducted these meetings. Although the meeting seems to have been arranged for the purpose of the chairperson bringing to the plaintiff's attention concerns which had been expressed to him, he is critical of the plaintiff recording these issues telling her that "*she appeared to be placing the onus on me to identify the problems in the school*". On at least three occasions during the meeting, he directly asked the plaintiff to acknowledge a breakdown of management or order within the school. When the plaintiff expressed concerns at how she perceived she had been treated at Board of Management meetings, he records that he "*felt it necessary to challenge her more directly*" effectively telling her that it was her own fault and that she had put herself under pressure by "*not been [sic] forthcoming with the truth*". The notes are replete with references to the plaintiff's "*non-disclosure*", "*omission*" and "*information she'd withheld*". On a number of occasions during the same meeting, the chairperson directly asked the plaintiff to confirm that he has not been unfair or unsympathetic to her or unreasonable or unsupportive of her. Given that

he also records that the plaintiff began to cry when asked these questions, very little reliance can be placed on her recorded answers of “No”.

77. This is certainly a very unusual approach for an employer to take towards meetings with a senior employee even where a meeting is organised to discuss a difficult issue. In my view it is open to question whether this was an appropriate approach to take in an employment context. The chairperson’s rationale, as set out in his own notes, appears to be as follows:-

“I use this style of an interview in all my work to ensure that people do not feel unduly pressurised or disrespected in situations where, because of the need to reduce potential risks, I need to address matters directly with them.”

The court is not aware of the work context in which the chairperson uses this approach, but he does not appear to have been particularly cognisant of his role as employer in his dealings with the plaintiff. Whilst clearly concerned about what he viewed as his lack of trust in the plaintiff, the chairperson seems to have been oblivious to the fact that there is a duty of mutual trust and confidence in an employment relationship.

78. The rest of the notes are in a similar vein. It is difficult not to get the impression that the chairperson’s accounts of these meetings are self-serving. He routinely describes himself as speaking “*gently*” and in a “*non-confrontational way*” despite the fact that on at least two occasions he also records the plaintiff as being reduced to tears. He tends to describe the plaintiff as “*annoyed and irritated*”, “*defensive*”, “*anxious*” or “*distressed*”. The chairperson deals at length with concerns expressed to him without, apparently, telling the plaintiff who expressed those concerns, but concerns expressed by her are discounted as irrelevant or based on hearsay. Whilst there are occasional references to it being a difficult time for the plaintiff personally, no further account appears to be taken by the chairperson of how the personal difficulties which the plaintiff was experiencing might have had a

bearing on any of the issues under discussion save to criticise her for not taking leave if she felt unable to deal with matters.

79. Apart from these general observations, there are two other elements of the notes which cause particular concern. Firstly, as far back as October 2019 the chairperson records that he had “*an issue of trust*” with the plaintiff. In November 2019 he records his view that the plaintiff’s explanations as to her failure to provide the Board of Management with relevant information on the SNA issue “*show evidence of dishonesty*”. He reports been concerned at an aspect of another discussion with the plaintiff but didn’t have immediately access to his notes “*to determine for sure that she had lied*”. His handwritten notes for 22 January 2020 state, “*I can’t trust what she reports*” and “*I am past losing any confidence in her*”. Thus, it seems that more than 20 months before commencing a disciplinary process against the plaintiff at stage 4 of the procedure, the chairperson had already formed a firm view that she was untrustworthy, dishonest and a liar. All subsequent engagements between the chairperson and the plaintiff, and indeed the fact that the chairperson recorded those engagements unknown to the plaintiff, have to be viewed in that context.

80. The second and equally disturbing matter is recorded in a note dated 30 October 2019. The note reads as follows:

“I also arranged to meet with the patron nominee to consider the concerns I have about the principal’s ongoing lack of transparency and disclosure regarding the SNA’s behaviour in the school. We discussed this matter in detail as to ways going forward. I expressed my concerns to the patron nominee that the principal has not mentioned the child’s welfare once in this case.”

This note indicates that 20 months before the plaintiff was made aware of any disciplinary concerns the chairperson had about her, he was discussing those concerns with the patron nominee on the Board of Management. These concerns were not being discussed in a purely

factual way but rather were characterised as the plaintiff's "*lack of transparency and disclosure*". It will be recalled that the plaintiff and his father were both directors of the patron company and thus, presumably, responsible for nominating the patron nominee to the Board of Management. Serious issues must arise as to whether the patron nominee can now sit on a Board of Management tasked with a disciplinary hearing into the chairperson's complaints against the plaintiff when that person has been privy to some of those complaints and the chairperson's perspective on them for nearly two years before they were brought to the plaintiff's attention.

