

**THE HIGH COURT**

[2023] IEHC 484

[2022/178 MCA]

**IN RE THE UNFAIR DISMISSALS ACT, 1977 AS AMENDED – AN APPEAL  
PURSUANT TO SECTION 46 OF THE WORKPLACE RELATIONS COMMISSION  
ACT, 2015 AS AMENDED**

**BETWEEN**

**AN BORD BANISTÍOCHTA, GAELSCOIL MOSHÍOLÓG**

**APPELLANT**

**AND**

**THE LABOUR COURT**

**RESPONDENT**

**AODHAGÁN O’SUIRD**

**NOTICE PARTY**

**JUDGMENT of Mr. Justice Cregan delivered on the 14<sup>th</sup> of July, 2023**

## **Introduction**

1. This case is a shocking story of a terrible injustice done to Mr. Ó Suird. It resulted in his odyssey through the school disciplinary process, the unfair dismissal process, and the legal system in order to clear his name and to be reinstated as Principal of the school he helped to establish. However, unlike the Odyssey, which only lasted ten years, Mr. O’Suird has had to endure this injustice for over eleven and a half years – all because of the unreasonable actions of Ms. Ni Dhuinn, the chairperson of the Board of Management, and other members of the Board of Management, of the school in question.

2. A summary of this case is as follows. On or about 20<sup>th</sup> January 2012 - over eleven and a half years ago - Mr. O’Suird was put on administrative leave from his position as principal of the primary school in respect of a single child incident which occurred on 10<sup>th</sup> January, 2012. The parents of the child regarded it as a “minor incident”; a HSE investigation concluded in November 2012 that the matter did not rise to the level of physical abuse of a child and recommended the school carry out its own investigation. However Ms. Ni Dhuinn did not do so. Instead she began to investigate other issues relating to enrolment figures which were returned to the Department of Education and Skills (“the Department”). As a result, Mr. O’Suird was kept on administrative leave and then suspended in May 2013. A disciplinary hearing of the Board of Management was conducted, prosecuted by Ms. Ni Dhuinn, and, in August 2015, he was dismissed from his position as principal with effect from 30<sup>th</sup> November 2015. He appealed to the Disciplinary Appeal Panel which upheld the dismissal. He appealed to the Workplace Relations Commission (“WRC”) which found his dismissal was unfair, and ordered his re-engagement. The Board of Management appealed to the Labour Court which also found he was unfairly dismissed and ordered his re-engagement. The Board then appealed to the High Court.

### **The parties**

3. The appellant in this matter is An Bord Banistiochta, Gaelscoil Moshiolog which I will refer to in this judgment as the “Board of Management ”or “the Board”.
4. The respondent is the Labour Court which took no part in these proceedings.
5. The notice party is Mr. O’Suird, the school principal.
6. It is important for the purposes of this judgment to introduce the main parties in this dispute. The two main parties are Mr. O’Suird, the principal of the school, and Ms. Melanie Ní Dhuinn, the chairperson of the Board of Management. Another important figure is Mr. Malcolm Byrne, a member of the Board and the chairman of the Board’s Disciplinary Panel which heard Mr. O’Suird’s case.
7. Mr. O’Suird was born in Gorey on 5<sup>th</sup> February, 1960 and is 63 years of age. He grew up in Wexford and attended St. Patricks College, Dublin where he qualified as a teacher. Subsequently he studied in the evenings for a B.A. in UCD. He also holds an M.A. from the Open University, an M.Sc. from Dublin City University and a Diploma in Educational Management from NUI Maynooth.
8. Mr. O’Suird began teaching at St. Pius X National School in Terenure. Then, between 1986 and 1998 he was a school principal at Boolavogue national school in County Wexford. He was appointed to that position at the age of 26. From 1998 to 2002 he was a teacher at a gaelscoil in Wexford town.
9. Mr. O’Suird had a dream of opening an inter-denominational gaelscoil in Gorey and he was centrally involved in the establishment of the new school which is at the centre of these proceedings - Gaelscoil Moshiolog. This new school opened in 2002 in Gorey. Mr. O’Suird said in his evidence on affidavit to this court that he was a “*very hands-on school principal and spent a lot of my spare time in the school’s early years trying to assist with its*

*establishment and growth. My three sons also attended the school. I am extremely proud of the school and the central role which I played in its establishment”.*

10. The other main party in this case is Ms. Melanie Ni Dhuinn. Ms. Ni Dhuinn is a qualified post-primary teacher and an Assistant Professor of Education at Trinity College Dublin. She is also a director of the Professional Master of Education programme there. She was invited by Mr. O’Suird to become chairperson of the new incoming Board of Management in December 2011.

### **The Board of Management**

11. The school at the centre of this case was founded in 2002. From the start, it had its own Board of Management. It appears that Mr. O’Suird had very good relationships with each member of the Board of Management from the foundation of the school in 2002 until January 2012. However an entirely new Board of Management was appointed in or about November 2011 and took up office in December 2011. Ms. Ni Dhuinn was elected chairperson of this Board of Management in December 2011.

12. Mr. O’Suird met the new Board once – at its monthly Board meeting on 9 January, 2012. Then on 20<sup>th</sup> January 2012, he was put on administrative leave by Ms. Ní Dhuinn.

### **The legal status of the Board of Management**

13. Section 14 of the Education Act, 1998, sets out the nature and powers of a Board of Management.

14. Section 14 (1) provides as follows:

*“14.—(1) It shall be the duty of a patron, for the purposes of ensuring that a recognised school is managed in a spirit of partnership, to appoint where practicable a Board of Management .....*”

15. Section 14 (2) provides:

*“A board established in accordance with subsection (1) shall fulfil in respect of the school the functions assigned to that school by this Act, and, except in the case of a school established or maintained by a vocational education committee, each board shall be a body corporate with perpetual succession and power to sue and be sued in its corporate name.”*

**16.** It is important to note that Section 14 (2) of the 1998 Act provides that each Board of Management shall be a “body corporate with perpetual succession”. Therefore, although personnel of the board may change from year to year, the board itself is a legal body with perpetual succession. This is important in the context of this dispute.

### **Chronology of events**

**17.** Given the extraordinary length of time this case has taken to come to the High Court and the convoluted route which it has taken, it would be helpful to set out a thumbnail sketch of some of the key dates in the history of this case. The landmark dates are as follows –

- 11<sup>th</sup> January, 2012 – single child incident (which will be dealt with in greater detail below).
- 20<sup>th</sup> January, 2012 – Ms. Ní Dhuinn puts Mr. Ó Suid on administrative leave.
- 26<sup>th</sup> January, 2012 - the Board of Management put Mr. O’Suid on administrative leave arising out of the single child incident;
- 13<sup>th</sup> March, 2013- Board of Management decided to keep Mr. O’Suid on continued administrative leave for reasons identified in its investigation into enrolment figures;
- 29<sup>th</sup> May, 2013 – Ms. Ní Dhuinn, chairperson of the Board of Management, writes setting out allegations against Mr. O’Suid and suspending him on full pay;
- 5<sup>th</sup> November, 2014, 8<sup>th</sup> April, 2015, 3<sup>rd</sup> June, 2015 – three days of disciplinary hearings before the Board of Management;

- 31<sup>st</sup> August, 2015 - letter dismissing Mr. O’Suird from the school with effect from 30<sup>th</sup> November, 2015;
- 9<sup>th</sup> November, 2015 - hearing before the Disciplinary Appeal Panel (which appeal was dismissed);
- 30<sup>th</sup> November, 2015 - Mr. O’Suird dismissed;
- 8<sup>th</sup> February, 2016 - Mr. O’Suird makes complaint of unfair dismissal to the Workplace Relations Commission;
- June 2016 - the post of principal of the school advertised;
- 1<sup>st</sup> July, 2016 - new principal appointed to that position;
- 4<sup>th</sup> December, 2017 – hearing before the Workplace Relations Commission (“WRC”);
- 25<sup>th</sup> April, 2018 - WRC issues a finding that Mr. O’Suird had been unfairly dismissed and directing reengagement with effect from 1<sup>st</sup> January, 2018;
- 15<sup>th</sup> June, 2018 - the Board of Management appealed the decision to the Labour Court;
- November 2018 - July 2021 - eleven days of hearings before the Labour Court;
- 3<sup>rd</sup> June, 2022 - Labour Court decision that Mr. O’Suird had been unfairly dismissed and directing reengagement with effect from 1<sup>st</sup> September, 2017;
- July 2022 - Appeal to the High Court from the Labour Court decision;
- 27 March – 29 March 2023 – Hearing before High Court.

### **Appeal to High Court**

**18.** The Board of Management has appealed to the High Court on a point of law pursuant to s. 46 of the Workplace Relations Commission Act, 2015 as amended (the “2015 Act”) seeking:

- (1.) A declaration that the Labour Court erred in law in its decision wherein it made the finding that Mr. O'Suird was unfairly dismissed and awarded reengagement with effect from 1<sup>st</sup> September, 2017 and
- (2.) An order setting aside the decision of the Labour Court and remitting the matter to the Labour Court.

### **Applicable legal principles governing such appeals**

19. There was no great dispute between the parties about the applicable legal principles governing such an appeal.

20. In *ESB v. Minister for Social Community and Family Affairs* [2006] IEHC 59 Gilligan J. set out the legal principles applicable to an application of this kind stating as follows (at page 12):

*“In Deely v. Information Commissioner (Unreported, High Court, 11th May, 2001)*

*McKechnie J. noted at p. 17 that the remit of the Court in an appeal on a point of law encompassed the following:*

*(a) it cannot set aside findings of primary fact unless there is no evidence to support such findings;*

*(b) it ought not set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision making body could draw;*

*(c) it can however reverse such inferences, if the same were based on the interpretation of documents and should do so if incorrect, and finally*

*(d) if the conclusion reached by such bodies shows that they have taken an erroneous view of the law, then that also is a ground for setting aside the resulting decision.”*

*“Budd J. in Brides v. Minister for Agriculture [1998] 4 I.R. 250 dealt with the position of the examining role of the High Court in an appeal such as this wherein he stated at pp. 274 – 275:*

*‘Since this is an appeal on a point of law, it is not a rehearing. Accordingly, the facts as found by the Labour Court are binding on this court where those facts are supported by credible evidence and this court should be slow to disregard the inferences drawn by the Labour Court from its findings of fact unless the inferences drawn are wholly unwarranted on the findings of fact made.’”*

**21.** Gilligan J. also stated at p. 30:

*“I take the view that the approach of this Court to an appeal on a point of law is that findings of primary fact are not to be set aside by this Court unless there is no evidence whatsoever to support them. Inferences of fact should not be disturbed unless they are such that no reasonable tribunal could arrive at the inference drawn and further if the Court is satisfied that the conclusion arrived at adopts a wrong view of the law, then this conclusion should be set aside. I take the view that this Court has to be mindful that its own view of the particular decision arrived at is irrelevant. The Court is not retrying the issue but merely considering the primary findings of fact and as to whether there was a basis for such findings and as to whether it was open to the Appeals Officer, to arrive at the inferences drawn and adopting a reasonable and coherent view, to arrive at her ultimate decision.”*

**22.** It is clear therefore from the authorities that there are limited circumstances in which the High Court should interfere with a decision of the Labour Court.



23. The Board of Management submitted that although the role of the High Court on an appeal on a point of law is a specific one, the High Court may intervene where there is an identifiable error of law or an unsustainable finding of fact.

24. It is clear from the detailed notice of appeal, that most of the 23 grounds of appeal are, in substance, a challenge to the decision of the Labour Court that the dismissal of Mr. Swords was unreasonable.

25. To that extent therefore it will be necessary in this judgment to

(a) consider the facts as found by the Labour Court and whether there was a proper basis in the evidence for such findings of fact;

(b) to consider the inferences from such facts drawn by the Labour Court and whether such inferences were reasonable;

(c) to consider whether the Labour Court made any error of law in its consideration of the appeal from the decision of the WRC.

### **The Unfair Dismissals legislation**

26. Section 6 (4) of the Unfair Dismissals Act, 1977 as amended provides that:

*“Without prejudice to the generality of subsection (1) of this section, the dismissal of an employee shall be deemed, for the purposes of this Act, not to be an unfair dismissal, if it results wholly or mainly from one or more of the following:*

*(a) ....*

*(b) the conduct of the employee,*

*(c) ....*

*(6) In determining for the purposes of this Act whether the dismissal of an employee was an unfair dismissal or not, it shall be for the employer to show that the dismissal*

*resulted wholly or mainly from one or more of the matters specified in subsection (4) of this section or that there were other substantial grounds justifying the dismissal.*

(7) ... *In determining if a dismissal is an unfair dismissal, regard may be had, if the adjudication officer or the Labour Court, as the case may be, considers it appropriate to do so—*

(a) *to the reasonableness or otherwise of the conduct (whether by act or omission) of the employer in relation to the dismissal, and*

(b) *to the extent (if any) of the compliance or failure to comply by the employer, in relation to the employee, with the procedure referred to in section 14 (1) of this Act or with the provisions of any code of practice referred to in paragraph (b) (inserted by the Unfair Dismissals (Amendment) Act, 1993) of section 7 (2) of this Act.”*

- 27.** The reference in s. 14 (1) of the Unfair Dismissals Act is a reference  
*“to a procedure that has been agreed upon by, or on behalf of, the employer concerned and the employee concerned or an excepted body within the meaning of the Trade Union Act, 1941 representing him”.*
- 28.** The Board of Management submitted in its legal submissions that *“in determining whether a dismissal is an unfair dismissal, regard may be had by the Labour Court as to whether the employer complied with agreed disciplinary and dismissal procedures”.*
- 29.** In the present case, the applicable procedures are the statutory procedures set out in *“Towards 2016 - revised procedures for suspension and dismissal of principals” (Circular 60/2009)* hereinafter referred to as *“Circular 60/2009”*.
- 30.** In *Bank of Ireland v. Reilly* [2015] IEHC 241 Noonan J. described the test in the following terms at para. 38:  
*“It is thus clear that the onus is on the employer to establish that there were substantial grounds justifying the dismissal and that it resulted wholly or mainly from*

*one of the matters specified in s. 6(4), which includes the conduct of the employee, or that there were other substantial grounds justifying the dismissal. Section 6(7) makes clear that the court may have regard to the reasonableness of the employer's conduct in relation to the dismissal. That is however not to say that the court or other relevant body may substitute its own judgment as to whether the dismissal was reasonable for that of the employer. The question rather is whether the decision to dismiss is within the range of reasonable responses of a reasonable employer to the conduct concerned.”*

- 31.** One of the grounds of appeal of the Board of Management is that the Labour Court erred in law in failing to apply correctly the legal test for unfair dismissal to the facts before it, namely whether the decision to dismiss taken by an employer was in “the range of reasonable responses open to a reasonable employer”.
- 32.** In substance, the fundamental issue before the Labour Court was whether the dismissal of Mr. O’Suird by the Board of Management was unreasonable having regard to all the circumstances of the case or whether it was justified because of his conduct.
- 33.** In substance, the central issues before the High Court on this appeal are:
- (a) whether the evidence before the Labour Court was sufficient to permit it to make the findings of fact which it made;
  - (b) whether the inferences drawn by the Labour Court from these facts were reasonable; and
  - (c) whether the Labour Court made any obvious errors of law in its determination of the matter.

### **Materials before the Labour Court**

- 34.** The Labour Court heard eleven days of evidence, the transcripts of which were provided to this Court. In addition the Labour Court received the transcripts of the three days

of hearings before the Board of Management. The Labour Court was also provided with the voluminous correspondence exchanged between the parties, numerous other documents and also had the benefit of legal submissions.

**35.** In this judgment, I will set out, in chronological order, the events as they occurred, all of which were established in evidence before the Labour Court. In so doing, I will comment on the evidence insofar as I believe it necessary or appropriate to do so, with a view to an eventual assessment as to whether the Labour Court was entitled, as a matter of fact and law to arrive at its conclusions that the decisions of the Board of Management and the Disciplinary Appeals Panel were unreasonable.

### **Circular 60/2009**

**36.** In order to consider these matters, it is first necessary to consider Circular 60/2009. Circular 60/2009 sets out the rules and procedures to be adopted by boards of management of primary schools when dealing with disciplinary matters concerning teachers or the principal of a school. These procedures were negotiated between the Department of Education and the teachers' unions. It was brought into effect in September 2009.

**37.** Section 2 of the circular sets out the general principles underpinning these procedures. It states in the very first sentence:

*“Apart from considerations of equity and justice, the maintenance of a good industrial relations atmosphere at workplace level requires that acceptable procedures be in place and be observed.”*

**38.** It states at paragraph 3:

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

39. It then states:

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

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

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

40. It goes on to say:

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

- *that there will be a presumption of innocence. No decision regarding disciplinary action can be made until a formal disciplinary meeting has been convened and the employee has been afforded the opportunity to respond to the allegations raised.*
- *that the employee will be advised in writing in advance of a disciplinary meeting of the precise nature of the matters concerned and will be given copies of all relevant documentation. In the case of a complaint, this detail will include the source and text of the complaint as received. A complaint should be in writing.*

- *that details of the allegations, complaints or issues of professional competence be put to the Principal concerned.*
- *that the right of a principal concerned to have access to and to view his/her personnel file (to include all records in relation to the teacher in hardcopy or electronic format, held by the school) will be fully respected.*
- *that the principal concerned be given the opportunity to respond fully to any such allegations, complaints or issues of professional competence.*
- *that the Principal concerned has the right to examine and challenge all evidence available and to call witnesses or persons providing such evidence for questioning.*
- *that the principal concerned has the right to a fair and impartial examination of the issues being investigated, taking into account the allegations or complaints themselves, the response of the principal concerned to them, any representations made by or on behalf of the principal concerned and any other relevant or appropriate evidence, factors or circumstances.*
- *that the Board of Management as employer, has a duty to act reasonably and fairly in all interactions with staff and to deal with issues relating to conduct or professional competence in a confidential manner which protects the dignity of the principal.*
- *that where a decision is taken to impose a disciplinary sanction, the sanction imposed will be in proportion to the nature of the conduct/behaviour/ performance that has resulted in the sanction being imposed.*
- *that these procedures are without prejudice to the right of a Principal to have recourse to the law to protect his/her employment.”*

41. It is clear from the evidence before the Labour Court that, all, or almost all, of these principles and procedures were breached in the current situation.

42. The circular then sets out the procedures relating to professional competence issues for principals in their role as teacher. It sets out a stage 1 (informal stage), stage 2 (initiation of a formal process), stage 3, (an external review) and stage 4 (hearing stage).

43. The Disciplinary Procedures for Principals states as follows:

*“As is the norm with any profession, it is a matter for the individual principal, in the first instance, to maintain appropriate standards of work and conduct and to personally address such issues if and when they arise. Work in this context involves all aspects of the role of principal (other than as teacher) as set out in the Education Act, 1998.”*

44. It also sets out a number of escalating stages of an investigation and provides for an informal stage, a stage 1 (verbal warning), stage 2 (written warning), stage 3 (final written warning), and stage 4, (untitled).

45. Under Stage 4 it provides as follows:

*“If it is perceived that the poor work or conduct has continued after the final written warning has issued or the work or conduct issue is of a serious nature, a comprehensive report on the facts of the case will be prepared by the Chairperson and forwarded to the Board of Management. A copy will be given to the Principal.”*

46. I would note in passing that the Board of Management can immediately move to a stage 4 investigation if “the work or conduct issue is of a serious nature”. I would also note in passing that it is the responsibility of the chairperson to prepare a “comprehensive report on the facts of the case”.

