THE COURT OF APPEAL

CIVIL

[2022 No. 237]

The President **Neutral Citation Number [2023] IECA 52**

Edwards J.

Whelan J.

BETWEEN

THE BOARD OF MANAGEMENT OF WILSON'S HOSPITAL SCHOOL

RESPONDENT

AND

ENOCH BURKE

APPELLANT

JUDGMENT of the President delivered on the 7th day of March 2023 by Birmingham P.

Introduction

1. The background to the matters that arise in this appeal received considerable public attention. However, at the outset, it is important to clarify the extent of the appeal, to confirm what is and what is not before the Court on this occasion. In this judgment, Mr. Enoch Burke, the appellant herein and the defendant in the High Court proceedings, shall be referred to as the "appellant". The Board of Management of Wilson's Hospital School, the plaintiff in the High Court proceedings and the respondent herein, shall be referred to as the "respondent Board" or the "respondent". The Notice of Appeal sets out the decisions sought to be appealed. These are:

(i) an order of Stack J. dated 30th August 2022;

(ii) an order of Barrett J. dated 7th September 2022;

(iii) an order of Dignam J. dated 12th September 2022, to the extent that the order of Dignam J. made no order as to reliefs that had been sought by the appellant at paragraphs 1, 3 and 4 of a motion dated 12th September 2022; and,

(iv) an order of Roberts J. dated 14th September 2022, insofar as that order refused reliefs sought by the appellant at paragraph 2 of his motion dated 12th September 2022.

At this stage, it is convenient to refer in more detail to what was contained in the orders the subject of the appeal.

2. The order of Stack J. of Tuesday 30th August 2022 restrained the appellant from attending at the premises of Wilson's Hospital School (hereinafter the "school") until after Wednesday 7th September 2022 or further order, and further restrained him from attempting to teach any classes or any students at the school. The order of Stack J. provided for interim relief. The application for interlocutory relief came before Barrett J. on 7th September 2022, and while couched in slightly more elaborate terms, the effect of the order of Barrett J. was to provide interlocutory relief in broadly similar terms to the interim orders that had been in place. The order providing for the interlocutory injunction is drafted in the terms of the Notice of Motion which had been issued on behalf of the respondent Board. It provided for:

(i) an interlocutory injunction restraining the appellant from attending at the premises of the school for the duration of his paid administrative leave;

(ii) an interlocutory injunction restraining the appellant from attempting to teach any classes or any students at the school for the duration of his paid administrative leave;

(iii) an interlocutory injunction restraining the appellant from interfering with the appointed substitute teacher's duties and teaching;

(iv) an interlocutory injunction restraining the appellant from failing to comply with the directions of the respondent Board; and,

(v) an interlocutory injunction restraining the appellant from trespassing on the property of the school.

3. The matter was before Dignam J. on Monday 12th September 2022, on foot of a motion brought by the appellant seeking certain reliefs as set out in an *ex parte* docket. The reliefs sought were:

(i) an injunction restraining the respondent Board, its servants or agents, from holding the disciplinary meeting at Mullingar Park Hotel, Co. Westmeath on Wednesday 14th September 2022 or any other date;

(ii) an injunction restraining the respondent Board, its servants or agents, from putting the appellant on paid administrative leave, or from continuing to put the appellant on paid administrative leave;

(iii) an injunction restraining the respondent Board, its servants or agents, from the conduct of any disciplinary or investigation process in respect of the appellant; and,

(iv) an injunction restraining the respondent Board, its servants or agents, from dismissing the appellant.

The order of Dignam J. recites that counsel for the respondent provided an undertaking that the disciplinary meeting scheduled for Wednesday 14th September 2022 would not be proceeding, and that should any further disciplinary or investigation meeting be held, the respondent Board would give the appellant not less than three days' notice of it in writing. The Court made no order in relation to the reliefs sought at paragraphs 1, 3 and 4 of the *ex parte* docket.

4. The matter was in court again on Wednesday 14th September 2022, on this occasion before Roberts J., who made an order, having heard the application made by the appellant in respect of the reliefs sought at paragraph 2 of the *ex parte* docket, refusing that relief.

Factual Background

5. In order to provide context to what has transpired before this Court, it is necessary to refer in outline to the factual background.

6. The appellant has been a teacher of German and History at the school. He started teaching there in 2018, and as of 2020, was on a permanent contract. On 9th May 2022, the then principal of the school (hereinafter the "principal") issued an email to staff, including the appellant, informing staff members that a student in the school would, with the support of the student's parents, be making a transition in their gender identity from the next day. The principal referred to the fact that, from then, the student would be known by a different name than had been the case heretofore, and that the pronoun "they" should be used, rather than the pronoun that had been used up to that point. The appellant took issue with the communication, and the following day, he emailed the principal as follows:

> "Can you confirm to me that parents of students in the school have been informed that their children will be told that one of their classmates is to be referred to as 'they' instead of [pronoun previously used] and that they must now approve this by referring to the student in this manner? Has the chaplain agreed to this?
>
> I am shocked that students in this school are being forced to accept this position."

The principal replied to the email as follows:

> "All due care has been taken.
>
> There is no 'agreement' required from Chaplain.
>
> There is no suggestion of 'force' by or for anyone involved.

> If you are not willing to include [the child, referred to by name] in your classroom going further, please make an appointment to see me at our mutual convenience."

The appellant responded to this email as follows:

> "It is wrong that this belief system would be forced upon students and I will be taking this further.
>
> It is an abuse of children and their constitutional rights."

7. The above email exchange took place on the morning of 10th May 2022. As it happened, there was a scheduled staff meeting that day and the appellant raised the issue at the meeting. The manner in which the issue was raised at the staff meeting is the subject of controversy, and there are divergent views in relation to it on the part of the principal and the appellant. The appellant says there was nothing inappropriate about him raising the issue or the manner in which he did so. The principal takes a different view. She acknowledges that staff meetings may, on occasion, "become heated when issues are discussed on which staff have opposing views", but that in her years as a principal and as a teacher, she has "never experienced a staff meeting where a teacher has sought to hijack a meeting to pursue an issue in such a disrespectful manner", as she says occurred on this occasion. She observes that, regardless of "personal views held by any teacher, it is inappropriate" for a staff meeting to be interrupted in the manner in which the appellant did.