81. The issues discussed in the preceding paragraphs reflect only the most obvious concerns arising from the chairperson's notes. It has to be borne in mind that in a plenary trial oral evidence can be given and the chairperson will have the opportunity to expand upon both the context and the content of these notes. However, unlike the more usual circumstances where a court anticipates that at trial the opposing side will challenge the evidence which was adduced on affidavit by the other side at the interlocutory hearing, here, although the evidence is exhibited by the plaintiff, it is the chairperson's own notes which he will be required to explain. As an aside I do not regard the fact that the plaintiff would have the opportunity of challenging evidence at a disciplinary hearing as being sufficient to outweigh the potential damage to her of allowing those notes to form part of the hearing nor of allowing persons who have been privy to the chairperson's views of the plaintiff over an extended period to sit on the Board of Management conducting that hearing.

Discussion and Analysis

82. The central argument made by the plaintiff is that by instituting the disciplinary process at stage 4, the chairperson has usurped and bypassed the role of the Board of Management. There were two strands to this argument. Firstly, it was contended that the

chairperson was not entitled to form a view as to the appropriateness of commencing the process at stage 4 without reference to the Board of Management. This argument is based in part on the fact that the reference in the circular to it being “*perceived*” that the conduct, the subject of the report, is of a serious nature does not specify whose perception is in issue. Further, it appears that there are a number of reported cases where the Board of Management requested a chairperson to prepare the report required to institute the process at this stage (see for example *Joyce v. Coláiste Iagnaid*). In my judgement in *Lally v Rosmini Community School* I expressed the view that specific consideration should be given to the appropriateness of instituting the disciplinary process at stage 4 even though a school has power under the circular to do so. Based on all of these considerations, the plaintiff argues that the decision to institute the process at stage 4 is one which must be taken by or in consultation with the Board of Management. The second strand was based on the involvement of the Board of Management at the earlier stages of the procedure as set out in the circular. It was argued that at each earlier stage of the process the Board of Management is involved and must take some step, whereas starting the process at stage 4 precludes the Board of Management’s involvement.

83. I am not certain that the arguments made by the plaintiff under this heading are correct or reach the threshold of a fair question to be tried. They are also legal questions the outcome of which will not depend on further factual evidence. Apart from the informal stage which may be commenced when the Board of Management forms a view that there are issues relating to standards of work or conduct on the part of a principal and arranges for the chairperson to discuss these with the principal, the Board of Management as such does not appear to have a direct involvement in the procedure thereafter unless and until the process reaches stage 4. It has an indirect involvement in stages 2 and 3 as the disciplinary meetings under those stages take place between the principal, the chairperson and a nominee of the

Board of Management thus requiring the Board of Management at the very least to nominate such a person in order for those meetings to be held. There is also a right of appeal to the Board of Management. Whilst a Board of Management as employer would no doubt be informed of any disciplinary action taken, it is a matter for the chairperson and the nominee of the Board of Management to decide on the appropriate action to take, if any.

84. Although the language used in the circular is at times opaque, it is clear that the process proceeds through stages 2 and 3 where the chairperson perceives that the principal's conduct remains less than satisfactory in light of the outcome of the earlier stages. Although the initiation of stage 1 does not refer expressly to the chairperson's perspective of matters, as the chairperson is responsible for convening the formal disciplinary meeting and there is no nominee of the Board of Management present, it would seem logical that it is the chairperson and not the Board of Management that is the moving party. Stage 3 refers to there being "*an occurrence of a more serious offence*" as an alternative to the chairperson's perspective of ongoing conduct remaining unsatisfactory. Even then, it is not entirely clear who makes the decision that there are grounds for believing that a more serious offence has occurred. In some instances, that belief may be prompted by a third party complaint or by a specific incident which has occurred to the knowledge of all parties. The extent to which the Board of Management might be regarded as detached from the formal disciplinary process as it moves through stages 1, 2 and 3 is most likely related to the fact that it is the appellate body for stages 2 and 3 and the decision maker at stage 4. The procedure necessarily has to work in an employment context where decisions on serious issues such as demotion, suspension or dismissal ultimately have to be made by the Board of Management as employer. Therefore, it seems likely that the circular has structured the process so that the Board of Management will only be indirectly involved up to that point and thus remains relatively independent and impartial for the purpose of the exercise of both its appellate function and

its function at stage 4. In conclusion on this issue, I am not convinced of the plaintiff's argument that the commencement of the disciplinary process at stage 4 excluded the Board of Management from a role that it would otherwise have and do not regard this as having reached the threshold of a fair question to be tried, although it would satisfy the additional *Rowland* element of that test.