47. This circular also provides:

*“The Board of Management will consider the matter and seek the views of the principal in writing on the report prepared by the chairperson. The Board of Management shall afford the principal an opportunity to make a formal presentation of his or her case. The principal should be given at least ten school days written notice of the meeting. The notice should state the purpose of the meeting and the specific nature of the complaint and any supporting documentation should be furnished to the principal. .... The principal will be given an opportunity to respond and state his/her case fully and to challenge any evidence being relied upon for a decision and be given an opportunity to respond. Having considered the response the Board of Management will decide on the appropriate action to be taken.... Where following the hearing it is decided that further disciplinary action is warranted, the Board of Management may avail of any of the following options:*

- *Deferral of an increment .*
- *Withdrawal of an increment or increments.*
- *Demotion. (loss on Principal’s allowance).*
- *Other disciplinary action short of suspension or dismissal.*
- *Suspension (for a limited period and/or specific purpose) with pay.*
- *Suspension (for a limited period and/or specific purpose) without pay.*
- *Dismissal.*

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

**48.** The next heading is entitled “Gross Misconduct” and it states as follows:



*“In the case of serious misconduct at work or a threat to health and safety to children or other personnel in the school, the stages outlined above do not normally apply and a Principal may be dismissed without recourse to the previous stages.*

*The following are some examples of gross misconduct offences for which any or each of Stages 1 to 3 of the disciplinary procedure may not apply, depending on the gravity of the alleged offence.*

- *Theft.*
- *Deliberate damage to school property.*
- *Fraud or deliberate falsification of documents.*
- *Gross negligence or dereliction of duties.*

.....

*If there is an allegation of serious misconduct, the Principal may be suspended on full pay pending an investigation and the conclusion of any appeal process.*

*In the course of investigation, the Principal concerned has the right to have the allegations brought to his/her attention and he/she has the right to respond to all allegations. If the investigation upholds a case of serious misconduct the normal consequence will be dismissal.” (Emphasis added).*

- 49.** I would note that the alleged gross misconduct offence is stated to be “fraud” or, (i.e. in the alternative) “deliberate falsification of documents”.
- 50.** Stage 5 sets out the appeal process.
- 51.** Ms. Ni Dhuinn stated at paragraph 12 of her affidavit that: *“I say therefore, insofar as any tests are to be applied to the dismissal of the school principal, as a matter of fact, the relevant tests and standards are set out in those procedures and must be adhered to by a Board of Management”.*

**Key principles in Circular 60/2009**

52. It is clear therefore, in my view, that the following cardinal principles are contained in Circular 60/2009:

- (i) the procedures must be fair;
- (ii) the general principles of natural justice apply;
- (iii) the Board of Management has a duty to act reasonably and fairly;
- (iv) the principal has a right to a fair and impartial examination of the issues being investigated;
- (v) the sanction must be appropriate to the conduct being investigated.

53. It is necessary to bear these key principles in mind when assessing how the Board of Management considered the issues in this case relating to Mr. O’Suird.

54. I now turn to the sequence of events which occurred in this case.

**The single child incident in January 2012**

54. An incident occurred in January 2012 which lay at the root of everything that followed. The best evidence of what happened on that day is given by Mr. O’Suird himself. He stated as follows in his affidavit prepared for this court.

*“26. On 11<sup>th</sup> January, 2012, an incident occurred while I was teaching first class in the school. I disciplined a pupil (who I shall refer to as [pupil A]) in front of the class, who then returned to his seat and deliberately stamped his feet while he did so. I lost my temper, approached [pupil A], banged his table with my fist and physically pulled him towards me by his jumper in order to remonstrate with him. What I did was entirely wrong, and I feel great shame in relation to it to this day. The incident passed relatively quickly but I cannot excuse my actions in any way. It was extremely stupid and represented an unacceptable failing on my part”.*

27. *The following day, I learned that parents in the school were aware of the incident. [Pupil A's parents] approached me and I discussed the incident with them in a fully open and transparent way on 13<sup>th</sup> January, 2012, in the presence of Ms. Ni Shullebhain. [the deputy principal]. I agreed with him that I would ask Muinteoir Fionntan who was the learning support teacher to take first class for the time being.*

28. *On 14<sup>th</sup> January, 2012, I discussed the incident with Ms. Ni Dhuinn by telephone, and explained what had occurred. I suggested that I could meet the parents of the class as a group but Ms. Ni Dhuinn instructed me not to. At that time I felt Ms. Ni Dhuinn was quite supportive of me”.*

29. *On 16<sup>th</sup> January, 2012, I met with [pupil A's parents] again. In broad terms they were satisfied with the meeting and that matters had been properly resolved. They accepted my apology and they were happy that [pupil A] had not been hurt or injured during the incident. They considered it to be a minor incident”.*

**55.** I will come back to this issue of a “minor incident” later.

**56.** In my view, this evidence given by Mr. O’Suird is clear and persuasive. He sets out the facts as they occurred and it is clear that he accepts that what he did was “entirely wrong”, that he feels “great shame in relation to it to this day” and that it “represented an unacceptable failing” on his part. He does not seek to minimise his actions nor does he seek to evade responsibility in any way. More importantly, no-one has sought to challenge the accuracy of his account.

**57.** It appears that on or about 16<sup>th</sup>/17<sup>th</sup> January, 2012 a small number of other parents in the class made complaints to the Board of Management about the incident - apparently based on what their children had told them.

**58.** On 20<sup>th</sup> January, 2012, as a result of these complaints, Mr. O’Suird was told by Ms. Ni Dhuinn to stay away from the school and only to carry out “administrative tasks”. He was

therefore, as he says, “de facto suspended from” his position from 20<sup>th</sup> January, 2012 - a period of over eleven years ago.

**59.** This Court was informed by counsel for the school that the Board of Management had an emergency meeting a couple of days later and, on 26<sup>th</sup> January, 2012, the Board of Management decided to place Mr. O’Suird on “administrative leave”. No minutes of this Board of Management meeting or decision were before the court and therefore it is not clear what information was before the Board at the time when it made its decision.

**60.** In effect therefore, the Board of Management effectively placed Mr. O’Suird on administrative leave without hearing his side of the story. Putting a principal on administrative leave is, in substance, the same as suspending a principal. It is an enormously draconian step to take.

**61.** However, to make matters worse, Ms. Ni Dhuinn and, subsequently, the Board of Management then suppressed and concealed enormously significant evidence in relation to this matter – an issue to which I will now turn.

### **The suppression and concealment of evidence by Ms. Ni Dhuinn and the Board**

**62.** As set out above, the single child incident occurred on the 11<sup>th</sup> January, 2012. Mr. O’Suird met the parents and discussed the incident with them on 13<sup>th</sup> January, 2012 and again on 16<sup>th</sup> January, 2012. Mr. O’Suird apologised to them and they accepted his apology. They said they considered it to be a minor incident.

**63.** Ms. Ni Dhuinn and the Board of Management then decided to put Mr. O’Suird on administrative leave from his position on 26<sup>th</sup> January, 2012.

**64.** However, in or around that time and, it appears, on the day before the Board of Management made that decision, (i.e. on 25<sup>th</sup> January, 2012) Mr. Garrett Fitzpatrick, a solicitor for the parents of pupil A, wrote to Ms. Ni Dhuinn in her capacity as the chairperson of the Board of Management and stated as follows:

*“Dear Madam*

*We are instructed by our above named clients in relation to an ongoing issue regarding their son [pupil A].*

*We are instructed that there was an incident regarding [pupil A] and involving Aodhagán Swords [Mr. O’Suird] on or about the 11<sup>th</sup> January. We are instructed that our clients dealt with the matter and were satisfied with Mr. Sword’s response, and indeed, proposals.*

*We understand that subsequently the board received some five or so complaints that apparently related to the particular incident in question. Our client wishes to clarify that they regarded the particular incident as minor in the general scheme of things and were satisfied with Mr. Sword’s handling of the issue. They regarded the incident as a one off and the matter has been dealt with fully to their satisfaction. We wish to place on record that none of the complainants consulted our clients at any stage in relation to these complaints.*

*What is of concern to them now is that the five complaints apparently received by the board have referred to [pupil A] and to the particular incident. Whilst our clients fully understand that parents who may have received information second or third hand in relation to the incident may well have certain concerns. [sic] Our clients wish to put on the record that they are satisfied that the incident was minor in nature and are somewhat alarmed that their son has been referred to in the various complaints.*

*In particular, our clients are concerned that the matter appears to have been referred to the HSE and our clients would regard this development as excessive in the particular circumstances.”*

- 65.** It is clear from this letter, that the parents of pupil A, - the persons most concerned with the incident which occurred on 11<sup>th</sup> January, 2012 - were of the view that the matter was

“minor” in nature and that they were entirely satisfied with Mr. O’Suird’s handling of events, and his apology. It is also clear that they were completely opposed to the matter being referred to the HSE as they clearly regarded that as a significant overreaction on the part of the Board of Management and the school.

**66.** Despite this, Ms. Ni Dhuinn, as chairperson of the Board of Management, appears to have ignored this letter altogether. It is not clear whether she gave a copy of it to the Board of Management; she certainly never gave a copy of it to Mr. O’Suird. It is not clear whether the Board of Management proceeded to make the decision to put Mr. O’Suird on administrative leave in the full knowledge of this letter or without knowledge of that letter. If a copy of this letter had been given to Mr. O’Suird at this time, and if the Board of Management had heard Mr. O’Suird’s side of the story, it is possible that it would not have placed him on administrative leave. However it did not hear his side of the story and he was never given a copy of this letter at that time. Counsel for Mr. Ó Suird characterised this non-disclosure as a “deliberate suppression and concealment of evidence.” Given the facts of this case and the correspondence, which I will deal with later in my judgment, I agree with this assessment.

**67.** Under Circular 60/2009, Ms. Ni Dhuinn had an obligation to act reasonably at all times. The deliberate suppression and concealment of this important evidence was unreasonable and entirely indefensible.

**68.** I would have thought once the solicitors for the parents of Child A had written to Ms. Ni Dhuinn on 25<sup>th</sup> January, 2012 to say that, in their view, it was a minor matter, that should have been the end of the matter. If Ms. Ni Dhuinn and the Board of Management had acted with a modicum of common sense, they would have prepared their own internal investigation report, presented it to the Board of Management and perhaps the matter could have been left at that - or perhaps it might have justified a first warning letter. This would have resulted in Mr. O’Suird being able to return to duty on the 26<sup>th</sup> January, 2012. Instead of acting in such a

measured and proportionate manner, Ms. Ni Dhuinn and the Board of Management saw fit to escalate this to immediately placing of Mr. O'Suird on administrative leave, without a hearing.

**69.** Moreover neither Ms. Ni Dhuinn nor anyone on the Board of Management (if it saw the letter) thought fit to reply to this letter. On 26<sup>th</sup> February, 2013 – one year later - the parents' solicitors wrote for a second time indicating that they had not received a response and enclosing a further copy of the letter for ease of reference. The letter stated:

*“We are at a loss to understand how no response to our letter was forthcoming from the board and in particular no response to our request for copies of the complaints, initial report to the board and report to the HSE. We understand the HSE has now concluded its investigation and the HSE is satisfied that the alleged incident did not constitute physical abuse.*

*In the first instance we again request response to our original letter. Secondly our clients are at a loss to understand why neither this office nor indeed our clients have been contacted. We are astonished, given the allegations made and the subsequent complaints that you have not invited input from our clients in relation to the incident involving [pupil A]. Our clients remain available to you should you wish to speak with them.*

*As you are no doubt aware, our clients are entitled to all information relating to their son [pupil A] and as the matter is now over one year old we would expect a full and adequate response from the board.*

*We await hearing from you,*

*Yours faithfully”.*

**70.** This letter was sent on 26<sup>th</sup> February, 2013 - i.e. one year and one month after the incident of 11<sup>th</sup> January, 2012. It is astonishing, given that Ms. Ni Dhuinn and the Board of

Management had seen fit to place Mr. O’Suird on administrative leave for this incident and to report the matter to the HSE, that Ms. Ni Dhuinn did not even bother to pick up the phone to the parents of pupil A or to meet with them and to discuss the matter with them (I will consider this further later in this judgment.)

### **The HSE investigation**

71. It appears from the evidence that Ms. Ni Dhuinn sought advice on how to deal with this single child incident. She contacted the HSE and the HSE advised her that the school should refer the incident to the HSE. As a result, Ms. Ni Dhuinn referred the single incident to the HSE in or about late January 2012.

72. On 24<sup>th</sup> October, 2012, the HSE wrote to Ms. Ní Dhuinn as chairperson of the Board to say that it had concluded *“an incident did occur, however the incident cannot be said to have constituted physical abuse of a child”*.

*“In the light of this and as discussed, the HSE will now be writing to the school Board of Management requesting that a comprehensive and thorough investigation of the incident be completed with a view to ensuring prevention of such incidents”*.

73. On the 5<sup>th</sup> November, 2012, the HSE wrote directly to Mr. O’Suird in similar terms.

### **Ms. Ni Dhuinn’s failure to conduct an investigation into single child incident**

74. It is clear that what should have happened upon receipt of this letter from the HSE was that Ms. Ní Dhuinn should have immediately completed her investigation into the incident and prepared a comprehensive report on the matter for the Board. The Board should then have completed a disciplinary hearing, and decided what disciplinary action, if any, should be taken against Mr. O’Suird.

75. There was no reason, in my view, as to why all of this could not have happened within a period of fourteen days so that Mr. O’Suird would have been reinstated in his position as principal either before Christmas 2012 or at the latest by 1<sup>st</sup> January, 2013.



**76.** Indeed, it is astonishing that Ms. Ni Dhuinn had not even begun, let alone completed, her own investigation into the incident. She had from 10<sup>th</sup> January, 2012 until December 2012. Yet it appears that Ms. Ni Dhuinn had not even commenced such an investigation – even though she had put Mr. O’Suird on “administrative leave”.

**77.** Instead, Ms. Ní Dhuinn wrote to Mr. Ó Suird to tell him that his “administrative leave” would be extended until 31<sup>st</sup> January, 2013. Ms Ní Dhuinn also asked the HSE to reconsider its decision (in itself an extraordinary thing to do), which it refused to do.

**78.** Ms. Ni Dhuinn apparently belatedly commenced the investigation in January 2013 as suggested by the HSE. However, extraordinarily, this investigation was never completed. It beggars belief that Ms. Ni Dhuinn never completed her investigation into this incident – first, given that she regarded it with such seriousness that it justified the immediate suspension of the principal and the complaint to the HSE and, secondly, that the HSE specifically requested the school to carry out such an investigation.

**79.** Under the rules of procedure for the investigation of principals, it is the duty of the chairperson of the Board of Management to prepare the comprehensive report on these issues. One year later, Ms. Ni Dhuinn had abjectly failed in her most basic of tasks on an important issue i.e. to prepare a comprehensive report to the Board on the single child incident.

**80.** The failure to carry out such an investigation, to prepare a comprehensive report on the matter and to present it to the disciplinary panel was an unacceptable lapse by Ms. Ni Dhuinn for which she is solely and exclusively responsible.

**81.** However it had enormous repercussions for Mr. O’Suird because the failure to complete this investigation left this incident hanging over his head throughout the entire disciplinary process before the Board of Management and the Disciplinary Appeal Panel process. Indeed evidence was given in the Labour Court that the Board of Management still

regarded the single child incident as serious and that it was at the back of their minds when considering the matter.

**82.** Given that the parents had indicated that they regarded it as a minor matter and wanted no further action to be taken, and given that the HSE also had concluded that it did not rise to the level of an assault, it is reasonable to assume that, under no circumstances, could the Board of Management have reached a decision to either suspend Mr. O’Suird or indeed dismiss him. Any sanction which might have been imposed, would have been, - in the overall context of what happened in this case, - relatively minor - perhaps a letter of warning, perhaps no sanction at all. This would have allowed Mr. O’Suird to resume his position relatively quickly.

**83.** As. Ms. Ni Dhuinn never completed an investigation or prepared a comprehensive report on this single child incident and, as she indicated in her evidence to the Labour Court, that this matter was now at an end, the keeping of Mr. O’Suird on “administrative leave” after January 2013 was entirely unreasonable and unlawful. I will consider this later in my judgment.

#### **Investigation in January 2013 into the enrolment figures**

**84.** It appears that Ms. Ni Dhuinn commenced the investigation into the single child incident in January 2013 by interviewing Ms. Ni Shuilleabhain, a teacher in the school. Ms. Ní Shuilleabhain then raised, for the first time, a number of concerns she had about enrolment figures in the school and the overstatement of numbers in returns to the Department of Education.

**85.** Ms. Ni Dhuinn, in her evidence, stated that, to her recollection, Ms. Ni Shuilleabhain told her that she, Ms. Ni Shuilleabhain, had been approached by another teacher in the school – Ms. Griffin – who told her she had concerns about enrolment practices in the school.

86. The concerns raised by Ms. Ni Shuilleabhain prompted Ms. Ni Dhuinn to seek full access to the school's roll books and associated documentation.
87. Mr. Ni Dhuinn carried out a review of the roll books and attendance books to try and identify which children were or were not in attendance.
88. Ms. Ni Dhuinn made a presentation about these matters to the Board in March 2013. Obviously Mr. O'Suird was not present.
89. It appears that , throughout this entire time, Mr. O'Suird remained suspended on his so-called "administrative leave". The INTO wrote on a number of occasions on his behalf to seek to have the board's investigation into the January 2012 single child incident urgently progressed and finalised. This was never done.

**Letter of 13 March 2013**

90. In March 2013, the Board of Management instructed its solicitors, Mason Hayes & Curran, to inform Mr. O'Suird that the Board had made a decision to investigate additional issues in relation to his role as principal of the school. As a result, Mason Hayes & Curran on behalf of the Board of Management wrote to the INTO on the 13<sup>th</sup> March, 2013 and stated as follows:

*"It is regrettably the case that serious issues have arisen which require to be investigated by the Board of Management. The chairperson Ms. Melanie Ni Dhuinn is preparing a comprehensive report on the issues of concern which will be forwarded to the Board of Management for investigation under the disciplinary procedures. In addition to the child protection issues which gave rise to the referral last year to the HSE, serious issues of concern with regard to the administration of the school accounts and compliance with DES requirements concerning the management of the school have recently come to light which require to be fully investigated. The chairperson is aware of the urgency of this situation. She has no desire to keep your*

*client on administrative leave indefinitely. The chairperson will be in a position to refer her concerns to the Board of Management for investigation once the details of the issues of concern surrounding the administration of accounts have been finalised. The principal will remain on administrative leave pending the outcome of the investigation. The chairperson of the Board of Management will be in contact with the principal in this matter as soon as practically possible.” (emphasis added).*

- 91.** It is clear therefore from this letter that instead of deciding to complete the investigation into the single child incident of January 2012, Ms. Ni Dhuinn decided to investigate a whole range of new issues.
- 92.** It is also clear that the Board had made a decision that Mr. O’Suird would remain on “administrative leave” pending the outcome of this investigation.
- 93.** It is impossible to see on what basis Mr. O’Suird should have had his “administrative leave” continued indefinitely throughout this time. As was set out above, the school never progressed its investigation into the single child incident of January 2012 and it is clear from January 2013 that Ms. Ni Dhuinn was investigating other matters.
- 94.** It is also clear, based on all the evidence before the Labour Court and particularly based on what happened afterwards, that the investigation into the single child incident was now effectively at an end. It is clear therefore that there was absolutely no basis whatsoever for keeping Mr. O’Suird on administrative leave from January 2013 onwards. He was, in substance, being kept on administrative leave whilst an investigation into a series of unknown matters was completed. He simply had no idea what he was being investigated for, or what the school was investigating, apart from the vague references to the matters set out in this letter.
- 95.** On 24<sup>th</sup> May, 2013, the INTO’s solicitors, Hayes Solicitors, wrote on Mr. O’Suird’s behalf to Ms. Ni Dhuinn on 24<sup>th</sup> May, 2013. In this letter they stated that the INTO had

written to Ms. Ni Dhuinn on 19<sup>th</sup> December, 2012, 18<sup>th</sup> January, 2013 and 26<sup>th</sup> February, 2013 seeking urgent updates from her in relation to the steps being taken by the Board in relation to the single child incident.