8. On 18th May 2022, there was a meeting between the appellant, the principal, and the deputy principal to discuss matters, but the issue was not resolved. On 27th May, the principal emailed the appellant, stating:

> "I am writing to you following on from the meeting last week (Wednesday [18th] May) regarding the request by a student and the student's parents that the student be addressed as [new name] rather than [previous name] and that the identifying pronoun of they/their be used going forward.

I wish to clarify the approach of [the school] to such requests. The ethos of our school is inclusive and ensuring the welfare of students is paramount. As set out in the school's Admission Policy, one of the core values of the school is 'Caring: Focusing on the experience of the young person to ensure that their experience of their time in school is accepting, happy and positive'.

The school's Admissions Policy includes an admission statement, which affirms that the school shall not discriminate in its admission of a student on any of the discriminatory grounds set out in section 3 of the Equal Status Act 2000. Gender is one of the discriminatory grounds. Section 7(2) of the Act further provides that a school shall not discriminate on any of the grounds in relation to (b) the access of a student to any course, facility or benefit provided by the establishment and (c) any other term or condition of participation in the establishment by a student. The right of persons to be called by a name of their choosing and in accordance with their preferred gender is a recognised right and a refusal to address persons by their preferred gender or new name has been held to constitute discrimination on the gender ground.

While I recognise that it may be challenging for you in light of your own religious beliefs, in view of the ethos of the school and the school's obligations under the Equal Status Act 2000, I expect that you will communicate with this student in accordance with the wishes of the student and the student's parents."

9. On the same day, the appellant responded as follows:

"On Monday 9 May you emailed all staff requesting that they address a student with a new name and refer to the student using 'they' rather than the [former pronoun] used up to that point. You also told us that the same demand would be made of all classmates of the student.

In the staff meeting the next day on Tuesday 10 May and also the meeting you requested last week on Wednesday [18th] May I explained to you clearly where I stand on the matter."

10. On 21st June 2022, there was a significant escalation of the issue. On that occasion, a religious service was scheduled to be held in the school chapel to mark the school's 260th anniversary. It seems the congregation included staff, members of the respondent Board, parents, clergy, some past pupils, and current students. Again, there are diverging accounts of precisely what happened. However, what is clear is that, as the service was coming to a conclusion, and the bishop who was officiating was about to deliver the final blessing, there was an interjection by the appellant. In the course of an affidavit sworn in the context of the present proceedings, the appellant has referred to "the exact transcript of [his] contribution". Despite being pressed on this by members of this Court during the course of the appeal hearing, it is not clear what is meant by this: whether someone with shorthand skills was creating a transcript; whether the interjection was recorded and transcribed later; or, whether it was the case that the appellant was speaking from prepared notes and has reproduced these. In any event, it seems clear that the appellant's intervention involved him saying he would not accept "transgenderism" and making a demand of the principal to withdraw her instructions of 9th May 2022.

11. The school takes the position that such an interruption of a religious service was entirely inappropriate, and quite simply, wrong, and that the issue should not have been the subject of an intervention in a public forum, in particular, during a religious service and in the presence of students. It appears that the sixth year students who were present walked out. It seems that it had been envisaged that there would be presentations of certain awards to staff members, but because of the intervention, this did not happen in the chapel, but happened outside instead. It had also been envisaged that the religious service would be followed by a

dinner in the school dining hall. Again, what occurred there is the subject of disagreement. The school and the principal would be very critical of the appellant's behaviour. On the principal's account, the appellant's behaviour at the event in the dining hall left much to be desired, while the appellant would contend that there is no basis for criticism. It may be noted that at the time these events were taking place, the principal's tenure as principal was coming to an end and she was about to move on to take up another position. It appears that the intervention during the religious service took place as the bishop was blessing the principal as she moved on to take up her future role.

12. On 15th August 2022, in what would have been one of her last acts in her role, the principal sent a communication to the appellant and also to the chairperson of the respondent Board, which included a report prepared by her in accordance with stage four of the revised procedures for the suspension and dismissal of teachers. The procedures are the subject of a circular: Department of Education and Skills Circular 49/2018 issued under s. 24(3) of the Education Act 1998. It is accepted that stage four of the procedures is the most serious procedure, and if the allegations forming the basis of the report are established, it is likely to lead to dismissal. The circular provides for less serious courses of action involving oral and written warnings, final warnings and so on. There was no resort to these; rather, the resort was to stage four.

13. On 16th August 2022, the chairperson of the respondent Board, Mr. John Rogers, wrote to the appellant informing him: that he had received a report from the principal which contained serious allegations which, if substantiated, might constitute serious misconduct; that the principal had initiated the disciplinary procedure provided for at stage four; and also that a meeting had been arranged for 14th September 2022, at which the appellant would be given an opportunity to respond to the allegations. The letter stated that if a case of serious misconduct is upheld, the normal consequence would be dismissal.

14. The next development was that, on 18th August 2022, the chairperson of the respondent Board wrote to the appellant, saying he believed the Board should give consideration to placing the appellant on paid administrative leave, and inviting the appellant's views before any decision was made. A meeting was arranged for 22nd August to address the question of whether the appellant should be placed on administrative leave. The appellant was accompanied to the meeting by a family member with a legal background. The decision of the meeting was to place the appellant on paid administrative leave.