85. However, separate to the role of Board of Management, it is undoubtedly the case that the procedures under the circular envisage that the process will move through a number of informal and formal stages before reaching the ultimate stage when the most serious sanction of dismissal becomes a possibility. Independently of the part that the Board of Management might or might not play in these earlier stages, this plaintiff has been deprived of the opportunity of engaging with her employer in the manner envisaged in the circular. If the complaints now made by the chairperson concerning matters which occurred in 2019 are of substance, the plaintiff has not been afforded the opportunity to improve in response to any warning which might have been issued to her. The circular does allow for the institution of disciplinary proceedings at stage 4 but doing so has extremely serious consequences for the employee concerned who faces the threat of dismissal without having had the opportunity to address concerns about her work or conduct through the earlier stages of the process.

86. As I commented in *Lally*, the mere fact that the circular allows for disciplinary proceedings to be instituted at stage 4 does not necessarily mean that it is appropriate to do so and, indeed, it is probably inappropriate to do so in most instances. The fact that it is technically possible does not of itself justify the choice to commence the process at the final stage and to by-pass the earlier ones. Normally, when this approach is taken one would expect there to have been a particularly serious incident – most likely coming within the types of gross misconduct described in the circular – and for that incident to have occurred shortly prior to the institution of the disciplinary proceedings. It is difficult to understand

how a number of complaints - most of them predating the report by a year or nearly two years - which were not considered sufficiently serious to merit any disciplinary action at the time can suddenly be grouped together in order to justify the institution of disciplinary proceedings at stage 4.

87. In addition to her argument as to the role of the Board of Management, the plaintiff made a number of other arguments which I regard as being more serious and more convincing. These arguments are largely based on the role of the chairperson in instigating the process, whether he was justified in doing so at stage 4 and the manner in which he complied has his report. In particular, the plaintiff alleges that that chairperson's report is biased against her: that he was closely involved in the events of which he complains so that he is effectively acting as both complainant and prosecutor; that most of the complaints refer to matters which occurred a year or two earlier which were not raised as disciplinary issues at the time; that these matters have been stored up by the chairperson to use cumulatively after a considerable delay; that the chairperson's report does not simply set out the facts but purports to make findings against her and does so in a very prejudicial manner and that the chairperson has stymied the Board of Management by effectively saying that he cannot work with her.

88. These arguments were not directly addressed by the defendant which relied instead on *prima facie* compliance with the circular and the assertion that as the process is ongoing nothing has been decided against the plaintiff. I acknowledge the practical difficulties facing the defendant in that asking the Board of Management (as distinct from the chairperson) to address matters for the purpose of this application could then create a difficulty as regards the disciplinary process. Nonetheless and taking that into account I still do not regard the defendant's response, at this interlocutory stage, as convincing. Even without looking in detail at the evidence exhibited in the affidavits, the chairperson has a clear conflict of

interest in that he is both the complainant against the plaintiff and has acted as prosecutor in presenting his report to the Board of Management. The chairperson is not merely the complainant in the formal sense of framing an issue or issues raised by third parties. The complaints in the report are very much based on his perception of the plaintiff and in many instances based on his interactions with her. Although the circular does provide that the chairperson of the Board of Management is to prepare the report at this stage, basic fairness of procedure requires that where the chairperson is conflicted, as this chairperson clearly is, that someone else should be asked to perform this role.

89. As noted by Binchy J. in *Joyce v. Colaiste Iagnaid*, the procedures in the circular should be looked at in a flexible and purposeful way. It is undoubtedly preferable that the school should depart from the strict terms of the circular and arrange for somebody other than the chairperson to prepare the report upon which a disciplinary procedure is to be based rather than to have the chairperson prepare that report in circumstances of a clear conflict of interest. In saying this I do not intend to suggest that it would generally be inappropriate for the chairperson of a Board of Management to author a report in respect of issues which they or the Board of Management perceive as being of concern in relation to a principal's conduct. However, in the circumstances of this case and bearing in mind the conduct of this chairperson in keeping critical notes on the plaintiff without her knowledge for a lengthy period strongly suggest that it is not appropriate that he have charge of the conduct of the disciplinary process against her.

90. It should be noted that in many if not most instances a conflict of this nature will not arise. Where allegations against a principal concern matters such as deliberate damage to school property, fraud, violent or disruptive behaviour or the circulation of offensive, obscene or indecent material (all of which are examples of gross misconduct set out in the circular) there will usually be evidence other than the chairperson's subjective views which

can be set out in such a report. However, here the allegations are more inchoate and concern what the chairman perceives as a lack of trust, a lack of openness and transparency, a lack of engagement and a lack of leadership.