**96.** The letter noted that despite the fact that the HSE had indicated that the matter did not constitute physical abuse of a child, the only action taken by the Board at this time was to write to Mr. O’Suird by letter dated 4<sup>th</sup> December, 2012 stating that his period of administrative leave would be extended until 31<sup>st</sup> January, 2013. The letter stated:

*“No regard was given by the Board to the distress and damage being caused to Mr. Swords by his protracted leave and his continuing absence from the school”.*

**97.** The letter also stated *“Despite these letters and numerous telephone conversations with both yourself and your legal advisors, Mason Hayes & Curran, the INTO received no response. It is grossly unfair and unacceptable that you and/or the Board of Management have disregarded the urgency of this matter and the distress being caused to Mr. Swords by his enforced absence from school and have taken no steps to advance the board’s investigation into this single allegation”.*

**98.** The letter then referred to the letter of 13<sup>th</sup> March, 2013 from Mason Hayes & Curran set out above. It stated that *“No such issues have ever been brought to Mr. Swords attention and we can only conclude that you and the board have deliberately set about a course of action to prevent Mr. Swords’ early return to the school. This is outrageous and we are reserving Mr. Swords position and all his rights in relation to this development”.*

**99.** The letter also stated:

*“Mr. Swords has been on administrative leave for almost seventeen months. The HSE communicated the outcome of its assessment to the Board of Management in November, 2012 but notwithstanding, no steps have been taken to address Mr. Swords ongoing leave. The board has failed in its duty of care to Mr. Swords and there is no*

*justification for this continuing delay. This is a flagrant breach of Mr. Swords' right to fair procedures and due process. It is absolutely outrageous that our client's professional reputation and right to his good name are being set at nought by the board's actions".*

*"The enforced leave has and continues to cause Mr. Swords and indeed his family enormous distress and damage in the local community. This has placed an intolerable strain on Mr. Swords' health which is unacceptable. Our client instructs us that he is continuously approached by parents of pupils questioning his absence from school. Given the widespread knowledge in the community that an allegation was referred to the HSE this has caused untold reputational damage to Mr. Swords and his continued absence from school has exacerbated his position and his good name. In this regard we are holding the Board of Management entirely responsible for all loss and damage to Mr. Swords health, his professional reputation and his right to a good name".* (Emphasis added.)

**100.** They then called upon the school to indicate, as a matter of urgency, how the board proposed to deal with the matter and to rectify the wrong done to Mr. Swords caused by the inordinate delay of the Board.

**Letter of 29<sup>th</sup> May, 2013 – the further allegations against Mr. O'Suird and his suspension**

**101.** On 29<sup>th</sup> May, 2013, some sixteen months after Mr. O'Suird had been placed on administrative leave, Ms. Ni Dhuinn eventually wrote to the INTO in respect of the allegations against Mr. Swords. The letter states.

*"However I now wish to inform you as Mr. Swords' representative, that I have decided to initiate the agreed disciplinary proceedings in relation to a very serious matter which has just recently come to my attention. I note that in 2009 the names of*

*eighteen non-existent children were added to the school roll in or about September 2009. They remained on the school roll until between October and November 2009 and were removed intermittently during this timeframe. One of the roll books was amended on 23<sup>rd</sup> October to reflect that nine pupils had been removed from the roll on 30<sup>th</sup> September. These pupils had in fact been on the roll up to the 23<sup>rd</sup> October and the roll was taken from the class teacher who is a newly qualified teacher and undertaking her diploma at that point and amended retrospectively with tippex being used to delete entries after 30<sup>th</sup> September. These pupils had never attended school.... A further nine pupils remained on the roll through October and November even though they did not attend the school, six of these nine pupils were marked present on the roll intermittently to infer that they were actually attending school even though they were not. All nine pupils were removed from the roll intermittently in October and November 2009. Capitation grant was claimed in respect of at least eight non-existent pupils. As a result of this action the recognised enrolment in the school for the 2009/2010 school year amounted to a total of 199 pupils which entitled the school to a post forbartha (buan) (pupil number required was 198) in the 2009/2010 school year to which it would otherwise not have been entitled. This enrolment figure also enhanced the principal's salary allowance from a category 2 allowance category of between 6-7 classroom teachers to a category 3 allowance category of between 8 to 11 teachers".*

**102.** The letter continued:

*"I am very concerned that the insertion in the school roll of the names of eighteen non-existent students and the subsequent returns made to the Department of Education and Skills could not have been accidental or otherwise inadvertent. I am concerned that this was a deliberate act carried out with the intention of deceiving the*

*Department of Education and Skills as to the number of recognised children in our school with the intent of creating an additional permanent teaching post in the 2009/2010 school year. If my concerns are substantiated I fear that what occurred amounted to a fraudulent misrepresentation of the position to the Department of Education and Skills. On foot of this misrepresentation, the Department of Education and Skills sanctioned an additional permanent teaching post in our school to which the school was not entitled. I have informed the DES in writing of the irregularity presented in the roll books and I have been in verbal communication with the school governance section and the inspectorate in this regard”.*

The letter continues:

*“I consider the principal to be responsible for any intentional misrepresentation of the position with regard to the enrolment of students in the school during the months of September, October and November 2009 to the Department of Education and Skills. The principal has a statutory responsibility for the day to day management of the school. He is accountable to the Board of Management in relation to his management of the school. Given the seriousness of this issue on its own, I am initiating the disciplinary procedures at stage 4 of the disciplinary procedures. I have referred this letter with its attachments as the comprehensive report on the facts of the case to the Board of Management. Having considered the matter the board has directed me, on its behalf, to seek the views of the principal in writing on this report. A special meeting of the Board of Management has been called for 22<sup>nd</sup> June next at 2 pm at the school. The board meeting will be a formal disciplinary hearing which may give rise to the imposition of a disciplinary sanction on the principal as provided for in the disciplinary procedures. The principal is entitled to be accompanied at the disciplinary hearing by his trade union representative and/or by a colleague subject*



*to a maximum of two people. The principal will be given an opportunity to respond and to state his case fully and to challenge any evidence that is being relied upon for a decision. Please note that the principal is suspended on full pay pending the outcome of this disciplinary investigation and the inclusion of any appeal process. I confirm that as the complainant in this matter I will not participate in the board's deliberations in this matter". (emphasis added).*

**103.** The letter of 29<sup>th</sup> May, 2013 also stated as follows:

*"It is my intention to submit a further comprehensive report to the Board of Management in relation to the other serious issues that have arisen in Gaelscoil Moshiolog namely:*

- *Incident involving the principal and a first class pupil in January 2012. [The single child incident referred to earlier in this judgment]*
- *Financial management of the school and/currently under audit.*
- *Compliance with DES regulations with regard to time school, school calendar and fulfilment of records of days.*
- *Compliance with and operationalisation of Croke Park hours and related productivity.*
- *Compliance with Education Act with respect to development of and operationalisation and implementation of school policies.*
- *Significant exposure of the Board of Management [to litigation by parents of a current pupil].*
- *Significant exposure of Board of Management to cases of the Equality Tribunal.*
- *Breaches of Teaching Council Code of Professional Conduct.*

### **Issues arising from this letter**

**104.** There are a number of significant matters to note about this letter. First, Ms. Ni Dhuinn and/or the Board of Management made a decision to suspend Mr. O’Suird – pending further investigation of this matter. Whilst the Circular provides that a Principal may be suspended on full pay pending an investigation if there is an allegation of serious misconduct, given that the Board has a duty to act fairly and reasonably, and given the dicta of Noonan J. in *Bank of Ireland v. Reilly* (set out below) it is a power in my view which should be only used if there are “reasonable” grounds for doing so. I note that suspension with pay is set out as one of the sanctions in the stage 4 process – and one of the most serious sanctions – after the disciplinary process has concluded that there is gross misconduct on the part of the principal. In this case Ms. Ni Dhuinn and the Board of Management were suspending the principal before he had proper notice of all of the allegations, before he had any opportunity to defend himself, before they had even heard anything from him in relation to these matters, and before a disciplinary hearing had been conducted.

**105.** Secondly, it is of some significance that even by May 2013, Ms. Ni Dhuinn had still not completed her “comprehensive report” to the Board of Management in relation to the single child incident of January, 2012 – an incident which occurred some sixteen months earlier – and which, as is clear from the letter, Ms. Ni Dhuinn still intended to pursue. No excuse was put forward by Ms. Ni Dhuinn as to why this had not occurred.

**106.** Thirdly, Ms. Ni Dhuinn - for the first time and without any notice to Mr. O’Suird, and without once hearing him on the issue - raised the issue of fraud. She said that she was concerned that this was “*a deliberate act carried out with the intention of deceiving the Department of Education*” and “*I fear that what occurred amounted to a fraudulent misrepresentation of the position to the Department of Education*”.

**107.** It is clear therefore that Ms. Ni Dhuinn was accusing Mr. O’Suird of fraud in relation to this matter. Of course an allegation of fraud, if proven, would have devastating consequences for Mr. O’Suird’s character, his professional reputation and his ongoing position with the school. However as will be seen, there was no evidence of fraud and no finding of fraud was made either by the Disciplinary Panel of the Board of Management or the Disciplinary Appeals Panel or the Labour Court.

**Failure to provide a “comprehensive report” on the enrolment issue**

**108.** There is another issue which was of significant concern to the Labour Court – and this court - in relation to this letter. On the face of it, this is a letter to Mr. O’Suird about the new allegations made against him and stating, for the first time, that he would now be formally “suspended” (as opposed to being on administrative leave), and making arrangements for a disciplinary hearing.

**109.** Circular 60/2009 provides as follows:

*“If it is perceived that the poor work or conduct has continued after the final written warning has issued or the work or conduct issue is of a serious nature, a comprehensive report on the facts of the case will be prepared by the Director of Schools and forwarded to the CE. A copy will be given to the Principal.”*

**110.** This letter of 29<sup>th</sup> May, 2013 (with its attachments) purported to be the “comprehensive report on the facts of the case” prepared by the chairperson. It is nothing of the sort. It is a flimsy sketching out of a series of allegations – many of which were simply wrong. It is a mish-mash of allegations, evidence, notification of suspension and procedural arrangements for a disciplinary hearing. It is essentially a couple of paragraphs sketching out, in the most general terms, a series of the most serious allegations of fraudulent misrepresentation of school rolls to the Department. The sum total of the “comprehensive report” in the letter when (shorn of all details concerning other matters) amounts to

approximately three paragraphs. Indeed the most important document in the case against Mr. Ó Suid on the enrolment issue was the Mags Jordan report which was only furnished to Mr. Ó Suid about a year later.

**111.** In *Lally v. The Board of Management of Rosmini Community School* [2021] IEHC 633 (4<sup>th</sup> October, 2021) Butler J., in considering DES Circular 49/2018 (dealing with procedures in relation to the suspension and dismissal of teachers and principals) stated that there was an obligation on a principal in preparing such a comprehensive report to act fairly (see para. 69). At para. 75 of her decision Butler J. stated:

*“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.”*

**112.** Clearly those statements of principle also apply when a comprehensive report is prepared by the chairperson of a board of governors in relation to a disciplinary process against a principal of a school, under Circular 60/2009.

**113.** I am of the view that this letter could not be regarded as a “comprehensive report” as required under Circular 60/2009 and, as no such comprehensive report was ever prepared, this was a further breach of the procedures of Circular 60/2009.

#### **Other eight allegations**

**114.** Moreover, Ms. Ni Dhuinn proposed to hold a disciplinary hearing in circumstances where eight other serious allegations had been made against Mr. O’Suid and where, as she

herself admitted in this letter, she had not prepared her “further comprehensive report” for the board on any of these issues.

**115.** Indeed, Ms. Ni Dhuinn never prepared a further comprehensive report on any of these other eight allegations and they were taken no further by her or the Board of Management. They were however allowed to “hang in the air” so to speak, or “fester” with the Board of Management, Mr. O’Suird was therefore put in the Kafkaesque position of being unable to defend himself against these allegations and yet these allegations were not withdrawn. It was an unacceptable position for him to be put in and the blame for this rests with Ms. Ni Dhuinn. These eight allegations were allowed to taint the disciplinary hearing.

**116.** What should have happened is that Ms. Ni Dhuinn should have either decided to prepare a comprehensive report on these allegations and allow Mr. O’Suird an opportunity to rebut them so that he could be, if necessary, cleared or found responsible for these matters. In the alternative, Ms. Ni Dhuinn and the board could have decided to say clearly and categorically to Mr. O’Suird that these allegations would not be made against him and that the allegations were withdrawn.

**117.** However by making the allegations, by refusing to withdraw them, and by failing to prepare a comprehensive report on the allegations, Ms. Ni Dhuinn and the Board of Management failed to comply with the provisions of Circular 60/2009 – which mandates that they act reasonably – and utterly failed to allow Mr. O’Suird an opportunity to vindicate his constitutional right to his good name. Their actions in this regard were completely unreasonable and indefensible.

**118.** It appears that, very late in the day (i.e. during the hearing in front of the Labour Court) some six or seven years later, Ms. Ni Dhuinn admitted that Mr. O’Suird was cleared of all those “charges”. This is an entirely unacceptable situation. If Ms. Ni Dhuinn did not

believe she could prepare a comprehensive report – as she clearly could not - then she should have dropped these changes at the earliest possible opportunity but she did not.

**119.** It was submitted by counsel on the part of Ms. Ni Dhuinn and the Board of Management, that she was only a volunteer and could only work at weekends or in the evenings. That, with respect, is not even remotely a defence, in circumstances where she brought disciplinary proceedings to destroy the career of the existing principal.

**Response by Mr. O’Suird to the letter of the 29<sup>th</sup> May, 2013.**

**120.** The INTO replied promptly on 11 June 2013 to Ms. Ni Dhuinn, protesting against the ongoing and unwarranted delay by Ms. Ni Dhuinn and the Board in bringing this matter to a conclusion. The letter also states:

*“Of even more concern now however is that the content of the letter of the 29<sup>th</sup> May, 2013 (and indeed the earlier letter from Mason Hayes & Curran of 13<sup>th</sup> March, 2013) which clearly confirm that you/the Board of Management have been maintaining Mr. Swords on administrative leave for the sole purpose of facilitating a retrospective trawl through school matters in an entirely unfair and prejudicial manner so as to construct a new and separate case against him to keep him out of the school. We entirely object to this action by you and the Board of Management of Gaelscoil Moshilog which is wholly unfair, entirely prejudicial and totally exploitative of both Mr. Swords and the administrative leave facility.*

*Your letter of 29<sup>th</sup> May, 2013 refers to matters which allegedly arose as far back as 2002/2003 well over ten years ago – and it is simply outrageous that you/the board are proposing to raise these alleged matters now in the context of a disciplinary hearing in circumstances where no such issues were ever raised at any time when Mr. Swords was placed on administrative leave in January 2012 for an entirely unrelated matter.”*

**121.** As the Labour Court subsequently found – correctly in my view - it was entirely wrong and unreasonable for Ms. Ni Dhuinn and the Board of Management to continue to keep Mr. O’Suird on administrative leave throughout this period of time whilst they carried out the investigation into these matters – until they suspended him in May 2013. What should have happened is that Ms. Ni Dhuinn should have completed the school’s report into the single child incident as quickly as possible i.e. within a period of two to four weeks and restored Mr. O’Suird’s position as school principal by no later than the end of January 2013.

**122.** If Ms. Ni Dhuinn wished then to investigate other matters in the school, such as the enrolment figures, she was, of course, completely at liberty to do so - provided Mr. O’Suird was back in position. She could then have carried out this investigation at her leisure and sought Mr. O’Suird’s input into these matters at the very start. Once she had completed her comprehensive report on this matter, she could then have brought the matter to the Board of Management, initiated a disciplinary hearing and if the Board of Management were of the view that it amounted to misconduct, it could then as a sanction consider suspending Mr. O’Suird at that time.

**123.** The procedure adopted by Ms. Ni Dhuinn and the Board of Management was, in the view of the Labour Court – correctly in my view - entirely unacceptable and a clear and obvious breach of his rights under the Circular. The fact that Ms. Ni Dhuinn and the Board of Management thought for a moment that their conduct in this regard was reasonable or acceptable is simply extraordinary.

**124.** It is clear that Mr. O’Suird put the school on notice of these concerns. The letter from the INTO dated 11<sup>th</sup> June, 2013 stated: *“Mr. Swords is entitled to have this matter dealt with in accordance with fair procedures, due process and natural justice”*. They objected to the *“wholly prejudicial approach being adopted by you/the Board of Management ”*.

**125.** Ms. Ni Dhuinn replied to the letter on the 20<sup>th</sup> June, 2013 saying that she appreciated that the allegations against Mr. Swords “are serious” and that he required time to consider the allegations. Therefore she said she had decided to defer the disciplinary hearing from 22<sup>nd</sup> June to 7<sup>th</sup> September, 2013.

**126.** She said:

*“With regard to the allegations against Mr. Swords in relation to the enrolment of non-existent students in 2009/2010 school year, I confirm these allegations were first brought to my attention by the deputy principal [Ms. Ni Shuilleabhain ] and the class teacher most directly involved in the matter. Following receipt of these serious allegations in May it became necessary to check the school records which disclosed further discrepancies as set out in my letter to you of the 28<sup>th</sup> May, 2013”.*

**127.** Counsel for Mr. O’Suird submitted to this Court that this statement by Ms. Ni Dhuinn, that she only received the serious allegations in May 2013, was entirely disingenuous if not downright untruthful. I agree with this submission. It is accepted that Ms. Ni Dhuinn, in fact, was made aware of these allegations in January 2013. This statement from Ms. Ni Dhuinn that she had only received these serious allegations in May 2013 was entirely disingenuous and untruthful. She had received notice of these allegations in January and was trying to cover up her delay.

**128.** On 31<sup>st</sup> October, 2013, the INTO wrote to Ms. Ni Dhuinn referring to her letter of the 29<sup>th</sup> May, 2013 and asking her where was the “further comprehensive report” in relation to the other eight allegations - apart from the allegation in relation to the false enrolment figures in 2009. The letter indicated, not unreasonably, that Mr. O’Suird could not possibly be expected to defend himself against allegations when he had no idea what were the underlying facts on which those allegations were based. Ms. Ni Dhuinn at all times failed to prepare a



comprehensive report as she was required to do under Circular 60/2009 in relation to these eight allegations.