15. Notwithstanding the fact of being placed on paid administrative leave, the appellant attended at the school; he did so specifically on 25th August 2022, and refused to leave, despite several requests that he should do so from the acting school principal. In these circumstances, the chairperson of the respondent Board issued what he described as a formal direction to the appellant that he should not attend at the school while he was on administrative leave, adding that if there was a refusal to follow this direction, disciplinary action might result. The appellant responded by letter, referring to the meeting on Monday 22nd August 2022, to which he had been invited, the stated purpose of which was to discuss suspension with pay, at which he represented himself and was accompanied by a family member. He stated that the meeting was conducted in a "haphazard manner by you the chairperson" and ended in disarray after less than 40 minutes, with the chairperson walking out of the room. The letter continues that, during the meeting:

(i) the chairperson confirmed, when questioned, that the respondent Board had received the report from the principal at an extraordinary meeting on 15th August 2022, attended by the principal, and that the report was read and discussed at the meeting;

(ii) the chairperson stated that suspension would give the school "a bit of leeway" but then refused several times to explain what he meant by the statement;

(iii) the chairperson refused to produce a copy of his initial letter to the appellant on 16th August 2022, stating "I'm not happy taking it out";

(iv) the chairperson refused to answer when asked whether it was his position that there was an allegation of gross misconduct against the appellant;

(v) the respondent Board refused to discuss the section of Circular 49/2018 relating to gross misconduct and the suspension of a teacher pending investigation;

(vi) the chairperson asked the appellant to leave the meeting after little more than half an hour and adjourned the meeting, although the appellant made clear that he was not finished his presentation.

The letter from the appellant concluded:

> "Your letter received today states that I 'offered the Board no assurance that . . [I] would refrain from misconducting [myself] in the school' and that 'accordingly there is a serious risk to the business and reputation of the school if the Principal's allegations about [my] conduct are well founded'. Neither of these extraordinary statements were put to me in the meeting. Notwithstanding, I, a teacher with an unblemished record over four years in the school, do not regard holding the Christian belief on male and female to be a case of misconduct or risk to a school, but a fundamental constitutional right.
>
> I consider the initiation of the disciplinary process and the decision of the [respondent] Board as regarding suspension to be unreasonable, unjust, and unlawful."

The appellant continued to attend at the school. Against that background, the school applied for an interim injunction before Stack J. on 30th August 2022, who made the orders set out above. The appellant, in disobedience of the orders, continued to attend at the school.

16. In circumstances where the appellant was not complying with orders of the High Court, the respondent Board moved for attachment and committal. On 5th September 2022, the appellant was committed to prison on foot of orders of Quinn J.. Thereafter, the appellant refused to purge his contempt. The appellant was before the court on many occasions in the following months, but refused to purge his contempt, and in the circumstances, remained in custody until 21st December 2022, when he was released on foot of an order of O'Moore J. in the High Court. It appears that the decision of O'Moore J. to order the release of the appellant on 21st December was linked to the fact that the school was closing for the Christmas holidays. However, when the school reopened in the new year after the school holidays, the appellant again began attending at the school. The matter was again before the High Court on 26th January 2023. At this stage, the appellant was continuing to be in breach of the orders of Barrett J., giving every indication that this was the course of action he proposed to continue. The High Court was of the view that a daily fine was the correct response and fixed the amount of that fine at €700 per day.

Proceeding with the Appeal

17. This appeal was listed for hearing on 16th February 2023. In the usual way, the members of this Court to which the appeal was assigned read the papers in advance in order to prepare for the appeal hearing. At that stage, it appeared to the members of the Court that the appellant would be seeking orders from the Court in his favour, while persisting in disobeying court orders already made in favour of the school. This Court felt that this raised serious questions as to how the Court should proceed and whether it should embark on the hearing of the appeal. The matter was listed on Monday 13th February 2023 for mention. At that stage, the attention of the parties was drawn to the fact that the Court had concerns about whether it would be proper to embark on a hearing of the merits of the appeal, in

circumstances where the appellant would be seeking to invoke the jurisdiction of the Court and to secure orders in his favour, while refusing to submit to the jurisdiction of the Court and insisting on an entitlement to disobey court orders. We pointed out that the issue of how a court should deal with somebody invoking its jurisdiction who is in contempt of court was a matter that had received consideration by Dignam J. in the course of this controversy. As Clarke J., as he then was, commented in *Moorview Developments v. First Active* [2008] IEHC 211, "[i]t is worth noting that the question of giving audience to persons in contempt involves the exercise by the court of a discretion in which ensuring obedience to court orders is afforded a very significant weight." It was indicated at that point that a response was not sought from the parties at that stage, rather that the Court was concerned lest anyone be taken by surprise by the fact of the issue being raised and that the parties were invited to reflect on the matter.

18. When the Court sat for the scheduled hearing on Thursday 16th February 2023, we raised this issue as a preliminary matter. The appellant was trenchant in his opposition to the suggestion that his access to the court could be impeded or obstructed by reason of his conduct. Further, while voicing opposition in sometimes strident terms, the appellant made clear that his primary concern during the hearing of the appeal would be in relation to the orders made by Stack and Barrett JJ., which he saw as having the potential to undermine or set aside the conclusion that he had been in contempt of court. It is a noteworthy feature of this case that the actual decision to hold the appellant in contempt and to commit him to prison has not been the subject of an appeal. The appellant asserted that, in circumstances where his concern was with the decisions of Stack and Barrett JJ., the Court's concerns about an apparent imbalance in circumstances of the seeking of positive orders, which would be sought to be enforced, while declining to obey other orders, did not arise.

19. In urging the Court to embark upon the appeal, the appellant has made the point that the restrictions that have been applied in respect of those who are in contempt of court should not prevent access to the court for the purpose of appealing and seeking to set aside the order upon which the alleged contempt was founded. He referred in that regard to the case of *Hadkinson v. Hadkinson* [1952] 2 All ER 567 and the more recent case of *O'Shea v. Governor of Mountjoy Prison* [2015] IECA 101, a decision of this Court given by the then President, Ryan P..