91. The concerns regarding the fairness of the chairperson's report crystallise when that report is looked at more closely. It is to be recalled that the circular requires the chairperson to prepare a comprehensive report on the facts of the matter. Thus, the report should be comprehensive in the sense of being a complete account of the issues and it should be factual rather than consisting of the author's opinions. As the sending of the report initiates a disciplinary process at an escalated level with the potential to lead to dismissal, it necessarily requires that the report is fair and balanced in its comprehensive treatment of the facts. On my reading of this report, it is neither. Even allowing that the school might adduce more complete evidence at the substantive trial which may cast a different light on matters, there is still a fair question raised as to whether any fair disciplinary process could be conducted on foot of this report.

92. To start with, the report could hardly be described as comprehensive. Seven separate complaints are made in little over six pages. Even then, much of the report comprises the chairperson's view of events (which is invariably phrased in negative terms) rather than an account of the facts underlying his complaints in respect of those events. Many of the complaints are essentially inchoate, such as a lack of openness and transparency, a lack of engagement or a lack of leadership, which make them difficult for the plaintiff to respond to.

93. In addition to forwarding the report, the circular envisages that a Board of Management will send a principal notice of a disciplinary hearing which will set out "*the specific nature of the complaint*" and any supporting documentation is also to be furnished. Here the report was furnished by the Board of Management to the plaintiff under cover of a letter dated 9

June 2021. That letter set out the proposed arrangements for disciplinary hearing and advised the plaintiff of her right to attend, to be represented and to challenge evidence. However, it relied on the details of the complaint as set out in the report without elaborating further. Apart from the report and the circular, no supporting documentation was furnished. The plaintiff had to make a data access request before she was provided with any additional material. The material furnished largely comprised the notes kept by the chairperson. The Board of Management now wishes its members to be supplied with these notes at the hearing. As will be appreciated from the preceding section of this judgment, I have very serious concerns about these notes.

94. I appreciate that the plaintiff's concern in relation to the adequacy of the report in terms of the level of detail provided to her would probably not meet the *Rowland* threshold for injuncting an disciplinary process since those concerns are, in theory, capable of being addressed before the process concludes. Nonetheless, it remains a matter of concern that to date no effort has been made by the Board of Management independently of the chairperson to ensure that the process is run fairly by, for example, ensuring that the plaintiff is provided with a comprehensive report which details the specific nature of the complaints against her and by providing her with all pertinent supporting documentation.

95. More fundamentally, no effort has been made by the chairperson to be balanced in his report. For example, the first complaint which relates to the plaintiff allegedly seeking to change the interview score of a candidate, refers to this being the second occasion the plaintiff asked to change information retrospectively and mentions backdating the date policies were signed by the Board of Management prior to an inspector's visit. The chairperson's report fails to record that the plaintiff asked him about backdating these policies and that he agreed that she should do this it before it was done.

96. Separately, although the chairperson was aware of the difficult personal circumstances under which the plaintiff was operating from the autumn of 2019 through the first part of 2020, he fails to consider how this may have impacted upon her or to make any allowances for the difficulties she was experiencing in respect of the third or fourth complaints both of which occurred during that period. Whilst it is, of course, open to the plaintiff to make these points in response to the allegations against her at the disciplinary hearing, in my view that may not adequately remedy the damage done by the partial way in which the allegations have initially been presented to the Board of Management in the report. In a similar manner, no mention is made of the difficulties arising from the covid 19 restrictions in relation to the complaint that the plaintiff showed a lack of leadership regarding July provision in the summer of 2020. A balanced report would at very least have acknowledged these factors and indeed acknowledged that once the decision to run July provision was taken by the Board of Management, the plaintiff duly implemented it.

97. On occasion the allegations are framed in a way which is directly contrary to the notes the chairperson made at the time the events were unfolding. For example, in respect of the issues between the plaintiff and the parent nominee on the Board of Management, the report records the plaintiff as having denied any difficulties between herself and the parent nominee which the chairperson observes is *“not what I have generally been witness to during meetings”*. This is not consistent with the chairperson’s own record of his discussions with the plaintiff on this issue as evident from his notes. At a meeting of 11 September 2020 he records the plaintiff as describing the parent nominee as being aggressive towards her at meetings and that the plaintiff suggested mediation to resolve the issues between herself and the parent nominee – something she would hardly suggest if she were asserting that there were no difficulties between them. On 9 October 2020, he records the plaintiff as saying that she is not angry with the parent nominee and bears her no ill will and that she is keen to

resolve the matter and happy to meet. The matter is presented in the chairperson's report as if the plaintiff had denied the existence of an obvious problem whereas the notes clearly indicate that she acknowledged the problem (although there were differences of opinion between herself and the chairperson as to how it had arisen) and was prepared to positively engage with the parent nominee to attempt to resolve it.