### **The Mags Jordan report**

**129.** In response to letters complaining about various matters, Ms. Ni Dhuinn wrote to the INTO on the 17<sup>th</sup> May, 2014, - almost one year after her “suspension” letter - stating as follows:

*“I fully accept that the principal is entitled to have this matter dealt with in accordance with fair procedures, due process and natural justice. Given the seriousness of the issues arising in relation to the alleged fraudulent misrepresentation of the position with regard to the non-existent children on the school rolls, I have decided to defer the further comprehensive report I propose to bring to the Board of Management until such time as this complex issue regarding enrolments has been decided. I consider that to be in the interests of all concerned. I also made it very clear in my letter to you of 29<sup>th</sup> May, 2013 that the disciplinary procedures initiated at stage 4 of the disciplinary procedures were purely in relation to the apparent enrolment of eighteen non-existent pupils in the school in 2009. I accept that you require further information in relation to enrolments during other years cited in that letter and I have provided that additional information and clarification in this response.”*

**130.** This long and detailed letter for the first time set out some more detail in relation to the enrolment figures over a number of years from 2002 to 2010. In this letter Ms. Ni Dhuinn reiterates her concern about “non-existent pupils” and that she feared that “*what has occurred amounted to a fraudulent misrepresentation of the position to the DES*”.

**131.** I would note a number of points in passing. First, the decision by Ms. Ni Dhuinn to “defer” the comprehensive report in respect of all other allegations was not an appropriate

step to take. Ms. Ni Dhuinn had a duty under the circular to finalise her comprehensive report immediately so that all allegations were before the disciplinary panel of the Board of Management and so that Mr. O'Suird could respond to all allegations together. In the alternative, Ms. Ni Dhuinn and/or the Board of Management could have decided not to proceed with all other allegations and/or cleared Mr. O'Suird of all these allegations. By proceeding with the disciplinary hearing on the enrolment issue of 2009 whilst leaving all these other matters outstanding, Ms. Ni Dhuinn essentially tainted the disciplinary hearing with entirely prejudicial charges made against Mr. O'Suird (charges which he regarded as absurd) but which he had no opportunity to rebut and allegations which were eventually withdrawn years later in the Labour Court.

**132.** It is also clear, from the information presented in this letter, that Mr. O'Suird was being presented with the information about the enrolment issue "in dribs and drabs" and that the "comprehensive report" required by Circular 60/2009 had not been prepared by Ms. Ni Dhuinn properly.

**133.** On 24<sup>th</sup> March, 2014 Ms. Ni Dhuinn had written to the INTO saying:

*"I enclose for your information a copy of a recently received report referencing an incidental inspection carried out by the Department of Education and Skills Inspectorate Division B at Gaelscoil Moshiolog. The report refers in the main to the Inspectorate's findings regarding the validity of enrolment of pupils and the maintenance of official school records – school register, daily report book and roll books in Gaelscoil Moshiolog".*

**134.** This report was prepared on 17 January 2014 by Ms. Mags Jordan, an inspector in the Department of Education. It was addressed to the Assistant Chief Inspector in the Department. It appears to be a report based on an examination of the school records in the school. It also appears that these books and records were furnished to the Department by Ms.

Ni Dhuinn as she alerted the Department to the issue. In any event, this report was only forwarded to Mr. O'Suird and his legal team two months later. No explanation was given for the delay.

**135.** INTO replied on behalf of Mr. O'Suird on 15<sup>th</sup> September, 2014 stating that Mr. Swords was entitled to have the further report and the details of the charges well in advance of the proposed hearing and to be given an opportunity to respond.

**136.** Ms. Ni Dhuinn replied on the 29<sup>th</sup> September, 2014 and astonishingly stated that:

*“With regard to the other issues raised in my letter to you of 29<sup>th</sup> May, 2013 which you have requested be addressed in the context of the current disciplinary procedures, this matter has already been addressed in previous correspondence. None of the matters to which you refer has been made the subject of a disciplinary charge and for that reason it would not be appropriate that they be investigated as part of the current disciplinary investigation”.*

**137.** This letter by Ms. Ni Dhuinn was not only disingenuous but entirely misleading. The letter of 29<sup>th</sup> May 2013 had specifically stated that it was her intention to submit a *“further comprehensive report to the Board of Management in relation to the other serious issues that have arisen in the school”*. The letter of the 17<sup>th</sup> May, 2014 – only three months earlier had stated: *“I have decided to defer the further comprehensive report I proposed to bring to the Board of Management until the issue of enrolments had been decided.”*

**138.** It is quite clear from the letter of the 29<sup>th</sup> May, 2013 that the eight allegations against Mr. O'Suird were the subject of a disciplinary charge.

**139.** Robert Dore of Dore Solicitors came on record for Mr. O'Suird on 15<sup>th</sup> October, 2014.

**140.** On 3<sup>rd</sup> November, 2014 (i.e. two days before the disciplinary hearing) Mason Hayes & Curran wrote to Mr. Dore and stated as follows:

*“For the sake of clarification the disciplinary issues under investigation by the Board of Management are set out in the letter from the chairperson of the Board of Management to the INTO dated 17<sup>th</sup> May, 2014. This letter makes it clear that what is under investigation are the enrolment returns to the Department of Education and Skills for the 2008/2009 and 2009/2010 school years in particular.”*

**141.** The letter also stated:

*“The chairperson is ‘particularly concerned about the pupil numbers returned in 2008/09 and 2009/10. If my concerns are substantiated I fear that what has occurred has amounted to a fraudulent misrepresentation of the enrolment position over two years. On foot of this misrepresentation of the enrolment position over two years (if that is what it turns out to be) the DES sanctioned an administrative principal in 2008/2009 and an additional teaching post in 2009/10 to which the school was not entitled”.*

*“Therefore the allegation against your client is that he fraudulently misrepresented the enrolment returns to the Department of Education and Skills in 2008/09 and 2009/10 school years and that this resulted in the Department of Education and Skills sanctioning posts in both school years to which the school was not entitled”.*

**142.** Mr. Dore objected to this letter stating that the Board of Management letter to the INTO dated 17<sup>th</sup> May, 2014 had stated in clear terms that the allegations were only in relation to the “apparent enrolment of eighteen non-existent pupils in the school in 2009”. Mr. Dore objected to the Board of Management seeking to expand the scope of the disciplinary hearing beyond the 2009/2010 figures.

**143.** Mason Hayes & Curran replied the following day to state that “we confirm that the disciplinary hearing this evening will only address the alleged fraudulent misrepresentation of the enrolment figures in the 2009/10 school year”.

**144.** Thus the sole allegations (in relation to the enrolment figures) before the Board of Management disciplinary hearing purported to be the enrolment figures for 2009/10 and whether Mr. O’Suird fraudulently represented the enrolment returns to the Department of Education and Skills for that one year. (The other eight allegations were however still in existence – including the single child incident).

**The disciplinary hearing before the Board of Management**

**145.** The first disciplinary hearing was conducted over three days - on 5<sup>th</sup> November, 2014, 8<sup>th</sup> April, 2015 and 2<sup>nd</sup> June, 2015. Mr. Malcolm Byrne, a member of the Board of Management, was appointed as chairman of the disciplinary hearing. In addition to Mr. Byrne, the disciplinary panel consisted of Mr. Alan O’Neill (the parents’ representative on the Board of Management, Ms. Nola Farrell (a community representative on the board), Ms. Avril Forest (a Church of Ireland representative on the board) and Ms. Nicola Dempsey (also a parents’ representative).

**146.** Ms. Ni Dhuinn assumed the role of prosecutor in the process, presented the evidence, cross-examined the various witnesses and made submissions. She did not participate in the Board of Management as a voting member.

**147.** Mr. O’Suird was represented by Robert Dore Solicitor. The Board was represented by Mason Hayes & Curran.

**148.** The witnesses presented by Ms. Ni Dhuinn to the Board of Management at the first disciplinary hearing were as follows:

1. Ms. Ni Dhuinn herself.
2. Ms. Ni Shuilleabhain.
3. Ms. Caroline Griffin, another teacher at the school.

### **Evidence of Ms. Ní Dhuinn**

**149.** The central allegations in Ms. Ni Dhuinn's evidence to the disciplinary hearing before the Board of Management were as follows:

- (i) that Mr. O'Suird had presented false and exaggerated number of non-existent pupils in the school as at 30 September, 2009 to the Department of Education;
- (ii) that these figures were used to calculate the capitation grant to the school and the number of teachers to which the school was entitled in the following school year;
- (iii) that as a result of these false enrolment figures, the school had received an extra teacher;
- (iv) that this was a fraudulent misrepresentation to, and a deception on, the Department;
- (v) that Mr. O'Suird had personally benefitted from this fraud because his salary had increased when the school received the extra teacher.

**150.** Ms. Ni Dhuinn in her submission said that

*"Having investigated the returns that were inserted for 30<sup>th</sup> September and having spoken obviously to Niamh Ni Shuilleabhain and also to the class teacher Caroline Griffin and taken on board their statements that you do have a copy of, and I also have a copy of them here, it became evident that those children were not attending school at that time.*

*So as chair of the Board of Management that would raise my concern and if that concern is to be substantiated I would see that potentially that is a fraudulent misrepresentation of the number of children actually attending school. Now the consequence of that is that the school would have received capitation for children who are not physically attending the school at the time and capitation which the*

*school would not be entitled and as chair of a Board of Management and as any member of the board sitting here or any previous member of the board would know, that would be a serious issue for the board because capitation comes from the exchequer and is on the basis of children who are actually attending school at the time. You are not entitled to capitation if the child is not attending school. Though the school budget is to receive capitation. It is a payment from the Department of Education per head that actually is in attendance at the school and the capitation that this school received at that time was in excess of what it was entitled to. That is one of the big concerns and it is obviously something that we want to discuss further at a later stage and again this would be the Department themselves that looked into this.”*

**151.** Ms. Ni Dhuinn continued that

*“if the numbers are not met on the 30<sup>th</sup> September that the post would then be suppressed, teachers should be returned to the panel and the school then has to continue without the services of that teacher which may involve classes being amalgamated, greater size in classes at different times, whatever arrangement that the school makes. The principal would have made those decisions. So our main concern is that the children that were entered on the roll, the eighteen children that I have just read out were not physically in attendance at the school at that time. This led to the school retaining a teaching post to which it was not entitled. It also led to the school receiving capitation to which it was not entitled which is an excess payment from the Department which potentially would have to be repaid to the Department of Education and also the returns as they were submitted directly by Mr. Swords at that time were submitted by him and would have been aware of the numbers that he was actually returning.*

*So the 2009/2010 returns are the main source of our concern as a board here. We would consider this to be of the utmost seriousness.”*

**152.** In relation to the issue of the false enrolment figures, Ms. Ni Dhuinn said she carried out her own investigation on that matter “*and it was an extensive investigation*”. She also said “*as was my duty, I was duty bound I reported the findings of that investigation. I reported them to Mags Jordan who is the district inspector and to Margaret Condon the assistant chief inspector and Mags Jordan came to the school, removed the roll books from the school, took them to the Department of Education and they were replaced with new roll books at that time and the Department then carried out an investigation across the roll books and that is the document to which you just referred. That is the Department of Education independent investigation. [That] Investigation obviously is a little bit more extensive than the 2009 but for the purpose of this meeting I am just going to focus on the 2009 figures*”.

**153.** Thus Ms. Ni Dhuinn gave evidence that when these concerns about false enrolment figures came to her attention, she brought them to the attention of the Department of Education. Apparently the roll books were collected from the school by the Department in June 2013 and the Department’s report was furnished to the school in January 2014. Thus Ms. Ni Dhuinn (and the Board) issued the letter of the 29<sup>th</sup> May, 2013 to Mr. O’Suidh suspending him from his position, even though she had not prepared a comprehensive report of her own and even though she was awaiting the report of the Department of Education into this matter which did not arrive until 17<sup>th</sup> January, 2014.

#### **The Mags Jordan memo**

**154.** A copy of a document headed “*Inspectorate Division Memorandum dated 17<sup>th</sup> January, 2014*” was used at the disciplinary hearing. A copy of this document was also before the Labour Court and before this Court. It is a memorandum from Ms. Mags Jordan, Divisional Inspector of the Department of Education to Ms. Margaret Condon Assistant Chief



Inspector of the Department of Education. The subject of the memorandum is stated to be “Gaelscoil Moshiolog, Gorey, County Wexford”.

**155.** The issue is stated to be the validity of enrolment and maintenance of official school records – school register, daily report book and roll books. It then says

*“The official school records of Gaelscoil Moshiolog were examined and included entries in the school register for 185 boys and 192 girls. The following issues emerged.*

*1. Validity of pupil enrolment. Review of the official school records of Gaelscoil Moshiolog confirmed that pupils who cannot be counted towards valid enrolment were taken into account for the purpose of determining staff numbers in contravention of the annual circular issued regarding staffing arrangements in primary schools.”*

**156.** In relation to the year 2009/2010, the report indicates that the number of pupils on the roll that could not be counted towards valid enrolment for 2009/2010 were “18 to 20”. This column has a note however to say that *“re pupils marked asterisk it is not possible to determine beyond doubt the validity of their enrolment”*. Two of the pupils had an asterisk marked beside their name. Therefore, in fairness to Mr. O’Suird, these last two numbers should not be included. That leaves a figure of 18 pupils apparently on the rolls who could not be counted towards valid enrolment.

**157.** This figure of eighteen pupils were divided as follows:

Group 1 – 8 pupils.

Group 2 – 6 pupils.

Group 3 – 2 pupils.

Group 4 – 2 pupils.

**158.** The middle column identified each student or pupil by particular number. The notes to the right hand column then explains each of the groups. In relation to group 2 the notes state as follows:

*“Five of the six pupils in group 2 (excluding 122B) attended between ten and thirteen days in junior infants in September/first week of October 2009. All five pupils were re-enrolled in junior infants in 2010/2011. 122B was enrolled on 30<sup>th</sup> September, 2009 and attended on 1<sup>st</sup> October, 2009 (two days). This pupil was not re-enrolled.”*

**159.** In my view, if Ms. Ni Dhuinn and the Board of Management were to act reasonably – as Circular 60/2009 says they should, - then this entire cohort of pupils should have been removed from the allegation of false enrolment. It is clear that these pupils not only existed but actually attended the school in or about September 2009. There is no basis for saying or alleging that these pupils were either “non-existent” or that these were “fraudulent returns”. This has the effect of reducing the number of “non-existent” pupils from 18 to 12. Indeed the Labour Court was clearly not impressed by this report and accepted the evidence of Mr. O’Suird who said the number of contested pupils was only nine. In my view, there was ample evidence before it which justified that decision.

**160.** It is also clear from the evidence of the witnesses before the original disciplinary hearing, that the record-keeping systems at the school were somewhat haphazard, inconsistent and incomplete. It is difficult therefore to place any firm reliance on the official school records maintained by the school to justify allegations of fraud or fraudulent misrepresentation against Mr. O’Suird .

**161.** It is also of some importance that the height of the conclusions arrived at by Ms. Jordan (as set out at paragraph 1 of her report) are:

*“A review of the official school records of Gaelscoil Moshiolog confirmed that pupils who cannot be counted towards valid enrolment were taken into account for the*

*purpose of determining staff numbers in contravention of the annual circular issued regarding Staffing Arrangements In Primary Schools.*”

**162.** She also states at page 3 of the report:

*“The return made by Gaelscoil Moshiolog to the Department statistics section based on enrolment figures for 30<sup>th</sup> September, 2009 claimed a valid enrolment of 199 pupils providing for a principal and eight mainstream class teachers for 2010/2011 (appointment/retention figures of 193 pupils). An examination of the roll books confirmed 208 pupils on roll. However the examination of roll books confirmed a minimum of 18 pupils on roll who could not be counted towards valid enrolment for staffing purposes as detailed in table 2 below. This reduced the valid enrolment of the school for staffing purposes to a maximum of 190 pupils, below the appointment figure for the 8<sup>th</sup> mainstream class teachers. Therefore the appointment of the eighth mainstream class teacher in Gaelscoil Moshiolog in September 2010 was not warranted and was in contravention of the terms of the circular 21/2010 Regulations Governing the Appointment and Retention of teachers in primary schools for the school year 2010/2011.” (Emphasis added)*

**163.** It is interesting to note in passing that the height of the conclusion of this official departmental report was that there was a “contravention of the terms of Circular 21/2010 regulations” governing the appointment and retention of teachers in primary schools for the school year 2010/2011. There is no conclusion that there was fraud by Mr. O’Suirid. It was therefore unacceptable that Ms. Ní Dhuinn insisted in her submission that this was evidence of fraud. It was nothing of the sort. It was only evidence of a “contravention” of Circular 21/2010.

**164.** It is also notable that Ms. Mags Jordan, who apparently prepared this Department of Education report, never gave evidence at the disciplinary hearing even though her report

formed the basis for the allegations made by Ms. Ní Dhuinn. This is a matter of some significance. In particular Ms. Mags Jordan never gave evidence about

- (a) The documents she considered
- (b) How she came to her findings of fact
- (c) What conclusions she drew from that.

**165.** It is also of significance that Ms. Jordan was never made available to be cross-examined by Mr. Dore who, as is clear from the transcripts, conducted an effective cross examination of other witnesses who were present on behalf of the Board of Management .

**166.** To that extent therefore Ms. Mags Jordan's report needed to be treated with some circumspection. The Labour Court did so – and in my view, it was correct to do so.

**167.** Whilst all the formal rules of evidence which might be required in a court hearing should not necessarily be imported into a school disciplinary hearing , it is clear that the more important the hearing and the more devastating the sanction, the more it is necessary to ensure that fair procedures are adopted.

#### **Mr. O'Suird 's first defence - knowledge, consent and approval of board**

**168.** I have set out above the nature of the allegations being made by Ms. Ni Dhuinn against Mr. O'Suird which were before the Disciplinary Hearing. It is now appropriate to set out what Mr. O'Suird's defence was against these allegations of false enrolment figures.

**169.** Mr. O'Suird stated categorically - at all times and in all venues – that, whilst he had accepted that there might have been some over-statement of enrolment figures to the Department of Education, this was at all times done for the benefit of the school and with the full knowledge, consent, approval and encouragement of the Board of Management. The evidence brought forward by Mr. O'Suird proved that this was precisely what had happened. The evidence of members of the previous board - that what he did, he did with the board's full knowledge, consent, approval and encouragement - was overwhelming. Mr. O'Suird

gave such evidence as did two other witnesses who were formerly members of the Board of Management . I will set out this evidence in greater detail below. He disputed at all times that what he did amounted to fraud.

**170.** In those circumstances, it was a matter for the new Board of Management to listen very carefully to this evidence and to give it full weight. As it turns out the Board of Management entirely ignored this evidence.

**171.** It also meant that it was incumbent on Ms. Ni Dhuinn and the new Board of Management to interview members of the previous Board of Management and to get their views on this matter.

**172.** However, astonishingly, neither Ms. Ni Dhuinn nor any member of the new Board of Management, ever sought to interview a single member of the previous Board of Management on this issue and never sought to produce a single member of the previous Board of Management to give evidence at the disciplinary hearing (apart from Ms. Ni Shuilleabhain). This was an astounding evidential failure on the part of Ms. Ni Dhuinn - as the prosecutor of this complaint - and indeed of the new Board of Management as the disciplinary body investigating this complaint.

**173.** In effect, Ms. Ni Dhuinn and the Board of Management simply refused to listen to the defence offered by Mr. O'Suird and refused to countenance it or give it any weight at all despite the overwhelming evidence presented on his behalf.

**174.** This refusal can only be regarded as a wilful and deliberate refusal to fairly and reasonably listen to, and consider, the evidence put before it at the disciplinary hearing. This is in flagrant breach of Circular 60/2009 which requires it to act reasonably and fairly. It is also a flagrant breach of the procedures for natural and constitutional justice which the Board promised it would uphold. It is also in flagrant breach of Mr. O'Suird 's constitutional right to vindicate his good name.