20. For my part – and I have no doubt that, in this respect, I speak for all members of the Court – it has absolutely been beyond doubt that the appellant was entitled to appeal the finding that he was in contempt of court. However, it did not appear to me that this was what he was in fact engaged in. There had been no appeal of the decision of Quinn J.. While there had been no direct or specific appeal of the finding of being in contempt of court, in exchanges with the appellant, I indicated that I recognised that there was an overlap between the issues that had led to the conclusion that he was in contempt of court and the issues he wished to canvass on the appeal. It was for this reason, I explained, that what had happened in the past, in terms of disobedience of orders up to that point, would not prevent the Court embarking on the appeal, but that the Court's concern was with what would happen in the future, while the matter was before this Court, including any period after judgment had been reserved and when the matter was being considered by the Court.

21. On the basis that the appellant was indicating that he was not seeking positive orders in respect of what had occurred before Stack and Barrett JJ., but was seeking to set aside orders that had been made, this Court, having taken a short time to consider the matter, indicated that we would proceed with the hearing, but dealing only with the issues as they related to Stack and Barrett JJ.. We would not consider any request for positive orders which would be sought to be enforced while the appellant continued to breach court orders on an

ongoing daily basis. Having earlier indicated that his primary concern was with the orders made in the context of an application for an interim injunction and in the context of an application for interlocutory relief, he indicated he was seeking that the Court would review the decisions of Dignam and Roberts JJ., while repeating that he was not, at this stage, seeking positive orders in relation to what occurred in their courts.

The Substantive Appeal

22. When the appellant began his submissions on the appeal, having been pressed to do so on a number of occasions, he did so with the words "this case concerns the issue of transgenderism and the suspension of a teacher who objected to a demand by a principal to address a student by a new name and the 'they' pronoun".

23. The assertion that the case is about "transgenderism" was the subject of keen controversy in the context of this case. In the course of his *ex tempore* ruling, Barrett J. commented that the case was not about "transgender issue[s]" and is roundly criticised by the appellant in that regard. In the course of her ruling, Roberts J. observed that there was no attack on the religious beliefs of the appellant by the placing of him on paid administrative leave pending an investigative process. Again, the appellant takes issue with Roberts J. in that regard.

24. In both written and oral submissions, the appellant has contended that at the core of the appeal is the constitutional right of citizens to freely profess and practice their religious beliefs. He contends that he has been subjected to a disciplinary process and stands suspended because he opposed what he describes as an unlawful demand of the principal that he deny his Christian beliefs, and because he expressed his religious beliefs on "transgenderism".

25. It is the case that the appellant has consistently categorised the communication from the principal as a demand that he act in a particular way. He has done this despite the fact that

the word “demand” was never used by the principal. The original communication from the principal on 9th May 2022 to staff members, including the appellant, used the passive voice. It spoke of the fact that the student would become known as “they”, though it must be acknowledged that the following sentence states: “[t]his means ‘they’ must replace where we would have used [former pronoun] until now”. While the reference to “they” and the former pronoun are in mandatory terms, this communication seems to me to fall well short of a demand. A later communication from the principal, sent on Tuesday 10th May 2022, concludes “[i]f you are not willing to include [name] in your classroom going further, please make an appointment to see me at our mutual convenience.” It seems to me that the suggestion of a meeting at the mutual convenience of the appellant and the principal is indicative of a willingness to seek an accommodation, and indeed in the course of the oral appeal hearing, the appellant appeared to concede as much. However, no such meeting was sought by the appellant, if it was in fact the situation that he was unwilling to include the student in his classroom.

26. The appellant submits that the principal’s “demand”, as he categorises it, that a student should be addressed by a new name and that the pronoun “they” be used was manifestly unconstitutional and unlawful. The appellant says that, while the principal and the respondent Board have maintained that there is a right for persons to be called by a name of their choosing and in accordance with their preferred gender, it is his submission that no such right exists. He says that, like every citizen, he has a right, which involves freedom of religion, and in that regard, teachers do not lose their constitutional rights at the school gate. He says what is involved here is an exercise in “compelled speech”, and that he cannot be compelled to express beliefs contrary to his conscience. What the respondent Board wants him to do is something he cannot do, as to comply with what is sought of him would be against his conscience, and in his view, against the explicit tenets of his Christian faith,

contradicting his well-informed and reasonable convictions and opinions, and would be incompatible with the integrity and honesty expected of a teacher.

27. In practical terms, how much is expected of the appellant is far from clear. In response to queries from members of the Court, the appellant confirmed that the pupil in question is not a student in any of his classes. However, the appellant does not draw any comfort from that because he says that a degree of interaction with every student in the school is inevitable, whether that interaction be on the corridor, in the course of substituting for another teacher or calling a roll, or whatever. The appellant asserts in trenchant terms that the invocation of the disciplinary process in the circumstances that have occurred is manifestly unconstitutional and unlawful. He says the actions of the principal and of the respondent Board amount to a total breach of the constitutional guarantee to "express freely [one's] convictions and opinions" and the right of "[f]reedom of conscience and the free profession and practice of religion", and are not in accordance with the express duty of the State to "respect and honour religion."

28. The position of the respondent Board is quite different. The respondent says what is in issue is the decision by the Board to place the appellant on paid administrative leave. The respondent says its position was lawful, while acknowledging that a final determination in that regard must await the trial of the action. The appellant refused to accept the decision, and instead, persisted in attending at the school, as a result of which it was necessary to apply to the High Court for injunctive relief. According to the respondent, this is not just the central issue, but really the only issue in the proceedings. The respondent Board is emphatic that the case is not about "transgenderism" or religious rights, and it says that the appellant's submissions in that regard are entirely misconceived.

Decisions of the High Court in Issue

29. Against that background, it is necessary to proceed to consider each of the decisions in issue; specifically, the decision of Stack J. dated 30th August 2022, and of Barrett J. dated 7th September 2022.

Decision of Stack J.