98. In passing I might observe that it is perhaps a pity that the plaintiff's suggestion of mediation between herself and the parent nominee was not pursued. This was a lost opportunity in circumstances where many of the difficulties which have arisen seem to have their origin in fraught interpersonal relationships. The involvement of a neutral person with the sole function of assisting the disputing parties to resolve their differences and to create a framework within which they might continue to work together in the future could only be a positive thing. Instead, the chairperson acted as facilitator at a meeting between the plaintiff and the parent nominee on 6 May 2021. This meeting was singularly unsuccessful as the parent nominee declined to accept the plaintiff's apology as she did not accept that the plaintiff was taking responsibility for what had happened. By this stage, the chairperson was manifestly not a suitable person to act as a facilitator given that he had formed and continued to hold a decidedly negative view of the plaintiff for over eighteen months. The parent nominee is now one of the witnesses the chairperson proposes to call in presenting his complaint to the Board of Management.

99. Further, in addition to not mentioning general matters such as the personal difficulties which the plaintiff was experiencing or the unprecedented difficulties arising as a result of the Covid 19 pandemic other details potentially favourable to the plaintiff and known to the chairperson are omitted from his report.

100. For example, complaint No. 2 concerns an alleged failure to give the Board of Management complete information in circumstances where an anonymous complaint was

made to the school concerning an SNA. In her affidavit the plaintiff states that when this issue was first raised with the Board of Management, she was directed to seek legal advice which she duly did. At the next Board of Management meeting, she reported on that legal advice which was to the effect that the anonymous letter should be dismissed, and its contents should not be discussed save that the person concerned should be informed. Although the plaintiff might have been justified in assuming that the matter would not be discussed further in light of the legal advice she had received, at this point she was questioned by length by the parent nominee. At the following meeting the chairperson raised the issue and again questioned the plaintiff at length. No doubt the parties will have differing views as to whether it was appropriate to discuss the matter in detail at two Board of Management meetings after legal advice had been received to say that it should not be discussed and on whether the questioning of the plaintiff was of such a nature and duration that she felt pressurised, under attack and overwhelmed (as she claims in her affidavit). However, the existence of legal advice on the issue is surely an objective fact which should have been mentioned in the report. I note that the minutes of the Board of Management meeting from 17 September 2019 record under the heading of "*Anonymous correspondence*" that "*following advice from MHC [the school's solicitor] it was agreed that the person concerned should be informed*". This is consistent with the plaintiff's account of the legal advice that she had received.

101. As an aside, I note that the chairperson states in his report that the main problem under this heading is a lack of openness and transparency. It seems to be common case that the threshold for a child protection issue was not reached in connection with these matters. Leaving aside disputes as to the extent of the plaintiff's knowledge and what the chairperson believes she should have disclosed to the Board of Management, it seems odd that the plaintiff is facing disciplinary sanction at stage 4 of the procedures, and thus her potential

dismissal, for an alleged failure to give the Board of Management complete information on a matter which did not reach the threshold of a child protection issue and which, according to the plaintiff, the school's solicitors had advised should not be discussed further.

102. Further, the report, short as it is, is replete with statements by the chairperson which can only be characterised as findings of fact against the plaintiff. For example, he states *"the fact that she had not provided full information to either the Board or me"*, *"the principal was not open and transparent with me"*, *"The Principal... provided inaccurate information"*, *"I cannot rely on [the plaintiff's] account"*, the plaintiff *"has not been forthcoming with accurate information about relevant aspects of the matters we address"*.

Unlike the report in *QQ v. Board of Management of a School* these statements are not balanced by suggestions elsewhere in the report that the views expressed by the chairperson are merely submissions or allegations. Instead, the report concludes that because of the issues which he has outlined: *"this makes it extremely difficult to fulfil my role as chairperson in ensuring that the principal is accountable to me"*. Consequently, the concern expressed by the plaintiff that the chairperson has affectively presented the Board of Management with a *"him or me"* choice is a real one.