**175.** It contributed to the finding by the Labour Court that there was an “animus” against Mr. O’Suird by the Board and Ms. Ní Dhuinn. In my view, this finding by the Labour Court was justified by the evidence and was a reasonable inference from the facts. It is clear that the Board was determined to “hang Mr. O’Suird out to dry” regardless of what the evidence was. They were not interested in the evidence. If they were, they would have engaged with it and sought to understand it. They did not.

**176.** As set out above, under the Education Act, 1998, the Board of Management is a body which has perpetual succession. Therefore insofar as Mr. O’Suird stated the previous Board of Management had full knowledge of, and consented to, his actions, it followed that the current Board of Management as perpetual successor to the previous Board of Management had to take account of such consent.

**177.** It is also the case that if what Mr. O’Suird said were true, then this was a matter for the Department of Education to take up with the Board of Management. It was likewise a matter for the new Board of Management to take up with the Department of Education. The blame rested fairly and squarely with the Board of Management not with Mr. O’Suird.

**178.** Most importantly, if Mr. O’Suird did inflate enrolment figures with the full knowledge, consent, approval and encouragement of the Board of Management, then it meant that Mr. O’Suird had sought and obtained the consent of the Board of Management for his actions. If that were so, it would be unreasonable – if not unconscionable – for the Board of Management to dismiss him, for actions which they approved and to which they consented. Such unreasonableness would therefore be a breach of Circular 60/2009 and would be unlawful.

**179.** The issue therefore of whether the previous Board knew or didn’t know, was the crucial issue before the disciplinary hearing. Ms. Ni Dhuinn knew this. The chairman of the disciplinary panel, Mr. Malcolm Byrne, knew this. Every member of the new Board of

Management sitting in judgment on Mr. O'Suird knew this. It is in that context that the evidence of Ms. Rachel Fitzpatrick, Ms. Grainne Quirke (and indeed Mr. O'Suird) is crucial and I set it out herein in some detail.

### **The evidence of Ms. Rachel Fitzpatrick**

**180.** Ms. Fitzpatrick was a member of the Board of Management of the school from 2002 to 2011 and, therefore, in 2009. From 2002 to 2003, she was the single manager of the school. She chaired the Board of Management for the first couple of years. She was also a parent who lived in Gorey and had a number of children in the school.

**181.** Ms. Fitzpatrick first gave evidence about how the school was founded. This is important to set a context for what happened. She said a notice was put up in a local paper and a number of people met up in the Loch Garman Arms pub. There was a general chat about what might be involved in setting up a gaelscoil and, arising from this meeting, a number of people stayed behind and formed a committee. Mr. O'Suird was the driving force behind this initiative; he called the meeting. Sixteen people formed the committee. They then publicised it in the locality and they got a very good response. The next goal was to look for premises. She said they received encouragement from members of other boards of management in other schools. The school started with premises in the Girl Guides Hall on Esmonde Street. It was just one room. They had children for junior infants, senior infants and a few pupils in first class. They had fourteen infants in September 2002. The Board of Management was established in 2003. In 2003 they moved to the GAA grounds where they had initially one prefab and then two prefabs.

**182.** Mr. Dore then asked her about the enrolment figures as follows:

*“Question: Now were there certain conversations before September 2002 in relation to numbers?”*

*Answer: It is always talked about really.*

*Question: And in the event that there wasn't what was the position?*

*Answer: Oh, you used this little pool of children that we had as spares, that were old enough to start but we knew that they weren't going to start.*

*Question: And you knew that they would not show in school for the year that they were enrolled.*

*Answer: Yes.*

*Question: Now, just such that we can get the motivation for that, can you indicate to the current Board of Management what way were you prepared to do that?*

*Answer: Well, we had such a passion for the school. You know it consumed us day and night. I lived by my phone taking phone calls. We just wanted the best for the school. We wanted it, you know, to progress. We wanted it to thrive and it did. It absolutely did and we were just passionate, we were so passionate about the school we felt it was our baby and we done what we thought was best.*

*Question: So would it be fair to say that on the basis of representations made to you by other Board of Management members and on the basis of the best interests of your child attending the school that if there was to be what you would consider a bending of the rules that you were prepared to countenance that?*

*Answer: Oh, yes, absolutely."*

**183.** On page 143 of her evidence she stated as follows:

*"Numbers were good. The more the school grew and the longer it was established you know the more, the less kind of problems we had with numbers.*

*Question: and what was the attitude of parents and the Board of Management in relation to the development of the school?*

*Answer: oh, they were as passionate as I was, they wanted to see it grow."*

**184.** Question at page 1044:



*Question: “We will get on to that in a moment but I just say 2004 and the development I mean once again what was the attitude of the Board of Management towards enrolment figures coming into 2004 and coming into 2005 and coming into 2006, is it the same?”*

*Answer: Oh, the very same it never changed.*

*Question: So it is the situation that the Board of Management who was then the employer of Aodhagan Swords was aware of, and in fact participated in, supplementing enrolment numbers for the benefit of the children?*

*Answer: Yes, under the advice of other gaelscoils that set up and even like I said, you were never told not to by Foras just don't discuss it”.*

*“Chairperson: At any stage either you as an individual or the board did either you as an individual or the board seek the view of the Department with regard to the practice?”*

*Answer: No because I will tell you why. We were always told; we were told we were the employers of Aodhagan but An Foras were our employers basically. We only answer to them and if we had concerns and they needed to bring it further that they would go to the Department. We never bypass our patrons on anything.*

*Chairperson: You will forgive me on this because this is kind of the crucial point here around this issue but the advice that you were given, language you used was to bend the rules?*

*Answer: Well I'll be honest. I did not feel we were bending the rules. I have to say if every other school was at it then obviously – it was just like one of those unspoken, everybody knew about it but you don't take [talk about] it. But at the same time we genuinely didn't feel there was any kind of wrong in it if you get me and as regards if*

*you go back through any case that we ever dealt with we never ever went past our patron ever”.* (Page 1046).

**185.** Ms. Fitzpatrick also gave evidence that the big selling point of the school was the small numbers of pupils, the excellent teacher/pupil ratio, the great teaching which the pupils received and the great progress which each of the pupils made in this school. She stated in her evidence that there was a discussion as to whether the school should keep its numbers small but the general consensus of the Board of Management was that they did not want to deny any child a place who sought to be educated through the medium of Irish. Thus, she said, the ethos of the school was to continue with expansion.

**186.** Ms. Fitzpatrick also gave evidence that in 2008/2009 there were major developments within the school. The lease was running out on the GAA grounds and the school needed to seek new premises. When they got word from the Department that they were going to be offered a brand new school she said *“we were absolutely thrilled”.* (See page 1051).

**187.** Ms. Fitzpatrick said *“Our kids were excelling; we were getting word from teachers in schools that you could spot a gaelscoil’s child a mile away because they were so far ahead. You know their education was just amazing and we felt that it was going to be compromised because there were split classes”.*

**188.** It is clear that 2009 was an exceptional year, as in September 2009, the school was starting into its new building.

**189.** It was put to Ms. Fitzpatrick by Mr. Dore that the Board of Management meeting on the 22<sup>nd</sup> October, 2009 noted that there were 199 pupils on the rolls on 30<sup>th</sup> September, 2009 but people had left since. She was asked what did she understand that to mean. Her answer was:

*“That we were back using our old methods basically.”* (See page 1057).

**190.** It was put to her that Ms. Ni Dhuinn thought this was very serious and what was her view as the then employer. She said

*“I didn’t think it was serious at all. I mean we were advised by other schools starting up. Foras didn’t want to know about it, it like turning a blind eye. We didn’t think it was serious. We just thought it was common practice.”*

**191.** Ms. Fitzpatrick had three children in the school. The chairman asked the following question.

*“Chairperson: “Ok because this for us is the crucial question you will appreciate. So at all stages the board would have been aware of what was happening in terms of the as you say the old method, if the numbers were short it was a case of take in, take in students and they would have fallen away at all stages.*

*Answer: yes.*

*Chairperson: All members of the board would have been aware.*

*Answer: Well yes. Well I was anyway. I never thought for a second that they weren’t.*

*Chairperson: And it was never questioned by any member of the board as it to be appropriate? (Sic)*

*Answer: No, nobody ever questioned it.*

*Chairperson: And you sought advice from members of other gaelscoil boards.*

*Answer: No, we didn’t even seek it, it was given to us. I just said Oh my god what if we don’t have enough numbers and it was don’t worry about the numbers.*

*Chairperson: Ok.*

*Answer: and in fairness I never thought I had to answer to anybody only our patrons and that is Gods honest truth. That is what we were led to believe.”*

**192.** Ms. Fitzpatrick was asked:

*“I mean just to get back to the nature of Mr. Sword’s then employer, the constituted Board of Management in 2009/2010 what was the board’s view as Mr. Swords employer as to what he had done”.*

*Answer: There was no view, we didn’t think there was anything to answer to. We were happy enough to let Aodhagan do what had to be done.”*

**193.** Ms. Fitzpatrick was asked *“What is your view on the level of awareness of the members of the Board of Management at that time of that practice”* [i.e. on the enrolment figures policy and supplementing enrolment figures if necessary]

*Answer: I am very aware. It was discussed at every meeting practically. Maybe off the record but it was definitely discussed.”*

**194.** Ms. Fitzpatrick was also asked about Ms. Niamh Ni Shuilleabhain who indicated, that although she had been a member of the Board of Management , she did not recall any discussions between the principal and the Board of Management discussing enrolment figures. Ms. Fitzpatrick’s evidence was. *“Well I’ve all the time in the world for you Niamh but you were aware of what we were doing”* It is clear from the tenor of Ms. Fitzpatrick’s evidence that she believed that Ms. Ni Shuilleabhain’s evidence was untrue.

**195.** Mr. Dore asked

*“Now in fact the true position is that it was a blind eye situation, the Board of Management was fully aware and in fact the Board of Management was prepared to embrace, the members were prepared to embrace that themselves individually isn’t that correct?”*

*Answer: Correct.”* (See page 1067).

**196.** The Chairperson asked Ms. Fitzpatrick:

*“Was there ever concern expressed, the board, because Rachel what you are saying is the board were aware of what was happening. Was there ever a concern expressed or*

*a question asked about the implication of telling the Department that these were the numbers that were on the rolls but in reality that wasn't the case. Was the question ever asked by the board what are the implications?*

*Answer: Never. We never even considered the Department in any of our discussions. It was always our patron. We never thought above our patron because that is what we were told when we went on.*

*Question: Who told you not to think about the Department?*

*Answer: No, we weren't told not to think. It was just that is what – there was a train of events as in there was the principal. Like there was the principal, there was the board, there was the patron and there was the Department and we never felt the need to really talk to the Department unless we were told by our patron first and foremost but anything we ever had to do so if we were talking about numbers and worried about numbers and at the time the patron said oh, they were at the meeting when we were advised, they heard the other members of the board also telling us, they heard that, they were sitting at the table with us while they were telling us this and then at another meeting I remember getting closer to the opening of the school and I said to one of the members of An Foras oh my god we're getting nervous, what if we don't and it was don't talk to me about numbers?*

*Chairman: I suppose and this is going back to the crucial point what you are saying is that the board were fully aware of the situation, that if the board were particular members on the roll and some weren't on the roll you never chose to ask the question.*

*Answer: Never.*

*Question: And never chose to inquire what the view of the Department of Education would have been in this.*

*Answer: Never. That was never even our way of thinking.*

*Chairman: Ok, even though the Department would have been supplying significant funds to the school.*

*Answer: The department never paid me my significant funds. I never worried what the Department ... (interjection).*

**197.** In relation to the allegation of fraud, Ms. Fitzpatrick's evidence was scathing about such an allegation. She stated in her evidence at page 1050:

*"All I know is I put a lot of my own money into it. I know Aodhagan put an awful lot of his. We all did. Like I know when Niamh started, I remember you came with hundreds of euros worth of your own stuff and never got paid for it and I would have been an unpaid secretary for a year sitting by the house phone waiting for enrolments. We would have brought tins of biscuits and made cakes and we would have had bottles of wine for raffles, for the big raffle to try and raise money. That all came out of our own pockets., We were never, we never looked to be reimbursed. Our phone bills, none of it. That was all off our own back.*

*Question: There are criticisms about, we will say there is a kind of mention of fraud with regard to capitation grants what would your view on that be?*

*Answer: There is not a hope. If we were to bill the Department for what we put into the school of our own money it would far outweigh the capitation grants. That's nonsense."*

**198.** She was then asked what did she think of the situation where the newly constituted board - within three weeks of its appointment - placed Mr. Swords on administrative leave - and was investigating his actions in 2009. Her answer should have given the new Board of Management serious pause for thought. She said

*"I think it is very very harsh. I am absolutely flabbergasted to be honest. I know you come in as a new board. You weren't there from the very beginning. You know*

*obviously you are trying to; I don't know, you probably thought you knew more than I knew or whatever. You probably would have been much more aware of the rules of the Board of Management or whatever but I think you have damaged the school as a parent massively because there is a whole negativity about the school at the minute and I think that this current board is responsible for that. That is just personally. I am not saying it as a fact but that is personally how I feel. I feel if the old board, if this had come up as an issue we would have given it to our patrons and let our patron deal with it. At the minute I don't understand why all this is happening I have to say. I really don't understand. You haven't benefitted the school one iota by doing what you have done, you have actually damaged the school. This is not the school we built."*

(Page 1061) (Emphasis added.)

**199.** Ms. Fitzpatrick's evidence was crystal clear: the Board was aware in each and every year - and in particular in 2009 - that there might be a slight exaggeration of the enrolment figures. This was done in order to build the school, to progress the school, to increase the number of schoolteachers, for the benefit of the children of the area and to ensure that they all had a better education. It was motivated from first to last by a sense of idealism of a group of parents who were pioneers in their community establishing an inter-denominational gaelscoil.

#### **Evidence of Ms. Grainne Quirke**

**200.** Mr. O'Suird also called Ms. Grainne Quirke as a witness at the disciplinary hearing. She was a member of the Board of Management between 2003 and 2007.

**201.** Ms. Quirke said that the numbers of pupils at the school was the main issue that would have been dealt with at most Board of Management meetings. She said the Board would have discussed how many pupils they would need and how we were going to obtain them. She was then asked by Mr. Dore:

*Question: Describe how you were going to ensure if needs be.*

*Answer: Well obviously we have some legitimate enrolments but certainly approaches would have been made to parents, me being one of them, that if my other children could have been used to put on the enrolment as attending the school. So my next child we'll say was due to start on a certain date but she was – I enrolled her for the year previous to that even though I knew she was never actually going to attend and I was aware that there were other parents who would agree to do the same and it was something that we would have discussed openly.*

*Question: And why would you do such a thing?*

*Answer: Because we wanted the school to survive, we wanted it to grow, we were, I know Rachel used the word passionate and that is exactly how I describe it. We were passionate about it. We really, really wanted the school to survive, to grow. We wanted you know, as many people as possible to be able to go to it. It was kind of nothing we wouldn't have done sort of. You know we would have gone to any extremes to get our numbers that we needed to keep the school going.*

*Question: What did you think of the practice of enrolling students who may not attend?*

*Answer: To be honest with you like from the very word go when I joined the board it was a very acceptable practice you know and again I actually was involved subsequently with the founding of a second level school and the same practice was in place and it was very acceptable.*

*Question: Do you think that the Board of Management at that time your clients then employer, condoned that?*

*Answer: Well condone is kind of a funny word to use in that we all were implicit in it rather than condoning it. We were a part of it. Like our own children were used. So it*



*wasn't like it was just the principal who was doing it and we were saying go ahead and do it. We were a part of it". (See page 1094). (Emphasis added.)*

**202.** Again this evidence is clear about the previous Board of Management's knowledge.

**203.** The chairman then asked Ms. Quirke about whether it was a widespread practice of putting additional students on the books and she said( at page 1011):

*"When we were there we were founding a school. We were getting a school up and running. We were dealing with the day to day basis. As Rachel had said we were running around like headless chickens trying to keep the thing ticking over. Trying to do everything that we could to keep the school going. With respect the board that is here today does an awful different job than we had then. The board here actually has time maybe to do what the board should be doing. We were actually cleaning toilets. We were running the school, anything that had to be done, we were photocopying, we were actually doing the day to day running of the school and because of that we were so passionate about it that we continued on. We knew what was going on. The board knew about it and to say that because I worked in the bank I should know that the figures add up. I know the figures added up if you know what I mean but because of the manner in which we were getting them". (Emphasis added.)*

**204.** Ms. Quirke also gave evidence that one of her own children was entered on the roll on or before 30<sup>th</sup> September, 2004 but was removed from the roll on 5<sup>th</sup> November, 2004. She said she was aware that her child had been removed from the roll on that date but that she sent her child to the school the following year. This is another classic example of how the enrolment figures worked and how certain pupils were not "non-existent", as Ms. Ni Dhuinn claimed, but were initially enrolled in the school and in fact materialised in the school the following year.

**205.** Ms. Quirke also gave other important evidence when she said:

*“The other thing as well was that for the school to get its permanent recognition we needed X amounts of students. So it wasn’t necessarily about capitation or getting teachers or getting anything. It was actually so that the school would continue to run, I suppose you know and be viable because you have to stay in operation for I don’t know how many years before you are actually deemed viable.”*

**206.** Again this evidence is illustrative in my view, that there was no fraudulent intention here by either Mr. O’Suird or indeed by the then Board of Management . For it to be characterised as a fraud or fraudulent misrepresentation is a gross distortion of the truth by Ms. Ni Dhuinn, and also by the chairman of the Board of Management Disciplinary Panel.

**The evidence of Mr. O’Suird.**

**207.** Mr. O’Suird also gave evidence on this matter. He also gave evidence about how the school was founded. He put an advertisement in a local newspaper; a meeting was called; a lot of people attended. An initial committee was set up. It met every Tuesday night for about two years. It had to consider what sort of patronage it would have and what sort of ethos the school would have. He said they decided on “an inter-denominational ethos, very specifically Roman Catholic, Episcopalian, Church of Ireland. We decided our patron would An Foras Patrúnachta Scoileanna Lan Ghaeilge”. The school moved to two prefabs in the GAA grounds and developed from there. Over the years 2002 to 2009 the school increased in size. It went from two prefabs to six or seven prefabs.

**208.** Mr. O’Suird also said in his evidence that he could not be more exact about dates because *“Again I wasn’t given access to my diary, I wasn’t given access to my office, so if I’m coming across that I am inexact it was because I looked for access and I looked for records and I wasn’t given them”*.

*Question: - that was denied to you?”*

**209.** Again, I find it extraordinary that Mr. O’Suirid was denied access to these very basic items so that he could prepare for his defence before he was dismissed from his position.

**210.** Mr. O’Suirid was asked about his relationship with the Board of Management through those years. He said:

*“It was great. We would have regular meetings and any of you who know Grainne or Rachel or lucky enough to know Paul Sheridan or Catriona Dickson, these are very strong people so they had very fixed views, very strong views or issues would come up and they would be discussed and they would be discussed at length. The first year too and again I apologise for my vagueness but I didn’t get any access to records and diaries where it might have helped me out, it was my practice when we had meetings that the meetings of the previous meeting would be written up as gaeilge usually.”*

(Page 1184).

*Question: Did you work hand in hand with the board at every turn?*

*Answer: Absolutely there was no secrets [sic]*

*Question: There was full transparency.*

*Answer: Absolutely.*

*Question: Specifically in relation to taking on new pupils and enrolments, that you worked hand in hand with the board?*

*Answer: Oh god could not have done it without them. They were trojan.*

*Question: It was fully transparent, everybody knew?*

*Answer: Yes.*

*Question: What was happening?*

*Answer: Yes.”*

(Page 1185).