30. We have been provided with a transcript of the hearing that took place on 30th August 2022, including the *ex tempore* ruling of the judge.

31. As is not infrequently the case when there are applications for interim relief, the proceedings were quite brief. It was clear that the judge was very attentive to the matters in issue, picking up on a typographical error in reference to a wrong date, and explaining that she was going to take a moment to read the notes of the meeting called to consider whether the appellant should be placed on paid administrative leave. She explained the reason she was going to do that was to get a feel for the alleged conduct of the appellant and whether that fed into the urgency of the situation and the requirement for relief. In the course of exchanges with counsel moving the application, the judge clarified that interim relief was being sought on the basis that the implied licence to enter onto the property of the school was withdrawn when a teacher is placed on paid administrative leave. At another point, the judge queried counsel as to whether the injunction was directed at the manner in which the appellant was expressing his views rather than the actual views themselves. Again, even the brief transcript shows that the judge was conscious of the seriousness of what she was being asked to do, making clear that there could be no question of interim relief continuing until the hearing of the disciplinary action. Ultimately, the judge indicated she had no problem giving the injunctions sought at paragraphs 1 and 2, but that the restraining of attendance would be until 7th September 2022.

32. Stack J. has been criticised for not referring specifically to the fact that she had to address the question of whether a fair issue to be tried had been established. For my part, I regard that argument as lacking in substance. Every lawyer, and certainly any judge of the High Court who has sat on the chancery list, would be aware of the threshold for granting interim relief, but judges will rarely find it necessary to advert to that specifically. By way of analogy, it would be rare for a judge sitting on the criminal side to feel it necessary to record that the onus of proof is on the prosecution. On the case presented to her, it seems to me inconceivable that any judge would not have concluded that this was a case for an interim injunction. Accordingly, I have no hesitation in dismissing the appeal so far as it relates to the order of Stack J..

Decision of Barrett J.

33. The ruling of Barrett J. is a succinct one, and indeed the appellant has been sharply critical, in quite offensive terms, it might be added, of the brevity of the ruling, which is contrasted with the detailed rulings, some at considerable length, that are to be found in a number of reserved judgments in relation to applications for interlocutory relief. The main thing I take from the judgment of Barrett J. is that he felt most, if not all, of the points made by the appellant were matters for the trial of the action and/or for the disciplinary hearing. The judge addressed the question of whether there was a fair question to be tried and said the fair question was whether the suspension was lawful or not. He referred to the fact that what was being sought was a prohibitory injunction, and that as a consequence, the burden for the respondent Board was a relatively low one. As to the balance of convenience, the adequacy of damages, and the question of where the justice of the case lies, he fully accepted that the balance of convenience lay in favour of granting the injunction. The appellant's continued attendance at the school would undoubtedly cause disruption to the operation of the school, and, he suspected, would cause upset to the pupils. He said there was no prejudice to the

appellant in terms of the injunction being granted, in that he continued to be paid. He accepted what was before him that day was not a transgender issue, but simply an application for an interlocutory injunction which he was going to grant.

34. I have already referred to the fact that the appellant is in fundamental disagreement with Barrett J. and his view that this case is not about transgender issues. I will express my views on this aspect and will do so when considering this remark alongside a broadly analogous observation by Roberts J..

35. I am quite unmoved by the fact that there have been much longer rulings in some other cases. It will sometimes be the case that an application for interlocutory relief involves complex issues with multiple affidavits being put before the court. If judgment is reserved, it will often be found necessary to recap in relation to the facts, to refer to the agreed facts to the extent that there are any, and to identify the areas of dispute. Again, in a situation where there is a time lag between the argument taking place before the Court and the Court delivering its ruling, it may be necessary to provide context for the ruling by referring to the submissions of the respective sides. However, different considerations will apply where a Court believes it is in a position to rule on the conclusion of oral argument. I am of the view that the criticisms directed to the length of the ruling are without substance and the offensive terms in which the criticisms have been formulated cause me to wonder whether this was not an exercise in creating soundbites.

36. An issue of greater significance is the comment by the judge that there was no prejudice to the appellant in terms of the injunctions being sought, in that he continued to be paid. The appellant says that, since the case of *Bank of Ireland v. Reilly* [2015] IEHC 241, it has been clearly established that extreme and exceptional circumstances are required to justify the suspension of an employee. Suspensions fall into two broad categories. A suspension, with or without pay, can be imposed as a disciplinary sanction. In other cases, a

suspension will be in the nature of a holding suspension, designed to allow an opportunity for disciplinary proceedings, or similar, to be brought to a conclusion. For my part, I would entirely accept that either form of suspension would impact significantly on the individual involved.

37. The appellant has drawn attention to a section of the judgment of Noonan J. in the High Court in *Reilly*, in particular to what the judge had to say at paras. 40 and 41, where he commented:

> "The suspension of an employee, whether paid or unpaid, is an extremely serious measure which can cause irreparable damage to his or her reputation and standing. It is potentially capable of constituting a significant blemish on the employee's employment record with consequences for his or her future career.
>
> . . .
>
> Thus, even a holding suspension ought not be undertaken lightly and only after full consideration of the necessity for it pending a full investigation of the conduct in question."

The appellant goes so far as to submit that the fair question to be tried test laid down in *Campus Oil v. Minister for Industry & Energy* [1983] IESC 2 is incompatible with the strict parameters set out in *Reilly*.

38. The suggestion that a well-established Supreme Court authority should be regarded as incompatible with observations which would seem to be largely *obiter* in a High Court decision is not one that accords with the system of precedent as it applies in this jurisdiction. The appellant suggests that there should be a refinement or variation of the *Campus Oil* test in circumstances where an employer is seeking injunctive relief to enforce a suspension and draws analogy with the line of jurisprudence as laid out in *Maha Lingam v. HSE* [2005] IESC 89.