103. Based on the above analysis I am satisfied that the plaintiff has established a fair question to be tried in relation to the continuance of this disciplinary process. In reaching this conclusion I have taken into account the fact that in order to secure a permanent injunction at the full hearing, the plaintiff will have to meet the *Rowland* criteria, i.e. demonstrate that by reason of the complaints she makes the process has gone irremediably wrong. Whilst I would not have reached that conclusion solely on the basis of the first argument made by the plaintiff (the lack of involvement of the Board of Management in the procedure to date), I am satisfied that the other concerns namely the chairperson's conflict of interest in being the complainant and preparing the report, the findings of fact made by

the chairperson in the report, the delay in raising certain of the allegations as disciplinary matters; the storing up of complaints over an extended period of time so as to treat them cumulatively as warranting the instigation of the procedure at stage 4; the lack of balance and fairness in the presentation of the issues in the report and the inherent unfairness in putting the matter to the Board of Management as a "*him or me*" decision all readily meet the necessary threshold.

104. In this analysis I have not expressly considered a further argument made by the plaintiff as to the inappropriateness of basing a complaint on matters which are currently live in a separate grievance procedure. There was some dispute between the parties as to whether matters which are the subject of a separate grievance procedure could, or could not, also be the subject of a disciplinary complaint but the matter was not teased out in detail in argument before me and passing reference was made on behalf of the school to case law which was neither opened nor in the books of authorities. Counsel for the school appeared to adopt the position that the chairperson could make a complaint about how the plaintiff had engaged with the grievance procedure as distinct from the matters underlying the complaint made in that procedure. However, in light of the strength the case made concerning the chairperson's conflict of interest, the lack of balance and fairness in the report and the delay and storing up of matters, I do not think it is necessary for me to reach a formal conclusion on this issue in order to be satisfied that the plaintiff has reached the threshold necessary for the court to consider the grant of interlocutory relief.

105. I am also satisfied that if the plaintiff were to succeed in her substantive proceedings, she could be granted a permanent injunction to restrain any disciplinary process from proceeding not just on foot of this report but on foot of any report prepared by the chairman in respect to his complaints against the plaintiff. This would not, of course, completely preclude the possibility of disciplinary proceedings, even of disciplinary proceedings based

on the complaints which the chairperson makes against the plaintiff. However, at a minimum if the plaintiff succeeds in establishing her allegation of a conflict of interest, it would necessarily follow that any such disciplinary process would have to be based on a report prepared by somebody independent of the chairperson. These are matters which can only be determined following a substantive trial.

Discussion and Analysis – Delay:

106. There remains a significant issue as to whether an interlocutory injunction should be granted and even whether the substantive action should be permitted to proceed in circumstances where the defendant alleges that the plaintiff has not complied with the three-month time limit for the institution of proceedings under O.84, r.21. For the purposes of this section of my judgment I accept that the plaintiff's proceedings are such that they could be brought by way of judicial review and that the time limits for judicial review cannot be circumvented by the issuing of plenary proceedings. I am being deliberately circumspect in this regard because whilst there is undoubtedly authority confirming that legal proceedings concerning disciplinary procedures under the circular can be brought by way of judicial review, it is also undoubtedly the case that such proceedings are frequently brought by way of plenary action. Thus, although there is certainly a public law quality to the plaintiff's employment, the courts have also treated such cases as having a significant contractual element.

107. The authorities relied on by the defendant as to the amenability of teacher employment disputes to judicial review do not deal with the applicability of the time limits under O.84, r.21 and the authorities dealing with the applicability of judicial review time limits to plenary proceedings do not specifically deal with the employment of teachers or principals under the 1998 Act. In fact, it does not seem that the particular issue raised by the defendant – i.e., the

applicability of judicial review time limits as distinct from the availability of judicial review – has been considered in the context of the circular. If this matter proceeds to trial, it may be the first occasion upon which a court addresses this issue. Therefore, I am reluctant to treat the issue as one which should bar the plaintiff *in limine* from being entitled to seek an interlocutory injunction.

108. My reluctance in this regard is not based solely on the fact that the issue has not yet been substantively determined. It is also based on a number of other factors which can be summarised as follows. Firstly, no supporting documentation was provided to the plaintiff with the chairperson's report nor by the Board of Management until some time in August 2021 (2 months after receipt of the report) in response to her data access request. Secondly, despite extensive engagement with the school some of the basic queries raised on behalf of the plaintiff have not to date been replied to. Other issues were only addressed when solicitors came on record for the school in October 2021. Therefore, it is by no means certain that the trial court will treat 2 or even 9 June 2021 as the date from which time should run.

109. Thirdly, in my view there is an issue as to whether a person who is the subject of an on-going process is required to institute litigation to challenge each step as it occurs on pain of losing the right to make the argument at a later stage in or at the conclusion of the process. Whilst there are certainly public policy reasons as to why challenges should be brought when they are ripe, there are also public policy considerations against forcing parties to litigate early – and perhaps often.