**211.** Mr. O’Suirid was then asked a final question by Mr. Dore.

*“Question: Can I just ask you one final question. Are you satisfied that the Board of Management your then employer was fully aware of what you were doing, that there was complete open transparency between you?”*

*Answer: Not a list of names yeah, they were aware. They weren't aware of exact specifics. But is this board aware of everything yes, they were aware.”* (Page 1270).

212. Again, this evidence could not have been clearer: the Board knew.

**Mr. O’Suird’s second major defence – the issue of reporting enrolment figures was a grey area at the time and he sought advice.**

213. Mr. O’Suird’s second major defence to this allegation was that the manner in which a principal of a school had to account for pupils enrolled in a school was a “grey area”, that there was conflicting guidance given by the Department’s circulars and the provisions of the Education (Welfare) Act, 2000; that he had sought advice from appropriate bodies dealing with these exact issues and that their advice was that he had to return the number of pupils actually enrolled in the school to the Department, even if they were not attending at end September of each year.

214. It was argued by Ms. Ní Dhuinn that Mr. O’Suird had made returns including at least eighteen “non-existent” pupils. The use of this phrase “non-existent pupils” clearly conveyed the impression, and was intended to convey the impression, that Mr. O’Suird was simply making the figures up, that he was conjuring pupils out of thin air and thereby deliberately falsifying the enrolment figures for fraudulent purposes. As will be seen this was not true.

215. In order to deal first with the allegation of “non-existent pupils” supposedly enrolled in the school, it is necessary to consider the evidence on how pupils actually were enrolled in the school.

**The enrolment of pupils in the school**

**216.** Mr. O’Suird gave evidence about the enrolment of pupils in the school – which evidence was uncontroverted. He said there were two ways in which parents could enrol their children in the school.

**217.** The first enrolment process was where parents of their own accord would fill in enrolment forms and send them into the school. The second process was an “Open Day” at which parents and their children would attend an open day to see if they liked the school and whether it might appeal to their child. If they did, the parents then submitted an enrolment form.

**218.** Mr. O’Suird said that all parents were interviewed and he always said to the parents that they were to consider whether the school, which taught everything in Irish and which was a Christian, but inter-denominational school, was the right school for their child. He said that he wanted parents who were committed.

**219.** Mr. O’Suird said that when he received the enrolment forms from parents enrolling their children to go to the school on the following 1<sup>st</sup> September of each year, these children were then formally enrolled on the rolls of the school. He said in his evidence that there was never a situation where a child appeared on the roll of the school for whom no enrolment form had been sent in. He said that he was the person who reviewed the enrolment forms, and after they were reviewed, he left them in the office with the school secretary. Further lists were then generated from these enrolment forms.

**220.** It is clear therefore from this - and other evidence – that the 12-18 pupils who were described as “non-existent” were nothing of the sort. They were real pupils whose parents had properly sought to have them enrolled in the school and whom Mr. O’Suird had properly enrolled in the school.

**221.** It also appears in this case that the enrolment forms for the school for 2009 were lost or mislaid. Some were available but not all. It is reasonable to assume that in fact all of the pupils were properly enrolled in the school at the time because their parents filled in enrolment forms, even if they never subsequently attended. Ms. Ni Dhuinn accepted under cross examination that it was possible that enrolment forms were received in respect of all of the children in the year 2009/2010. (See transcript page 76) (page 946 of the papers).

**222.** Ms. Ni Dhuinn also accepted in her cross examination that the enrolment forms were “all in disarray”. In these circumstances, it is more likely than not, given that these were actual names of actual students (and not “non-existent” pupils as Ms. Ni Dhuinn asserted) that parents of these pupils had actually enrolled their children at the school but, for whatever reason, these children did not appear at the school at the start of the new school year

**What happened the pupils after enrolment?**

**223.** The question then arose as to what happened if certain enrolled pupils did not attend the school on 1 September or in the weeks that followed.

**224.** Mr. O’Suird’s -again uncontroverted – evidence was that, in some cases, some pupils might not have attended the school on 1<sup>st</sup> September or in the weeks that followed. This might have happened for a variety of reasons e.g. if the parents decided to send the child to a different school, or if the parents decided to delay their child starting primary school. In certain cases, a family might have moved away. In some cases, a child might attend for a few days and then be moved or taken out of the school.

**225.** Mr. O’Suird’s evidence was that this clearly caused an administrative problem for him as principal of the school. In particular it caused a problem when he had to submit the official enrolment figures as at 30 September 2009 (and each year) to the Department of Education.

**226.** Mr. O’Suird’s evidence was that how this was to be handled by a principal was a very grey and uncertain area. He said that, on the one hand, the circulars from the Department said that such children (who were enrolled but who were not attending) were not to be included in the enrolment figures; on the other hand – and this is of great significance – the Education (Welfare) Act, 2000 provided that if a school had enrolled a child for September and that child remained on the roll as at 30 September, that child could not be removed from the roll until the school had received notification from another school that the child in question was now enrolled in that other school.

**227.** Mr. O’Suird then did what any sensible or reasonable school principal would do: he sought advice on how to deal with this issue from the INTO, the Irish Primary Principals Network (“IPPN”), and the National Education Welfare Board (“the NEWB”). The advice from these bodies, according to Mr. O’Suird, was clear: once the pupils were on the rolls they must stay on the rolls.

**228.** He was then asked what would he have done in the event that 30<sup>th</sup> September came along and children had not shown up during the course of that month. His evidence on this was of crucial importance. He answered:

*“Well you are in a dilemma, the Department of Education’s circulars 2006, 2007, 2008 whatever, said you should not be counted for enrolment and that is what the circular said. But the NEWB was saying once they are on your roll they must stay on your roll. The Education and Welfare Act never spoke about a difference between a register and a roll. It only spoke about enrolments, that is the only word that was used. That was a big dilemma and what were we going to do. I would have taken advice; I would have talked to people like Evan, I would have talked to people in the INTO. I would have talked to the NEWB. I would have talked to the IPPN (“Irish*

*Primary Principals Network”). I would have chatted to other people what was going on.*

*Question: What was the upshot of all of that advice?*

*Answer: The upshot of that was that there is a very grey area there. That basically do what is good for your school, you must do what is good for your school and the best for the children. The other thing was it was really noticeable that when I started teaching in 1980, the first thing an inspector would do is come in, they would look at your roll book and they would initial it. When I was appointed principal in Boolavogue I had no training in the rolls and I went to Maura Sinnott in Loreto to show me how to do it....but around that time the inspector stopped looking at roll books, it was just they didn't*

*Question: well I mean the rules changed in 2000.*

*Answer: They did but the Department were still saying should. In 2003 the wording changed to 'must'. It was a big change from 'should' to 'must'. My advice from people was well there is a big grey area there. There is a query and I would have – the board would have been aware; members of the board would have been aware. They might not have been as intimately aware as I was but it was made known to them. The circular was given to them. There were questions that they might have asked. As well as that the inspectors they weren't looking.” (See page 1190).*

*Question: Apart from that though I mean pursuant to 2000 legislation, is it your understanding that if you had enrolled a child for September and that that child had remained on your roll on 30<sup>th</sup> September that you were obliged to leave the child on the roll until you got notification from another school that the child was placed there.*

*Answer: Yes.*

*Question: That was your understanding.*



*Answer: Yes. And that wasn't clarified until the 2013 [Circular].*

**229.** Mr. O'Suird was also asked by Mr. Dore, his solicitor, about the board's knowledge of the enrolment figures in 2009.

*Question: In doing that were you acting on your own initiative or were you acting with the full knowledge and cooperation of the Board of Management ?*

*Answer: The board knew everything.*

*Question: And cooperated?*

*Answer: And cooperated.*

*Question: So insofar as you are concerned, your employer for those years was fully aware of what was happening and you were never told not to do it. You were in fact encouraged to do what was necessary to develop the school?*

*Answer: I would say it wasn't just accepted I think it was expected. It wasn't just accepted and expected by my board you know a culture where things are not said?*

*Answer: We know that there are things you do and things you don't do. There was a culture in gaelscoil that if you needed it you did it. The 2009 Act made it very easy.*

*Question: It muddied the waters?*

*Answer: It certainly muddied the waters."*

**230.** Mr. O'Suird also gave evidence that in 2008/2009 it was a particularly hectic year because they were suddenly told that the Department was building a new school for them. He said the excitement of a new school and a new building was extraordinary and it was being built that summer. He gave the following evidence:

*"If you remember that was a rotten, dirty, wet summer and I was in here almost every day helping with the – meeting people. The school was built and we moved in on 1<sup>st</sup> September. But there was such panic to get stuff in, there was a child in the school in a wheelchair, we needed a changing bench and that was being left outside and it*

*wasn't being moved in. I said it has to come in. I put it in the lift and brought it up and I gave myself a very bad hernia. I had to be operated on sometime in December. I was not meant to come back for twelve weeks but like an eejit I came back before that."*

**231.** In relation to the 2009, 2010 enrolment figures and their possible over-statement Mr. O'Suird gave this evidence.

*"Question: Was the Board of Management fully aware of what was going on?*

*Answer: Yes. It may not have been discussed explicitly as in this is what is going on and this is what we are going to have to do but it was known it was well known.*

*Question: The board was fully aware?*

*Answer: The board was fully aware and the board had been given circulars and would have read them. I would have expected them to have read them.*

*Question: Did you go through your normal procedure then of enrolments, did you get in your parental forms?*

*Answer: That is how the list would have been generated.*

*Question: on the basis of those forms the roll was written up on 1<sup>st</sup> September?*

*Answer: Yes.*

*Question: And after rigorous interview of parents who were new to you?*

*Answer: Yes. And that would have happened say January, February, March. I would need to see the forms because the forms would have been filled in and there would have been a date put on them and then there would have been another date written in when they were received back to the school." (Page 1196).*

**232.** Mr. O'Suird said in his evidence that in respect of all eighteen of the pupils in dispute in 2009 set out in Ms. Mags Jordan's report he would have received an application form/enrolment form in respect of each of these children. (At page 1097).

**233.** He was then asked:

*“On the basis of that, they were listed on the rolls for the 1<sup>st</sup> September that year and in compliance with the 2000 Act they remained on the rolls after 30<sup>th</sup> September of that year isn’t that right?”*

*Answer: yes.*

*Question: This is the specific complaint that is being made against you, this is what you are being accused of, effectively being accused of fraud which is a very very serious allegation. You are accused of fraudulent misrepresentation by Ms. Ni Dhuinn, what do you say in relation to that?*

*Answer: I reject it.”*

**234.** Mr. O’Suird was then asked about the 2009/2010 enrolment figures by Mr. Dore.

*“Question: To get to the core issue in relation to the 2010 enrolment figures in your view you have done nothing wrong?”*

*Answer: No. What I did was – I am making this very black and white but look it, the NEWB said if a child is registered they are registered, they are enrolled. There was no difference between on a roll and being on a register, it is enrolled. The Department of Education was making a distinction between the roll book, valid enrolments and ones on the register. So I am getting advice here, I am getting advice there, so you take the advice that goes to the benefit of the children in your school.*

*Question: And this is what you did?*

*Answer: That is what I did. I did that with the full knowledge of my board.*

*Question: You heard Mr. O’Reilly’s evidence where he said that he did not feel that anything that you did merited sanction and I presume you agree with that.*

*Answer: I would say that wouldn’t I? Yes, I do agree and I strongly agree with it.”*

**235.** Mr. O’Suird also gave evidence as to why the children remained on the rolls after 30<sup>th</sup> September, 2009 as follows. He said:

*“There were directives from the NEWB; if they have attended and are registered you cannot take them off. And the Education Act only talks about enrolled. It doesn’t talk about rolls and registers. The Department is talking about two different types of enrolment. There was enrolment where there was only on the register and enrolment where they were on the roll. Then this – the 2013 Circular said that they had reached agreement with the NEWB as regards to what it was. So Melanie [Ms. Ni Dhuinn] they were put down because we believed under the 2000 Act and directions from the NEWB that these children were validly enrolled, despite what the Department of Education was telling us. And that was in the context of knowing that there was a huge amount of schools doing it. For instance if a child moved to my school from another school and I rang the principal and said Malcolm Byrne has just enrolled in fifth class they would say ‘do me a favour don’t send that letter until October’.”* (Page 1245 of the papers supplied to this Court).

**236.** The importance of this evidence is that it is clear that there was a genuine difficulty and confusion about the proper interpretation of the Education (Welfare) Act, 2000 and whether pupils who were enrolled on the 30<sup>th</sup> September should remain enrolled after that date if not attending. Mr. O’Suird is not responsible for the confused state of the law. That is a matter for the Oireachtas and the Minister for Education. Moreover there appeared to be some form of confusion about “rolls” and “registers”. Again Mr. O’Suird cannot be held accountable for these confusions which are not of his making.

**237.** In response to a question from the chairman Mr. O’Suird was asked why did he record eighteen names on the roll on the September returns in 2009/2010 and he said:

*“I did it for the benefit of the school.”*

*Question: do you believe that you are correct in doing that?*

*Answer: I don't believe I was incorrect.*

*Question: Ok ok, do you believe*

*Answer: Grey area, Malcolm and it was obvious that somebody drafting the legislation had not taken cognisance of registers and roll books in primary schools.*

*Question: But for the purposes of the October returns, because this is crucial, the October returns are to the Department of Education, why was it a grey area for the Department of Education? There is a requirement in terms of the returns that go to the Department of Education and they have a requirement in October for specific returns.*

*Answer: Because they were talking about enrolment and valid and not valid. The 2000 Act only talks about enrolment. You cannot remove them until you know where they have gone.*

*Question: Ok.” (See page 1260).*

*“Question: You had a requirement to go to the Department, the rolls, and you would have signed off on those with the chairperson and the chairperson was aware.*

*Answer: And the knowledge of the board.*

*Question: And full knowledge of the board.”*

*(Page 1260).*

*“Question: Do you believe the board and I think you did say it earlier, fully understood the ramifications of what you were doing.*

*Answer: It wasn't hidden. They were not stupid. I believed everybody knew.”*

**238.** Mr. O’Suird also said that in the case of the eighteen children in question when they had not turned up at any stage in September he would have made phone calls or tried to contact them to find out what had happened in respect of some but not all of them.

**239.** Mr. O’Suid’s evidence (and the evidence of Mr. Brian O’Reilly) was that it was difficult to understand the differing requirements of the circulars, (i.e. the annual circulars dealing with enrolment), the requirement of the Education (Welfare) Act, 2000 and the provisions of Rule 108 of the non-statutory rules of the Department of Education.

**240.** There were therefore three entirely separate matters to be considered by Mr. O’Suid and the Board of Management in September 2009. These were:

- (1) The annual circulars circulated to each primary school each year e.g. primary circular 002/2009 and in particular circular 0002/2009.
- (2) The provisions of the Education (Welfare) Act, 2000.
- (3) Rule 108 of the 1965 non-statutory rules.

**241.** In addition to the various regulatory layers, there was also considerable confusion about the rules and requirements for the maintenance of the register, the roll book and the daily attendance book. There was also clearly confusion about which of these three documents was to be regarded as “the register” for the purposes of section 20 of the Education (Welfare) Act, 2000.

**242.** In the present case, it appears that the Education (Welfare) Act, 2000 required, as a matter of law, that once a child was registered in a school his/her name had to remain on the register until such time as the principal of the school has been notified in accordance with the Act that the child was registered in another school or was registered with the NEWB.

**243.** In those circumstances, when Mr. Ó Suid received valid enrolment application forms from parents of a child and entered those children on the school register as pupils - as he was entitled to do - then that child’s name had to remain on the register until such time as the principal was notified that the child was registered in another school or was registered with the NEWB.

**244.** In the present case therefore, in respect of nine pupils whose existence at the school was contested by the Department of Education and Ms. Ní Dhuinn, it appears that:

1. There were valid enrolment forms for each of those pupils.
2. Mr. O'Suird was therefore entitled to enrol these pupils on the school rolls/register for the 1<sup>st</sup> September, 2009 for the 2009/2010 year.
3. Whilst it might be the case that some of these pupils did not attend for the month of September 2009 and therefore could be regarded as not being present, Mr. O'Suird appears to have had a legal obligation under the Education (Welfare) Act to keep these pupils on the school rolls until he had specifically been notified in accordance with the Act that the child was registered in another school or was registered with NEWB.
4. It follows therefore that if Mr. O'Suird was not so notified that he had a statutory obligation to retain those children on the school rolls.
5. If that were the case, then the returns which had to be prepared as at the 30<sup>th</sup> September, 2009 had to include those children's names. If that were the case, then the returns which Mr. O'Suird made were returns which were properly made in accordance with the legal obligations of the principal and the Board of Management and the school at that time.

**245.** It is clear that the circulars and the provisions of the Education (Welfare) Act, 2000 created a very unclear environment in which Mr. O'Suird had to operate.

**246.** In those circumstances, the understanding of the National Educational Welfare Board (NEWB) and the understanding of fellow school primary principals ("IPPN") was of fundamental importance in understanding the context in which Mr. O'Suird was operating. Mr. O'Suird gave clear evidence that he consulted with fellow primary school principals, he consulted with the Irish Primary School Principals Network, he consulted with people from

the National Educational Welfare Board and was advised by all of these parties as to the appropriate way in which to conduct the enrolments. He followed this advice at all times.

247. In addition of course, everything he did, he did with the full knowledge, consent, encouragement, participation of his Board of Management .

248. The question therefore is not whether Mr. O’Suird was right or wrong but rather whether his actions in completing the said enrolment figures and making such returns to the Department of Education were “reasonable” in the circumstances and whether his detailed explanation and defence of his actions amounted to a reasonable defence of his actions such that he merited at worst, as he says, “a rap on the knuckles” but certainly not suspension for three and a half years and then dismissal in November 2015. All of this evidence was before the Labour Court when it made its decision.

### **New clarification in 2013**

249. It is also clear that the situation was so confused that the Department had to issue a new Circular in 2013. Circular 28/2013 which was promulgated in 2013 was expressly stated to be **“Simplified arrangements for the maintenance of the Register (Clarleabhar) Roll Book (Leabhar Rolla) and Daily Attendance Book (Leabhar Tinrimh Laethúil) and also Clarification in relation to the Register to be maintained under the Education (Welfare)**

250. The introduction to this circular states as follows:

*“With effect from the beginning of the 2013/14 school year the Department is simplifying the requirements for the maintenance of the Register, Roll Book and Daily Attendance Book by primary schools. The details of the new arrangements are outlined in the Appendix to this circular.”*

251. This circular also clarifies that in the case of primary schools, the register is regarded as the “register” for the purposes of s. 20 of the Education (Welfare) Act, 2000.

252. Circular 28/2013 stated at paragraph 2 that:



*“The National Educational Welfare Board (NEWB) has confirmed to the Department that in the case of primary schools, the school’s Register is regarded by it as the ‘register’ for the purposes of Section 20 of the Education (Welfare) Act, 2000. The Education (Welfare) Act, 2000 requires that once a child is registered in a school, that child’s name must remain on the register until such time as the Principal of the school has been notified in accordance with the Act that the child is registered in another school or is registered (under Section 14 of the Education (Welfare) Act, 2000) with the NEWB.”*

**253.** This circular is of considerable importance in this case because Mr. O’Suird was put on administrative leave on 20<sup>th</sup> January, 2012 and the investigation into the enrolment figures commenced in or about January 2013. The report of Ms. Mags Jordan of the Department of Education was only completed in January 2014. Thus the report was completed after this circular had come into effect but the enrolment figures to which her report refers were enrolment figures submitted on or about 30<sup>th</sup> September, 2009 for the pupils in school in that year.