39. In any event, I do not believe that the decision in *Reilly* provides the degree of comfort to the appellant that he suggests. The case involved the dismissal as distinct from the suspension of a bank official, though it is the case that, prior to dismissal, there had been a period of suspension. It was in that context that Noonan J. made the remarks he did in relation to suspension. I note that the sentence in the judgment at para. 41, which follows immediately after the sentence quoted by the appellant in his written submissions, states "[i]t [suspension] will **normally be justified if seen as necessary to prevent a repetition of the conduct complained of,** interference with evidence or perhaps to protect persons at risk from such conduct" (emphasis added). In *Reilly*, there was no question of repetition where the conduct in question involved circulating what might be described as inappropriate emails in breach of the bank's email policy. Here, there was every reason to believe that the appellant was intent on conducting himself in the future as he had in the past.

40. In relation to the proceedings before Barrett J., it is noteworthy that the appellant had not put an affidavit before the court. As such, the only evidence before the court was that presented on behalf of the school, in terms of the affidavit of Mr. Rogers with the exhibits it contained. Stack J. had provided that the appellant could move to set aside the interim injunction at any time during the week between the making of the interim order and the matter coming back before the court by way of an application for interlocutory relief, but that option was not availed of. When the hearing commenced before Barrett J., counsel on behalf of the respondent Board indicated that, in cases such as this, it would not be unusual for defendants to seek time to put in a replying affidavit and she would have no difficulty with that, though she would be seeking to continue the interim injunction in place. The judge enquired of the appellant whether he wanted an opportunity to put in a replying affidavit, but he indicated he was happy to proceed. When it was his turn to address the court, he did so in terms that would not have been out of place at a public meeting or a political rally, though it

seems, they were somewhat out of place in the context of a court hearing. By way of example, he observed that counsel for the respondent Board had used the phrase "this honourable court" and pointed out that it was a term that had appeared on the order providing for his arrest. He stated he was aware it was a term widely used, but he would submit that, in relation to its business in this matter, while the court had been at times in past years, perhaps since the foundation of the State, an honourable court, he would say in relation to the matter before the court that it had divested itself utterly of all honour and had "been mean, contemptible and base".

41. The appellant's submissions before Barrett J. largely comprised assertions in strident terms. He referred to the "demand" of the principal that he would accept "transgenderism" in violation of his conscience, which he categorised as indecent. It was, he said, "absurd to a sound mind" and "an abomination to the Christian faith", and he suggested that this issue was at the core of the case. He referred to the meeting where the decision was taken to place him on paid administrative leave and said he had submitted a letter, which was before the Court, indicating that there were serious unlawful breaches of procedure as regards that meeting. He said there was nothing before the meeting to support the view that there had been any gross misconduct on his part. He said that, in those circumstances, the suggestion by the respondent Board's counsel that there was a fair issue to be tried was an entirely ludicrous proposition.

42. At another point in his submissions, the appellant addressed the question of how the issue of gross misconduct was dealt with in the disciplinary procedures. He referred to a list, by reference to Circular 49/2018, of areas where gross misconduct might arise: theft; deliberate damage to school property; fraud or deliberate falsification of documents; gross negligence; or, dereliction of duties. He then quoted the sentence "refusal to comply with legitimate instructions resulting in serious consequences". He pointed out that the reference was to "legitimate" instructions, and in that regard he said the demands made of him by the

principal did not accord with the Constitution or his lawful rights. He said the instruction that had been issued was not a legitimate instruction in light of the ethos of the school which the principal was obliged to uphold. In dramatic terms, he said what was being presented to him was that he could be a Christian in Mountjoy Prison, or he could be a Pagan respecter of "transgenderism" outside it, and if that was the choice, he knew where he belonged. His faith had led him to prison, and it would keep him there. He submitted that the Court was seeking to deprive him of his religious beliefs.

43. I regard the proceedings before Barrett J. and the order made by him providing for an interlocutory injunction as being at the heart of the present appeal and I will return to them. However, before doing so, I wish to make some brief comments in relation to the proceedings before Dignam J. on 12th September 2022 and Roberts J. on 14th September 2022. I am in a position to deal with these aspects briefly because I do not believe that what took place before these judges can have any real relevance to the question of whether Barrett J. was correct or incorrect. Indeed, the appellant appeared to accept as much during the course of the oral appeal hearing.

The Proceedings before Dignam J.

44. As referred to earlier in this judgment, this matter came before Dignam J. on foot of a Notice of Motion submitted by the appellant. In the Notice of Motion, he sought four reliefs. Counsel on behalf of the respondent indicated that she was instructed to offer an undertaking to the Court that the school would not proceed with the disciplinary meeting scheduled for 14th September 2022, and further would undertake to give the appellant at least three days' notice of a disciplinary process. The judge felt the undertakings that had been offered meant it was unnecessary for him to grant any order in terms of paragraphs 1, 3 or 4 (referred to above). The *ex tempore* ruling of the judge records that the appellant disagreed with that view in relation to paragraphs 3 and 4, saying that the school could initiate a new process or new

proceedings. However, Dignam J. said it seemed to him that this was in fact covered by the school's statement given in open court, that they would give three days' notice of an intention or proposal to initiate a new process, and that this would give the appellant sufficient opportunity to take whatever steps he wished, including bringing the matter to court. He added it was noteworthy that the appellant did not request such an undertaking or commitment from the respondent before applying to the court for an injunction, and that this suggested the real focus of the application was relief number two, which referred to an order sought restraining the respondent Board from putting the appellant on paid administrative leave or from continuing to put the appellant on paid administrative leave.