110. Fourthly I am conscious that the school's delay argument, which at its height involves a delay of just over 2 months outside the permitted time limit (taking the school's case at its height and assuming that time runs from 2 or 9 June), is made in circumstances where the chairperson delayed in making any disciplinary complaint in relation to many of the matters covered in his report for periods of between 11 and 22 months. Thus, there are equitable

arguments as to why the defendant should not be permitted to rely on the plaintiff's delay or why the plaintiff should be granted an extension of time in those circumstances.

111. Looking in more detail at the exchanges between the parties subsequent to receipt of the report, the plaintiff's trade union initially engaged in correspondence on her behalf. That correspondence was devoted, in part, to ascertaining two things, namely who had made the decision to start the disciplinary process at stage 4 and why that decision was made. These were not unreasonable queries when the greater part of the allegations made against the plaintiff concerned events which had happened a year or more earlier and in respect of which no disciplinary action had been taken at the material time. No satisfactory answer was provided to the plaintiff's trade union. Instead, the Board of Management stood on the proposition that the circular allowed for the instigation of the procedure at stage 4 and that this was a matter for the school. Presumably, in stating that this was a matter for the school, the Board of Management intended to convey that no reasons would be provided to the plaintiff for this decision.

112. Indeed, instead of clarifying matters the correspondence sent on behalf of the Board of Management may have clouded issues. The initial letter of 9 June 2021 stated that the disciplinary procedures had been invoked by the chairperson at stage 4 of the procedures. When queries were raised on this, the language in the correspondence changed and instead of referring to the chairperson having invoked the procedures at stage 4, it referred to the entitlement of the school to commence the process and to decide at which stage the process should be invoked (letter of 21 June 2021). On 1 September 2021 the Board of Management wrote stating that it was a matter for the Board of Management and not the chairperson to decide on any appropriate action to be taken in accordance with the procedures. The same letter stated that the chairperson's involvement in the process "*is solely to prepare a report*". All of this suggests that the Board of Management had a greater involvement in the process

than was subsequently acknowledged. In particular, by saying that the chairperson's involvement in the process was solely to prepare a report and that it was for the Board of Management and not the chairperson to decide on appropriate action, the Board of Management appeared to suggest that the decision to institute proceedings at stage 4 may have been taken by the Board of Management rather than by the chairperson.

113. That this was still unclear is reflected in the following letter from the plaintiff's trade union which stated that the plaintiff "*is entitled to query and to seek to understand how she is the subject of a stage 4 disciplinary process*". At a later stage the same letter states "*Our member is entitled to know how that first step came to be taken; who decided to deprive her of stages 1-3 of the circular?*".

114. The Board of Management of the school responded to that letter on 27 September 2021. Counsel for the defendant asserted that all outstanding issues were dealt with in this letter. I do not agree. The 27 September letter does not clarify how or why the process came to be instituted at stage 4. Instead, it repeats the terms of the circular to the effect that the process may be commenced by the school at any stage. Even if everything had been clarified as of 27 September and that was the date on which the plaintiff was fixed with full knowledge of the potential grounds upon which she could apply for judicial review, she instituted her proceedings and sought this injunction within three months from that date. Subsequent to this correspondence, the plaintiff instructed a solicitor whose correspondence was in turn replied to by a solicitor on behalf of the defendant. It was not until 1 November 2021 that the defendant's solicitor clearly confirmed that it was the chairperson who made the decision to commence the process at stage 4.

115. In his submission to the court, counsel for the defendant made the case that because the plaintiff's trade union had indicated from the outset the plaintiff's "*commitment to cooperate fully with any fair process for dealing with any matters there may be*" and had

engaged with the organisation of the disciplinary hearing, she had acquiesced in the process such that she could not then seek to injunct it immediately prior to the disciplinary hearing taking place. I do not accept that the e-mail from her trade union on 27 September 2021 indicating that the plaintiff would attend the hearing then scheduled for 13 October 2021 with a representative from the trade union somehow reflects a crystallised view that the plaintiff would participate in the process. Subsequent solicitor's correspondence on her behalf on 11 October and 26 October 2021 indicates that she was still trying to ascertain who took the decision to instigate the process at stage 4 and why that decision was taken. Although the plaintiff ultimately received confirmation that that decision was taken by the chairperson, no explanation as to why the decision was taken has ever been provided to her.