#### **Eight other issues**

**254.** Mr. O’Suird also addressed the other issues of which he was accused. He said:

*“Mr. O’Riordan [solicitor for the Board] was in contact and apologised for the delay and then when I thought, yeah, something is going to happen now I was accused of other issues and again I am not allowed address those issues. Every one of those could have been disposed of like that, every one of those could have been disposed of in an instant. Every one of those could have been dealt with in one sentence but I wasn’t allowed address them.”*

**255.** Mr. O’Suird also said that it was not only the issue of enrolments that was raised in the letter of 29 May 2013, but also there was the issue of the accounts. As he said:

*“Yeah, before we even get to that there was an issue of accounts. Nobody minded Bishop Eamonn Casey having a child, what he did was that he fiddled money in Galway to do it. Irish people would forgive a lot of things but not issues around money and that was put in the public domain. There was a letter written to one parent saying the board was going to audit all the books for the last ten years. These were accounts that had been certified by accountants and now they write publicly to a parent saying they are going to audit the books for the last ten years. People are saying why is he out? Surely it can’t be that bad and then suddenly oh, they are auditing the books for the last ten years.”*

Chairperson *“can I [ask] who wrote the letter?”*

Answer: *“Melanie”*.

Chairperson: *“and to which parent*

Mr. Dore: *“To [Parents B].”*

(See page 1206 of Court papers).

**256.** It is clear therefore that the raising of these allegations by Ms. Ni Dhuinn, the failure to either remove these allegations in their entirety and to clear Mr. O’Suird of all blame for these allegations, and the failure to allow him to address those allegations was manifestly unreasonable and tainted the hearing before the Board.

### **The decision of the Board of Management**

**257.** The Board of Management Disciplinary Panel, chaired by Mr. Malcolm Byrne, then considered the matter. One might have thought that, in the light of the overwhelming evidence which it had heard that the Board would have concluded (i) that the previous Board knew and approved Mr. O’Suird’s actions and (ii) that it was a grey area and perhaps a written warning would have sufficed. Instead the Board of Management decided to dismiss Mr. O’Suird.

**258.** There is no formal written decision of the Board of Management which sets out the allegations made against Mr. O’Suird, summarises the evidence put before the disciplinary hearing, assesses that evidence and then arrives at a conclusion as to whether there was or was not gross misconduct. Likewise there is no written decision which assesses the range of punishments and sets out the reasons why the most severe sanction of dismissal was chosen rather than any other punishment.

**259.** Instead what the Board of Management did was to write a letter of dismissal to Mr. O’Suird on 31<sup>st</sup> August, 2015. This letter is two pages long. It purports to be a letter of dismissal and also a record of the decision of the Board of Management on the hearing.

**260.** The letter states:

*“Dear Mr. Swords,*

*The Board of Management has concluded its deliberations into the serious allegations that were made against you by the chairperson of the Board of Management, Ms. Melanie Ni Dhuinn and which allegations were investigated over the course of three disciplinary hearings on 5<sup>th</sup> November, 2014, 18<sup>th</sup> April, 2015 and 2<sup>nd</sup> June, 2015. At each of the disciplinary hearings you were accompanied by your legal representative Mr. Robert Dore solicitor. The board recently received further legal submissions from Mr. Dore dated 7<sup>th</sup> August.*

*“The allegations against you are set out in the letter from the chairperson of the Board of Management to the INTO dated respectively 29<sup>th</sup> May, 2013 and 17<sup>th</sup> May, 2014. The allegations set out in those letters are that you knowingly made false enrolment returns to the Department of Education and Skills during the 2009/2010 school year which resulted in the appointment of a teacher in the school during 2009/10 and in 2010/2011 to which the school was not entitled, based on its valid enrolment figures as of 30<sup>th</sup> September, 2009. It was alleged against you that you*

*knowingly made false returns in relation to eighteen students who were not validly enrolled in Gaelscoil Moshiolog as of 30<sup>th</sup> September, 2009”.*

*Following the referral of these concerns to the Department of Education and Skills, the inspectorate of the Department carried out its own investigation, the results of which are set in the inspectorate division memorandum dated 17<sup>th</sup> January, 2014.*

*That report concluded that the appointment of the eighth mainstream class teacher in Gaelscoil Moshiolog in 2010 was not warranted based on valid enrolment and was in contravention of the terms of DES Circular 21/2010. The DES report also found that on examination of the roll books, it was confirmed that there was a minimum of eighteen pupils on rolls who could not be counted towards valid enrolment for staffing purposes. In the conduct of the investigation of the serious allegations made against you, the board were very mindful of the fact that ‘fraud or the deliberate falsification of documents’ is listed as one of the examples of ‘gross misconduct’ in the disciplinary procedures for principals introduced pursuant to s. 24 (3) of the Education Act, 1998.*

*The board has given very careful consideration to everything that was said by you and on your behalf in response to the allegations made against you over the course of three disciplinary hearings. The board has had the benefit of transcripts of the hearings. The board has also given very careful consideration to the evidence of the witnesses who gave evidence at the hearings. The board has also taken into consideration the legal submissions received from your solicitor Mr. Robert Dore. Having considered all the evidence available to it (both oral and written) the board has concluded that the allegations against you are supported by the evidence and have been substantiated. The board finds as a matter of fact that you are responsible for making false enrolment returns to the Department of Education and Skills in the*

2009/10 school year. The false returns made misrepresented the enrolment position in the school by at least eighteen students. The consequences of this misrepresentation were serious in that it resulted in the continued employment in the school of a teacher during the 2009/2010 school year and the appointment of a teacher in the 2010/11 school year which were not warranted by the valid enrolment as of 30<sup>th</sup> September, 2009. The board finds that your actions in this regard amount to serious conduct”.

“Having found the allegations against you were substantiated and that they amounted to serious misconduct on your part, the Board of Management have decided on the appropriate disciplinary sanction. In coming to its decision on this matter the board was mindful of a number of mitigating factors which need to be taken fully into consideration as follows.

1. The enormous contribution that you have made to Gaelscoil Moshionlog since its foundation. The board recognises that the school would not exist were it not for you.
2. The board recognises that although you benefitted from the false returns to the extent that your principals allowance was increased as a result of the filing of the enrolment returns in 2009/2010 you were not motivated by personal gain and your actions were taken in what you considered at the time to be in the best interests of the school.

However notwithstanding these very substantive mitigating factors, the board has reluctantly come to the conclusion that the seriousness of your misconduct in making false enrolment returns to the Department of Education and Skills in the 2009/2010 school year has so undermined the trust and confidence that the Board of Management has in you as principal as to make your position as principal in

*Gaelscoil Moshiolog untenable. The board has noted that according to the agreed disciplinary procedures:*

*'If the investigation upholds a case of serious misconduct, the normal consequence will be dismissal'. The board finds that the making of false returns to the Department amounted to the deliberate falsification of documents and as such it amounted to such serious misconduct on your part as to justify your dismissal. Accordingly and with great regret the Board of Management wishes to inform you that you are hereby dismissed with effect from the expiry of three calendar months' notice. The Board of Management does not require you to work through the notice period. The notice period begins with immediate effect and will expire at the end of November 2015. Your dismissal will therefore take effect on 30<sup>th</sup> November, 2015''.*

The letter then set out the right to appeal.

Yours sincerely,  
 Malcolm Byrne,  
 Chairperson (Acting)  
 Board of Management ,  
 Gaelscoil Moshiolog.

### **Problems with the letter**

**261.** There are a number of enormous problems with this letter.

- (1.) First, the letter purports to be both a record of the decision of the Board of Management disciplinary panel and a letter of dismissal. However it is difficult, if not impossible, for one letter of two pages to fulfil both functions. It is clearly a letter of dismissal. It is not a full or proper reasoned decision of the Board of Management in relation to the decision;

- (2.) secondly, there was absolutely no engagement by the Board of Management in this letter with the evidence given by Ms. Rachel Fitzpatrick, Ms. Quirke, and indeed Mr. O'Suird himself, that the Board of Management was completely aware at all times of the enrolment issues in 2009. This evidence was clear and uncontroverted. It was, in substance, evidence from three members of the Board of Management (including Mr. O'Suird ) who were serving on the board. Their evidence was that everything he did was done with the full knowledge and permission and consent of the board. Indeed the evidence went further: the evidence indicated that the board encouraged Mr. O'Suird and even provided him with names in respect of this matter. None of this evidence was considered or measured or given any weight in this letter and absolutely no reason whatsoever was given as to why the Board of Management decided to reject this evidence;
- (3.) thirdly, there was absolutely no evidence given by Ms. Ni Dhuinn (as the prosecutor) or by any other witness produced by the Board of Management or any Board of Management member in 2009 who disagreed with the evidence given by Mr. O'Suird, Ms. Quirke and Ms. Fitzpatrick. This was an extraordinary evidential deficit on the part of Ms. Ni Dhuinn as prosecutor and of the Board of Management the body tasked with carrying out the investigation;
- (4.) fourthly, the only evidence that the previous board might not have been aware was given by Ms. Ni Shuilleabhain. Ms. Ni Shuilleabhain however was not a member of the Board of Management in 2009 having stepped down from it in 2007. Moreover Ms. Ni Shuilleabhain's evidence was criticised as being untrue by Ms. Fitzpatrick. It is clearly the case that there was a question mark over the

credibility of Ms. Ni Shuilleabhain's evidence . Moreover, as the Labour Court concluded in its decision Ms. Ní Shuilleabhan "had skin in the game" because she also had been subject to a disciplinary process, and her evidence was not accepted by the Labour Court. There were good grounds for it not to do so.

- (5.) Fifthly, the Board of Management made no attempt to analyse or weigh up the very difficult and confused legal and regulatory environment in which Mr. O'Suird was operating. It is clear that there was enormous confusion between the provisions of the non-statutory rules of the Department of Education (e.g. rule 108) the statutory provisions of the Education (Welfare) Act, 2000 and the relevant circulars. Mr. O'Suird gave detailed evidence on this matter. No contrary evidence was given at all and yet all of this evidence was ignored without any reason.
- (6.) The statement that "*the Board recognises that [although] you benefitted from the false returns to the extent that your principal's allowance was increased as a result of the filing of the enrolment returns in 2009/2010*" is manifestly untrue and demonstrably false. Mr. O'Suird was never asked about this either in his direct or cross-examination by Ms. Ni Dhuinn. It appears that the Board of Management and Ms. Ni Dhuinn saw some form from the Department which indicated that the principal of a school with a higher number of teachers would receive a higher salary and they therefore leapt to the false conclusion that Mr. O'Suird had benefitted from this increased number of pupils. It has since been clear from the evidence presented by Mr. O'Suird that his pay was never increased as a result of this matter. This was an unforgivable and gross error on the part of Ms. Ní Dhuinn and the Board of Management because it



indicated that they had formed the view that he personally financially benefitted from this arrangement when he had not done so.

- (7.) It is also the case that the extraordinary failure by Ms. Ni Dhuinn to finalise the investigation into the single child incident meant that this incident tainted the entire hearing before the Board of Management. They were dealing with a principal whom they knew had been suspended for three and half years and who had a cloud hanging over his reputation because of that single child incident.
- (8.) In addition the further eight allegations which were set out by Ms. Ni Dhuinn in her letter of the 29<sup>th</sup> May, 2013 also tainted the investigation. These allegations were left hanging over Mr. O'Suird throughout the entire disciplinary hearing. These allegations were not withdrawn nor were they progressed. They were left there as further charges to be brought against Mr. O'Suird at a later date. They never were. There were simple answers to all of those allegations and Mr. O'Suird has answered all of them in his written submissions.
- (9.) The solicitor's letter from the parents of Child A continued to be concealed from Mr. O'Suird at all times.
- (10.) There was no consideration given to a lesser sanction. The Board paid lip-service to the idea of mitigating factors and then decided to apply the ultimate sanction of dismissal.

**262.** As will be seen, the Labour Court was satisfied that no reasonable Board of Management could have come to this decision based on the evidence which was before it. There was overwhelming evidence before the Labour Court to justify its decision. The decision of the Board of Management was manifestly unreasonable.

**263.** It is also of considerable note that although allegations of fraud and fraudulent misrepresentation had been made by Ms. Ni Dhuinn against Mr. O'Suird and although the

letter states that *“the board was very mindful of the fact that fraud or the deliberate falsification of documents is listed as one of the examples of gross misconduct in the disciplinary procedures”* the dismissal letter makes no finding of fraud against Mr. O’Suird.

It simply concludes that he was responsible for making “false enrolment returns to the Department of Education and Skills in the 2009/10 year” and that “the false returns made, misrepresented the enrolment position in the school by at least eighteen students”. If the Board of Management wished to make a finding of fraud against Mr. O’Suird it could have stated this in the clearest and most unambiguous of terms. There is however no mention in this dismissal letter that the Board of Management had made any findings of fraud against Mr. O’Suird and in the circumstances Mr. O’Suird, the Labour Court – and this Court – is entitled to conclude that the Board of Management made no findings of fraud against Mr. O’Suird .

**264.** It is clear therefore that the “gross misconduct”, of which he was found guilty, was “making false enrolment returns” to the Department.

**265.** In my view, the entire hearing, including the failure to furnish a comprehensive report as required by the rules, the failure to fairly and reasonably assess the evidence, the continued concealment of evidence, the tainting of the hearing with other allegations, the false allegation that Mr. Ó Suird profited from the process - amounted to an abysmal failure by the chairperson of the Board of Management and the Board of Management disciplinary panel. It was nothing short of a travesty. It is no wonder the Labour Court found the decision unreasonable.

### **The Disciplinary Appeal Panel hearing**

**266.** Mr. O’Suird, not surprisingly, appealed this decision of the Board of Management . His appeal went to a body called the “Disciplinary Appeal Panel ”, as is provided for under s. 24 (3) of the Education Act, 1995.

- 267.** This hearing took place on 9<sup>th</sup> November, 2015 over one day.
- 268.** The members of the appeal panel were Dr. Carl O’Dalaigh, independent chairperson, Mr. Seamus Caomhanach, and Mr. Michael McGarry a nominee of INTO.
- 269.** Mr. Swords was represented by his solicitor Mr. Dore. The Board of Management were represented by Ms. Ni Dhuinn and by Mr. Liam Riordan of Mason Hayes & Curran.
- 270.** The appeal grounds were stated to be that:
1. all relevant facts were not considered in a reasonable manner.
  2. the principal teacher could not reasonably be expected to have understood that the behaviour alleged would attract disciplinary action.
  3. the sanction recommended was disproportionate to the underperformance or misconduct alleged.
- 271.** The five page decision of the Disciplinary Appeal Panel said that “it considered written submissions and statements given at the oral hearing”.
- 272.** The structure of its decision was as follows:
1. It summarised the appellant’s arguments in two short paragraphs;
  2. It summarised the Board of Management ’s response in two short paragraphs;
  3. It summarised Mr. O’Suird’s reply to the Board of Management in five lines;
  4. It summarised the Board of Management ’s reply to Mr. O’Suird in three lines;
  5. It summarised questions put by the panel in three short paragraphs;
  6. It summarised the final statements by Mr. O’Suird in six lines;
  7. It summarised the statements by the Board of Management in four lines.
- 273.** It then set out its actual decision.
- 274.** In relation to the first ground of appeal (i.e. that all of the facts were not considered in a reasonable manner) it dealt with this matter in three short lines. It stated as follow:

*“It has been confirmed that the enrolment figures sent to the DES by the principal were incorrect. There is no evidence that these were signed off by the then acting chairperson of the BOM in October/November 2009”.*

**275.** In respect of the second ground of appeal (i.e. that the teacher concerned could not be reasonably expected to have understood that the behaviour alleged would attract disciplinary action), the disciplinary appeal dealt with this in five lines stating as follows.

*“Circular 24/02 and circulars in subsequent years placed great emphasis on the importance of actual enrolment returns. Rule 108 for national schools deals with the falsification of school records and lists a range of possible sanctions.*

*Circular 60/2009 which arose from section 24.3 Education Act (1998) was published in September 2009. It lists falsification of records as an example of severe misconduct”.*

**276.** In respect of the third ground of appeal (that the sanction recommended was disproportionate to the underperformance or misconduct alleged) it said:

*“One of the sanctions mentioned in rule 108 for national schools is the withdrawal of recognition of the teacher in any capacity for the falsification of school records.*

*Section 24.3 of the Education Act, 1998 states that the BOM may suspend or dismiss principals or other teachers in accordance with procedures agreed from time to time between the Minister and others. These procedures were developed in Circular 60/2009 which states: ‘If the investigation upholds a case of serious misconduct the normal consequence will be dismissal’.”*

**277.** It then set out its hearing decision as follows:

*“Accordingly the Disciplinary Appeal Panel is of the opinion that A case has not been established by the teacher.*

*In accordance with Circular 60/2009, Appendix A section 16 the BOM may proceed with the disciplinary action.*

*Date 14<sup>th</sup> November, 2015.”*

### **Problems with Disciplinary Appeal Panel decision**

**278.** There are a number of matters of concern about the above decision. These are as follows.

- (1) Firstly, again there was no engagement by the appeal panel with any of the evidence that was given by Mr. O’Suird at the first disciplinary hearing; this ground of appeal is dismissed in approximately three to five lines.
- (2) Secondly, Mr. O’Suird, Ms. Fitzpatrick and Ms. Quirke gave compelling evidence at the first disciplinary hearing that what Mr. O’Suird did, he did with the full knowledge and consent and approval and participation of the Board of Management . That should have afforded Mr. O’Suird a complete defence. Whilst that is summarised in one paragraph (set out above of the arguments of Mr. O’Suird), it was clear that the disciplinary panel gave it no weight whatsoever, as it ought to have done.
- (3) Thirdly, it is clear that there was no evidence from the previous Board of Management given to contradict any of the above evidence. Ms. Ni Dhuinn never sought to interview or call a single member of the previous Board of Management . This evidential deficit should have given the Disciplinary Appeal Panel pause for thought. It appears that it gave it no consideration or weight whatsoever.
- (4) Fourthly, there was no engagement with the evidence given by Mr. Ó Suird (and others) of the “grey area” and the confusion caused by the conflict between the Circular and the Education (Welfare) Act, 2000.

- (5) Fifthly, the letter of dismissal of 31<sup>st</sup> August, 2015 stated that the Board of Management believed that Mr. O’Suird “*benefitted from the false returns to the extent that your principal’s allowance was increased as a result of the filing of enrolment returns in 2009/2010*”. This, as was set out above, was not only false but was demonstrably false and if Ms. Ni Dhuinn or the Board of Management had properly investigated the matter they would have realised that this was simply untrue. This material untruth seems to have also formed part of the Disciplinary Appeal Panel’s hearing because it did not seem to correct the record in this regard.
- (6) Sixthly, it is also notable that there is no finding of fraud or fraudulent misrepresentation made by the Disciplinary Appeal Panel against Mr. O’Suird. This again is of enormous significance given the evidence which was later given by Mr. Malcolm Byrne to the Labour Court and by Ms. Ni Dhuinn and Mr. O’Riordan of Mason Hayes and Curran on behalf of the Board of Management to the High Court;
- (7) It is also the case that Ms. Ni Dhuinn had made eight other allegations which she said were serious and which she referred to in the letter of 29<sup>th</sup> May, 2013 bringing Mr. O’Suird before the disciplinary panel of the Board of Management. The Disciplinary Appeal Panel would have read this letter, would have been aware of these allegations and this must have undoubtedly tainted its thinking about Mr. O’Suird. Mr. O’Suird was never given a chance to defend himself against these allegations nor were the allegations withdrawn. They simply hung, over his head, as a sword of Damocles, throughout the Disciplinary Appeal Panel hearing.