45. While it appears that, in the court below, the appellant's concerns in relation to the undertakings that were offered was with their efficacy, before this Court, he has elevated the issue to a matter of principle. He contends that a judge is not entitled to avoid deciding issues in a case where the issues require to be decided. In that regard, he relies on the decision in *Society for the Protection of Unborn Children Ireland v. Stephen Grogan & Ors* [1990] ILRM 350. In my view, what was in issue in *Grogan* has no real relevance to the present case. It will be recalled that, in that case, the plaintiffs had sought interlocutory injunctions against the defendants, officers of various students' unions, restraining them from publishing information in relation to the availability of abortion services outside the jurisdiction. In the High Court, Carroll J. did not make any formal order in relation to the application for an interlocutory injunction, and instead, indicated she was seeking a ruling from the Court of Justice of the EU (CJEU) in relation to the issues raised by the case. The Supreme Court was of the view that, in fact, in the High Court, two orders had been made: one referring questions of law to the CJEU, and the other declining to grant the injunctions sought.

46. Thus, the procedures followed meant that the plaintiffs in that case failed to achieve the orders sought. In the present case, the position is quite different. It is indeed the exact

opposite of what happened in *Grogan*; in this case, the undertakings offered and accepted by the Court gave the moving party, the appellant, what he was seeking. In my view, it was therefore the case that it was fully open to the High Court judge to accept the undertakings offered and to take the view that it was unnecessary to proceed with a hearing in relation to the other reliefs sought, in that no practical benefit could derive to the moving party over and above what was on offer by way of the undertakings. In the course of the appeal hearing, as I sought to identify what the appellant's real grievance was, I enquired whether his complaint was because the judge did not proceed to a hearing, and as such he was denied the opportunity to obtain a ruling which, whether ultimately successful or not, might have offered him an advantage. Whether that is the case or not, it would not have provided a reason that mandated a judge to hear an application for orders that were not actually required by the moving party.

47. While not necessary to my decision in this case, I am happy to indicate that I am of the view that Dignam J. was quite justified in taking the view that it was unnecessary to hear the application in respect of the reliefs being sought where undertakings were being offered.

The Proceedings before Roberts J.

48. This matter came before Roberts J. in the High Court on 14th September 2022; as it happens, this was the day that had been scheduled for the disciplinary hearing. We have been provided of a transcript of her *ex tempore* ruling. In the course of it, she referred to the fact that the plenary summons issued had seen the respondent seek a declaration that the appellant was on paid administrative leave pending the outcome of the disciplinary process, and a further declaration that the decision to put the appellant on paid administrative leave was lawful. She referred to the fact that the appellant had counterclaimed regarding the validity of his paid administrative leave and challenged its lawfulness. She said these central matters

were issues to be determined by a trial judge following a full consideration of the evidence and could not be determined at the interlocutory stage.

49. Having referred to the significance of Circular 49/2018, Roberts J. then reviewed the facts. In doing so, she noted that the appellant had been notified in writing of the respondent Board's decision to place him on paid administrative leave on 24th August 2022, and that a formal direction had issued to him on 25th August in relation to his attendance at the school while on administrative leave. The judge noted that it would have been open to the appellant to challenge his paid administrative leave at a much earlier stage, and he did not do so. Neither had he appealed the order of the High Court granting injunctive relief against him, and this was a matter of considerable importance in relation to the application. Instead, she said the appellant was effectively now seeking to rerun the same argument dealt with by the High Court at the hearing of the respondent Board's injunction application, and in doing so, appeared to be mounting a collateral attack on that order, in the hope that by doing that, he might bring the order to an end. She commented that she felt the appellant's course of action in now seeking an injunction against the respondent to be procedurally misconceived given the extant High Court order. However, she said she was conscious that the appellant was a lay litigant without the benefit of independent legal advice. She proposed to consider the application requested by the appellant despite her serious reservations from a procedural perspective.

50. For my part, I share her doubts in relation to the procedure followed. I do accept that any interlocutory order is capable of review; circumstances can change, and sometimes new information comes to light which was not put before the original court. However, in this case, it does not appear there was any new material or that there were even any new arguments advanced. Rather, it appears that the appellant repeated the arguments which had failed to

find favour with Barrett J.. He was, in effect, requesting Roberts J. hear an appeal from her colleague. That was something which could not be permitted.

51. The judge then referred to the fact that, while the reliefs sought by the appellant were couched in terms of restraining orders, he was, in effect, seeking a mandatory injunction, and to that extent, he would need to convince the Court that he had a strong likelihood of success at trial in order to meet the threshold test. The judge said she was not convinced that the appellant had met this threshold in light of the factual circumstances and Circular 49/2018. She went on to say that even if the appellant were to meet the threshold, the Court would have to look at the balance of convenience to assess whether it favoured granting or refusing the injunctions sought. That required balancing the fact that the appellant was unable to attend at the school, but remained on full pay, suffering no financial loss, against the fact that the school needed to protect its students from any possible disruption to their classes and to ensure the school ran without disruption. She noted that the school was also concerned to comply with its legal obligations under the Equal Status Act 2000 in relation to all students, and particularly the child concerned.

52. The appellant takes serious issue with the reference by the High Court judge to the Equal Status Act 2000, going so far, in the course of submissions, as to say that she had "made a false reliance on the Equal Status Act". The observation is quite unjustified since it is clear that Roberts J. was referring to the fact that the school had concerns in relation to their obligations under the Equal Status Act 2000, something which is clearly established to be the case on the papers. Whether the school's concerns in that regard were well-founded or not is another matter. Counsel on behalf of the respondent, while saying, in effect, that arguments based on the Equal Status Act 2000 would not be unstateable, was prepared to concede that the Act was not directly relevant to the present proceedings. I propose to proceed on the basis that the Act, contrary to the respondent Board's belief, was of no application.

53. The judge went on to comment that while the appellant was entitled to hold whatever religious beliefs he wishes, and she had no doubt they were genuinely held, there was no attacks on these religious beliefs simply by placing the appellant on paid administrative leave pending an investigation process. She had no doubt that the balance of convenience strongly favoured refusing the reliefs sought.

54. The comments of Roberts J. in relation to the balance of convenience and her comments that there was no attack on the religious beliefs of the appellant echo the consideration of the issue of the balance of convenience by Barrett J., and what that judge had to say about the fact that the case did not concern transgender issues.