116. In the course of submissions, counsel for the school suggested that the plaintiff was not entitled to know the basis for the decision to invoke the process at stage 4 and the fact that the chairperson took the view that the conduct issues were sufficiently serious was sufficient to justify the decision. I am far from satisfied that the defendant is correct in asserting that the plaintiff is not entitled to an explanation as to why the process has been instigated at stage 4. Indeed, in purely judicial review terms, if the taking of a decision to institute a disciplinary process at stage 4 is to be characterised as a reviewable decision, how is the plaintiff to challenge that decision if she is not informed of the reasons for it? Given that the circular envisages that a disciplinary process may be instituted at stage 4, any challenge to the legality of a decision to do this must necessarily focus on the rationality and proportionality of the decision in question. The defendant cannot claim the benefit of judicial review in terms of its stricter time limits without also accepting the obligations under which a public law decision maker acts in terms of promptly providing a person affected by its decision with reasons for it and with full information and complete documentation in order to equip that person to take a challenge within time.

117. The defendants' argument effectively requires any concern that an employee of a school may have with any aspect of a disciplinary process to be raised and determined in legal proceedings whilst the disciplinary process remains live and on-going (even if temporarily enjoined). I specifically queried whether, if an injunction was refused and the plaintiff were required to submit to this process on foot of this report, she would be entitled to raise issues as to the chairperson's role, the fairness of the report or the appropriateness of instituting the process at stage 4 either at the hearing or subsequently on appeal or in litigation. Counsel for the defendant was emphatic in stating that she could not. In his view, she could dispute the allegations contained in the report and argue generally that the report was unfair but not that its unfairness vitiated the report as a basis for the process. She could not raise issues such as the chairperson's conflicted role as both complainant and prosecutor nor could she challenge the decision to commence the process at stage 4. Having failed to institute legal proceedings raising those issues within three months of receiving the report, he contended that she lost the entitlement to ever raise them notwithstanding that the disciplinary process to which she is subject is still at a very early stage.

118. I have serious reservations as to the application of O.84 r.21 to proceedings arising under the circular in this manner. At a most basic level it would seem to demand not just earlier but more litigation if those subject to disciplinary action under the circular are not to lose the entitlement to raise *prima facie* meritorious arguments as to the conduct of the process, in the process itself or in subsequent litigation. It may be that having heard all of the evidence and arguments, the trial judge will come to this view but at this interlocutory stage I am reluctant to accept the proposition that the plaintiff must necessarily be shut out *in limine* from ever making these arguments either to the Board of Management or thereafter in litigation if they are not accepted by the Board of Management.

119. For all of these reasons, I do not accept that the delay defence raised on behalf of the defendant's school is sufficiently conclusive either to change the view I have reached that the plaintiff has raised a fair question to be tried or, when weighed in the balance of convenience, to persuade me that the plaintiff should not have the opportunity of having these issues determined by a court before she is required to subject herself to this disciplinary process. In reaching this conclusion, I do not intend to preclude the defendant from making a delay argument at the substantive hearing much less to suggest how the trial court might ultimately determine that issue.

Balance of Convenience

120. The most significant argument made touching on the balance of convenience has been dealt with in the preceding section of this judgment. Apart from that, the parties did not engage with this issue in any great detail nor was any argument made as to the adequacy of damages save in the most general terms. The plaintiff submits that the balance of justice is overwhelmingly in her favour given the injustice that would be caused if she were subject to a flawed and unfair process. She also points to the fact that the school has not sought to suspend her pending the disciplinary investigation, which it would be entitled to do under the circular. This, she suggests, is indicative of the fact that the issues raised do not constitute serious misconduct. Her view in this regard is reinforced by the fact that it took the chairperson a year, or in some instances nearly two years, to make those issues part of any disciplinary process, much less a process commencing at stage 4.

121. The school on the other hand suggests that the balance of convenience is clearly against the grant of the relief sought. It contends that the proper functioning of the school is impacted by the existence of court proceedings and that the Board of Management is

prejudiced in not been able to proceed to investigate serious matters pending the conclusion of the litigation.

122. There is, I think, an element of circularity to many of these arguments. It is, of course, important that a school be able to conduct appropriate disciplinary processes and to take disciplinary action against school employees when that is required. However, the fact that most of the issues the subject of this complaint pre-date the chairperson's report by well over a year, tends to undermine the school's reliance on this factor. The parties have continued working together throughout. On the other hand, the plaintiff faces grave reputational damage if she is subjected to a disciplinary process, particularly if that process results in a negative outcome for her, and it is subsequently found to be legally flawed. Neither side has put damages in issue and, in fairness, this is not really a case in which the main concern of either party is purely financial.

123. Taking all of these factors into account, I am of the view that the balance of convenience favours the restraint of this disciplinary process until the High Court has had the opportunity of determining the issues raised by the plaintiff. Consequently, I will grant the plaintiff the injunctive relief which she seeks.