Discussion and Decision

55. Barrett J. – and it is with his judgment I am primarily concerned – and Roberts J. considered what was involved in identifying where the balance of convenience lay as involving the balancing of the impact of the suspension on the appellant against the disruption caused by him in failing to comply with a direction from the Board that he stay away from the school while on paid administrative leave. The appellant says both judges were in error in understating or minimising the seriousness of what was, in reality, a suspension. He points to the fact that the courts in other cases have recognised the serious impact that a suspension may have.

56. I have already indicated I do not disagree with the view that suspension is a serious matter, and certainly not something to be resorted to lightly. I want to make clear my views in that regard extend to so-called holding suspensions, and even those suspensions that are on full pay. However, it does seem to me that the impact of suspensions will vary from case to case. There will be cases where the background to the suspension brings immediately to mind the adage of "no smoke without fire". In such cases, the effect of the suspension is likely to

be very grave indeed, and may not be easily or at all remedied, even if the individual suspended is eventually vindicated. I do not believe this is such a case. The attention this controversy has received means there can be few people in the educational world in Ireland who will not be aware of the background to the suspension and very few who could be under the misapprehension that it relates to other forms of grave misconduct.

57. This is a case where the principal and the Board have come to a view about what is the appropriate response to a situation with which they were presented. The appellant takes exception to the course of action decided upon by the school and has repeatedly expressed his objections. While the stage four report prepared by the principal refers to the appellant's actions at the staff meeting, the focus of attention at the various High Court hearings and before this Court has been very much on what happened on the occasion of the chapel service and dinner. It also seems to me to be a relevant consideration that the appellant has given the clearest possible indication of having every intention of conducting himself in a similar manner into the future. In the course of his submissions to Barrett J., the appellant indicated that, having had much time to consider his actions and behaviour, far from finding "any instances of misconduct, let alone gross misconduct," he has only found actions worthy of commendation. He asserts it is to be commended that he had the courage to respond to the principal, telling her that her "transgenderism" was an abuse of children and a breach of their constitutional rights to the free profession and practice of their religious beliefs, as the Constitution says. When asked the direct question by me whether, even at this stage, he has any regrets about interrupting a religious service, his response was to say he felt he was to be commended for what he did.

58. It also seems to me that the position of the child at the centre of the controversy requires consideration in the context of identifying where the balance of convenience lies. With parental support, the child indicated a desire to transition. In those circumstances, while

it is not inconceivable that an accommodation satisfactory to all could have been reached, given goodwill and flexibility on all sides, it would seem at this stage, given the attitude taken by the appellant, that it is not possible to meet simultaneously the desires of the child and the parents, on the one hand, and the appellant's concerns, on the other. If that is the choice – and I am afraid that, by reason of the appellant's actions, it may well have in fact come to that – I would be of the view that the wishes of the child and parents must prevail.

59. I turn now to the observation by Barrett J. that this case was not about transgender issues, remarks echoed – or certainly, I suspect, in the mind of the appellant – by the remarks of Roberts J., that there was no attack on the religious beliefs of the appellant. I am of the view this case is not about what the appellant has chosen to describe as "transgenderism", and I would prefer to express my views in terms of the fact that the case is not about transgender rights. I cannot but believe that the term, as used by the appellant, is a somewhat pejorative one, as is his use of the term transgender "ideology". These are phrases I prefer to avoid; I do not believe they are phrases that in today's Ireland would find favour with transgender individuals and I would wish to respect their preferences in that regard.

60. In relation to the suggestion that there has been an attack on the appellant's religious beliefs, I think it necessary to recall the circumstances in which this issue arose. A pupil in the school, along with the child's parents, informed the school authorities of a decision that had been arrived at and sought the support of the school. The school was therefore presented with a choice: to respond positively or to reject the request. If the request was rejected, it would involve saying that the school would be a cold house for the pupil involved. The school authorities took the position that the pupil would be facilitated, and that the ethos of the school required that this be so. The school invoked its admissions policy and also referred to the Equal Status Act 2000, when explaining the approach at which it had arrived.

61. It is true that the principal and the respondent Board have at different stages placed reliance on the Equal Status Act 2000, a reliance which may have been misplaced, but it seems to me that the school authorities were well positioned to identify what was the appropriate response to a request of this nature on the part of a school under the auspices of the Church of Ireland. In passing, I note that the notepaper of the school, which forms part of the exhibits in the case, lists the directors of the school and that the Board of directors includes four distinguished senior clergymen and clergywomen from the Church of Ireland. While the identification of the ethos of the school is a matter for the school authorities and may be a matter that arises for consideration at a full hearing, I feel bound to say that I do not find the approach of the school at all surprising. It seems to me that the approach of the school is very much in accordance with wider public policy as articulated in legislation such as the Gender Recognition Act 2015. That Act is not directly applicable in the circumstances of this case, as the pupil involved, being under 18 years of age, has not applied for and is not in a position to apply for a gender recognition certificate. However, it is part of the statute law of the State, and is, to a degree, I believe, declaratory of public policy. The long title of the Act is that it is "An Act to recognise change of gender; to provide for gender recognition certificates; to amend the Irish Nationality and Citizenship Act 1956, the Civil Registration Act 2004, the Passports Act 2008 and the Adoption Act 2010; and to provide for matters connected therewith." Against the background of the statute law of the State, it seems clear to me that the decision of the principal and of the school is in no sense an outlier.

62. In summary, I am of the view that the appeal against the decisions of Stack J. and Barrett J. must be dismissed. To the extent that issues in relation to the proceedings before Dignam J. and Roberts J. have been canvassed and have been the subject of comment or argument, I am of the view that the criticisms have not been made out. In all of the circumstances, I would dismiss the appeal.

63. I would like to add that I have had the opportunity to read in draft form judgments that will be delivered by Edwards and Whelan JJ. shortly and I wish to record my agreement with them.