- (8) The Disciplinary Appeal Panel must also have considered the fact that Mr. O'Suird was now on suspension for over a period of three and half years. Yet it did not appear to have given any consideration as to whether that suspension was reasonable or unreasonable and/or whether it was in accordance with Circular 60/2009.
- (9) The evidence about the parents letter of January 2012 which was exculpatory of Mr. Ó Suird was suppressed and not given to Mr. Ó Suird.
- (10) There was no consideration of a lesser sanction.

279. I will deal with some of these matters later in my judgment.

**Impact on Mr. O'Suird of his suspension and dismissal**

280. As a result of the stress of the suspension Mr. O'Suird developed shingles.

281. He was asked:

*"Question: Do you firmly believe there was outrageous delay in relation to dealing with this matter.*

*Answer: Savage, just unconscionable".*

282. Mr. O'Suird also described the disastrous effect the suspension and dismissal had on him and on his wife and children. Mr. O'Suird gave this evidence:

*"Well I was put away from my work. My three children were in the school and Mel is quiet and Mel said nothing he just got on with it.... Just horrible. But my wife is a very quiet and very private and lovely person and she was going about every day to teach in a school where Ms. Ni Dhuinn's children were going. I don't know but she was probably teaching one of Melanie's children at the time and she serves on a board with Melanie and it was tearing her apart. She also didn't know, I only found out this last week, she said she didn't know the day she would come home and I would have committed suicide".*

**283.** In light of this harrowing evidence, one might have thought that Ms. Ni Dhuinn and the Board of Management might have had a small measure of humanity, a small measure of empathy, for the disastrous and unlawful sanction to which they had already subjected Mr. O’Suird - particularly after the WRC decision - but they did not.

**284.** It is also clear from the evidence that despite his best efforts, Mr. O’Suird was never able to obtain alternative employment as a teacher since November 2015.

#### **Appeal to the Workplace Relations Commission**

**285.** On 19<sup>th</sup> November, 2015, Ms. Ni Dhuinn wrote to Mr. Swords confirming the sanction of dismissal with effect from 30<sup>th</sup> November, 2015.

**286.** On 8<sup>th</sup> February, 2016, Mr. Swords made a complaint to the Workplace Relations Commission (“W.R.C.”) of an unfair dismissal.

#### **Appointment of new principal and pre-emption of jurisdiction of the Workplace Relations Commission, the Labour Court and the High Court**

**287.** Despite the fact that Mr. O’Suird had made a complaint to the WRC under the Unfair Dismissals Act and, despite the fact that he now had the benefit of a statutory presumption that his dismissal was unfair, the Board of Management advertised for the post of principal of the school in June 2016, and, in July, 2016, an existing teacher at the school was appointed principal of the school.

**288.** On 4<sup>th</sup> December, 2017, the hearing before the Workplace Relations Commission took place and the decision of the WRC adjudication officer was delivered on 25<sup>th</sup> April, 2018. This decision will be set out below. In summary it upheld the complaint of an unfair dismissal and directed the re-engagement of Mr. O’Suird.

**289.** Ms. Ni Dhuinn and the Board of Management of the school then decided to appeal the WRC decision to the Labour Court on 15<sup>th</sup> June, 2018 - no doubt motivated in part by the fact that they had already appointed a new principal as Mr. Ó Suird’s legal team contended.



**290.** It was clear therefore that the Board of Management made a decision to appoint a new principal in the full knowledge that Mr. Ó Suid had complained to the WRC and that the WRC or the Labour Court or the High Court (or all three) could make a decision ordering the reinstatement of Mr. Ó Suid as a principal. It was therefore absolutely clear, as counsel for Mr. O’Suid put it to Ms. Ni Dhuinn, that the Board made a deliberate and calculated decision to pre-empt the jurisdiction of the WRC, the Labour Court and the High Court. In the circumstances, the Board of Management - and indeed all those who advised such a course of action - are liable for the consequences of such an extraordinary and ill-advised decision.

**291.** Moreover the principles and procedures of Circular 60/2009 expressly provide that these procedures are “without prejudice to the right of a Principal to have recourse to the law to protect his employment”. In appointing a new principal, the Board was seeking to limit or prevent possible remedies available to Mr. Ó Suid.

### **The decision of the Workplace Relations Commission**

**292.** The decision of the Workplace Relations Commission was made by one of its adjudication officers – Ms. Niamh O’Carroll Kelly, Barrister-At-Law. The decision runs to eighteen pages. It sets out a summary of Mr. O’Suid’s case, a summary of the Board of Management’s case, the findings and conclusions. It noted that the parties had agreed the transcripts for the first disciplinary hearing could be admitted into evidence.

**293.** As this was a complaint to the WRC under the Unfair Dismissals Act, 1977, Mr. Swords had the benefit of s. 6 (1) of the Unfair Dismissals Act, 1977 which provides as follows:

*“Subject to the provisions of this section, the dismissal of an employee shall be deemed, for the purposes of this Act, to be an unfair dismissal unless, having regard to all the circumstances, there were substantial grounds justifying the dismissal.”*

**294.** It is not necessary for the purposes of this judgment to go into too much detail about the decision of the WRC decision. A number of matters however should be emphasised.

(1.) First, the WRC concluded that the decision to extend the leave period by the Board of Management to prolong the period of time Mr. O’Suird was on “administrative leave” after the HSE had reported on 5<sup>th</sup> November, 2012 was *“unfair, unnecessary and potentially damaging to the principal’s reputation. Had the board done what they said they were going to do i.e. investigate the single child incident and done so expeditiously there would have been no need to extend the leave period at all”*.

(2.) The WRC also stated:

*“Once the disciplinary process in relation to the enrolment figures commenced, it was progressed at a snail’s pace. The complainant’s right to a fair and expeditious hearing is protected by Article 6 of the European Convention of Human Rights. In circumstances where the principal was on leave pending the outcome, it was incumbent on the board to act expeditiously”*.

(3.) The WRC also stated:

*“I note that the chairperson of the board, during her protracted investigation of the matter, failed to interview anyone who sat on the board at the material time. Given that the board is the employer, and the principal, an employee, of the board and only one of eight members of the board, it was a fatal error on her part not to establish what role the other board members had to play in the misrepresentation. The evidence of the two previous board members given at this hearing did go further than at the disciplinary hearing. It was however clear that*

*the board at the time were wholly complicit. Evidence was also adduced that prior to 2013 there was an ambiguity in relation to the returning of enrolment figures.”*

- (4.) The WRC also held:

*“Having been complicit in the act, the same board, albeit with new members cannot now seek to justify a dismissal of the complainant, him being only one of eight members involved in the misrepresentation/fraud.”*

- (5.) The WRC held that the delay in bringing the disciplinary matter to its conclusion was not only unacceptable but in breach of Mr. Swords’s rights pursuant to Article 6 of the European Convention of Human Rights. Mr. Swords was first put on notice of the issue in March 2013 but the investigation did not reach its conclusion until 30<sup>th</sup> November, 2015. There was a legal duty on the chairperson to deal with the matter expeditiously- particularly where Mr. Ó Suird was suspended for the entire period of time. Ms. Ni Dhuinn had a duty to prioritise this matter. There was also a duty on her to furnish Mr. Ó Suird with all relevant documentation prior to any disciplinary hearing. She failed to do so in a timely fashion. The delay was entirely her fault and was entirely unacceptable.
- (6.) The WRC concluded that the Board of Management had failed to justify the dismissal of Mr. Swords and therefore his claim would succeed.
- (7.) The WRC also concluded that Mr. Swords was to be re-engaged in the role of principal with effect from 1<sup>st</sup> January, 2018 on the same terms and conditions prior to his dismissal.

**295.** Ms. Ni Dhuinn accepted in cross-examination at the Labour Court hearing that one member of the Board of Management stated - after the WRC decision - at a Board of Management meeting that Ms. Ni Dhuinn should resign and that her position was untenable given the findings of the WRC report. However Ms. Ni Dhuinn did not resign. Instead she and the Board of Management instructed their lawyers that an appeal should be taken to the Labour Court.

### **The appeal to the Labour Court**

**296.** Section 8A (2) provides that a party to a claim for redress under the Act of 1977 may appeal a decision of an adjudication officer given in relation to that claim to the Labour Court.

**297.** On 5<sup>th</sup> July, 2018, the Board of Management appealed the WRC decision to the Labour Court.

**298.** The Labour Court heard this matter over eleven days of evidence and submissions on the following dates:

1. 7<sup>th</sup> November, 2018
2. 8<sup>th</sup> November, 2018
3. 26<sup>th</sup> March, 2019
4. 27<sup>th</sup> March, 2019
5. 21<sup>st</sup> January, 2020
6. 22<sup>nd</sup> January, 2020
7. 21<sup>st</sup> October, 2020
8. 1<sup>st</sup> June, 2021
9. 2<sup>nd</sup> June, 2021
10. 28<sup>th</sup> June, 2021
11. 5<sup>th</sup> July, 2021.

**299.** The decision of the Labour Court was handed down in June 2022.

**Decision of the Labour Court**

**300.** The decision of the Labour Court consists of almost 50 pages. It sets out the background to the appeal, a summary of the evidence of Ms. Ni Dhuinn, the evidence of Ms. Ni Shuilleabhain, the evidence of Mr. Malcolm Byrne, the evidence of Dr. Carl O’Dalaigh (a member of the disciplinary appeals panel), the evidence of Mr. Enda McEvoy (an assistant principal officer in the Department of Education) - all of whom gave evidence on behalf of the Board of Management .

**301.** The Labour Court’s determination also sets out a summary of the evidence of the witnesses who gave evidence on behalf of Mr. O’Suid including Ms. Rachel Fitzpatrick, Ms. Grainne Quirke, Mr. Brian O’Reilly (a retired school principal), and Mr. O’Suid.

**302.** The Labour Court decision also contains a section entitled “Discussion and decision” in which it assesses the matter and concludes that Mr. O’Suid was unfairly dismissed.

**The evidence before the Labour Court in relation to the first part of Mr. O’Suid’s defence – that previous Board had knowledge of overstated enrolment numbers and approved his actions.**

**303.** In addition to the transcripts of hearings before the Board of Management, the Labour Court heard evidence from Ms. Rachel Fitzpatrick, Ms. Grainne Quirke and Mr. O’Suid on this issue. All gave clear evidence that the previous Board of Management was fully aware of, and consented to, the approach to the enrolment figures for pupils sent in by Mr. O’Suid to the Department.

**Evidence of Ms. Fitzpatrick**

**304.** The Labour Court’s decision summarised the evidence of Ms. Fitzpatrick on this issue as follows.

*“[The witness said....] They put the names of children on the rolls who were not actually attending but were likely to attend in the subsequent years. The Board members themselves suggested the names of their own children for example. She said the Board had been advised to do this. The extent of the practice varied from year to year, she said. She and the Board engaged regularly with [Mr. O’Suird] in this regard, particularly in advance of, and at the beginning of, each school year. The witness said the Board was aware at all times about the situation vis-à-vis numbers enrolling and the entire Board felt it was their responsibility to achieve the desired numbers “officially or unofficially” so as to achieve the necessary increase in teacher allocation for the following year. She said the administrative work in this regard was done by [Mr. O’Suird] but members of the Board supplied him with the names of children for inclusion on the rolls.”* (see decision of the Labour Court, summary of evidence of Ms. Rachel Fitzpatrick].

**305.** Ms. Fitzpatrick also said that Ms. Ní Shuilleabhain’s evidence to the Disciplinary Panel was incorrect in that, according to Ms. Fitzpatrick, Ms. Ní Shuilleabhan was present at Board of Management meetings at which discussions about enrolment numbers had taken place.

**306.** Ms. Fitzpatrick *“also agreed that the direct evidence she had given to the Labour Court as that the entire Board, of which she had been a member, had knowingly assisted [Mr. O’Suird] in making false returns to the Department about enrolment numbers”* (see Labour Court p. 1482).

**307.** Ms. Fitzpatrick also said that Mr. O’Suird *“did not inform her or the Board of the exact numbers by which he was inflating the return but he did inform her and the Board that he was submitting overstated returns at a meeting of the Board that included the names of pupils who had not attended at the school”*. (Labour Court decision p. 1482). She said that

such conversations were “off the record” and “*that no member of the Board had objected to what [Mr. O’Suird] was proposing or doing*”. (Labour Court p. 1483). Ms. Fitzpatrick also confirmed that this was the practice of the Board from 2003 to 2007.

**308.** Ms. Fitzpatrick’s evidence could not have been clearer and accorded with the evidence she had given at the Board of Management hearing. The Board was actually aware of, and had actual knowledge of, and approved and encouraged Mr. O’Suird’s practice of submitting over-stated numbers of pupils attending the school.

### **Evidence of Ms. Grainne Quirke**

**309.** Ms. Quirke was a member of the Board of Management from 2003 to 2007. She told the Labour Court that the enrolment of pupils issue was the primary concern of the Board at that time – in order to ensure the survival of the school. She told the Court that she “knew that the practice of enrolling children in those circumstances wasn’t “kosher”; that the Board knew it was “massaging figures and playing with the numbers”. She said that people from other schools had visited to explain to them what needed to be done to keep the school viable and they emphasised the need to keep the numbers up in order to achieve official recognition for the school and increased capitation. Finally, she said that she thought it was “*an abomination that Mr. O’Suird had been dismissed for overstating numbers in the returns to the Department as she was of the view that he did what he did for the good of the children and the school and not to benefit himself*”. (Labour Court p. 1484).

**310.** Ms. Quirke also “*confirmed that no fictitious names were ever placed on the roll. She said the names belonged to real people who eventually attended the school but not necessarily in the year that their names were first included in the roll. She said that to her knowledge, the approach taken by the Board was endorsed by An Foras Patrúnachta. She reiterated her evidence to the effect that everyone on the Board of Management was fully aware of what was going on in relation to the school’s enrolment practices that were*

*discussed at the Board meetings and implemented then by [Mr. O'Suird]". (Labour Court, page 1485).*

**311.** It is clear therefore that her evidence was similar in substance to that of Ms. Fitzpatrick and Mr. O'Suird. The Board knew at all times, and approved and encouraged, Mr. O'Suird's enrolment practices in relation to the Department of Education.

**Evidence of Mr. Malcolm Byrne**

**312.** The Labour Court also heard evidence from Mr. Malcolm Byrne, the chairman of the Board of Management Disciplinary Panel. Mr. Byrne became a member of the Board in December 2011. He served one four year term.

**313.** He said that he understood Ms. Rachel Fitzpatrick's evidence to the Disciplinary Panel of the Board to be that the Board at the time had left the management of enrolment issues to Mr. O'Suird *"from which he inferred that the Board did not know of the false returns"* (see Labour Court decision page 1477). He said that *"the disciplinary panel concluded that there was no evidence before it that supported the defence [Mr. O'Suird] had sought to advance."*

**314.** However Ms. Fitzpatrick in her evidence commented on Mr. Malcolm Byrne's evidence to the Labour Court as to how the Disciplinary Panel had interpreted Ms. Fitzpatrick's and Ms. Quirke's evidence about the Board of Management's interactions with Mr. O'Suird. She said *"that Mr. Byrne was wrong to have interpreted that evidence in a way that suggested the Board turned a blind eye to what [Mr. O'Suird] did. She reiterated her earlier evidence to the Court that the Board members actively participated in the process by providing names of children to [Mr. O'Suird] but left the administrative side of things to him"*. (see Labour Court decision (p. 1482).



**315.** It is clear that Mr. Byrne’s interpretation of their evidence was completely and utterly wrong.

**316.** It is clear that the Labour Court did not accept this evidence from Mr. Byrne and, in my view, it was right not to do so. As set out above, there was overwhelming and uncontroverted evidence from Ms. Rachel Fitzpatrick, Ms. Quirke and Mr. O’Suird himself that the Board had actual knowledge of the enrolment practices and not only consented to it but encouraged Mr. O’Suird. For Mr. Byrne to say that he “inferred” from this evidence that the Board did not know of the false returns is simply extraordinary.

**Decision of the Labour Court in relation to Board’s knowledge**

**317.** The Labour Court found that the evidence of Ms. Fitzpatrick, Ms. Quirke and Mr. Ó Suird, that the Board knew of, and approved, Mr. Ó Suird’s enrolment practices in 2009, was “credible and consistent”. In my view, there was ample evidence for it to come to that conclusion.

**318.** The Labour Court also noted that the Board did not call any former member of the Board (apart from Ms. Ní Shuilleabhan) to give contrary evidence. But the Labour Court did not accept her evidence because , as it said, she had “skin in the game”. In my view, there was ample evidence for it to come to this view also.

**319.** The Labour Court therefore accepted that Mr. O’Suird was acting with the support and encouragement of the Board which it said called into question the proportionality of the sanction. In my view, the evidence which justified this conclusion was overwhelming.

**320.** It is clear therefore that Mr. O’Suird made his 2009 returns to the Department with the full knowledge, consent, approval and encouragement of the Board, his employer.

**321.** Whilst, of course, a later Board can always question decisions of a previous Board, it is manifestly unreasonable to dismiss an employee where as here, he did what he did with the full consent, knowledge and approval of the Board.

**322.** In those circumstances, there was ample evidence on this ground alone before the Labour Court to allow it to come to the conclusion that the decision of the new Board to dismiss Mr. O’Suird was unreasonable.

**The evidence before the Labour Court in relation to the second part of Mr. O’Suird’s defence – that practices around enrolment figures were a “grey area”.**

**(1) Evidence of Mr. O’Suird**

**323.** Mr. O’Suird also gave evidence to the Labour Court that the method of handling enrolment of pupils in the returns was not entirely clear and was a grey area. In particular, (as he also said to the Disciplinary Panel of the Board of Management), although the Department circular said pupils whose names were on the rolls but who were not attending the school should not be included in the returns, the Education (Welfare) Act, 2000 provided that if a pupil’s name was on the school rolls, it should not be removed until the school had received notice that such a child was now attending another school. Faced with such confusion and apparent conflict, Mr. O’Suird sought advice and guidance from the Irish Primary Principals Network (“IPPN”) and the National Education Welfare Board (“the NEWB”). His evidence was that both of these bodies told him that he should include these non-attending pupils in the school’s returns to the Department.

**324.** As the Labour Court stated in its summary of his evidence: *“He then went on to tell the court that in or around 2009 he had canvassed the views of a number of educational professionals who gave him conflicting advice about recording information in the school’s roll books, what information in this regard school inspections were reviewing on their visits to schools, and what was required pursuant to the Education Act. He said he discussed this with Ms. Fitzpatrick and other members of the Board at the time. They ultimately decided, according to [Mr. O’Suird] to go with “what was to the advantage of the children in the school”. He also said at the board meetings when the issue of enrolment was discussed, that*

*he was told by the Board to do its best. The witness was very clear in recalling that discussions took place at Board meetings about what numbers were to be submitted to the Department in October each year, including 2009.*" (Labour Court p. 1491).

**325.** Mr. O'Suird gave evidence that he did contact the Department of Education at the time because of a lack of clarity in its circulars on this issue. He also said that the Department was saying one thing but doing another and that inspectors were not even looking at rolls because "they did not want to see it".

**326.** The Labour Court decision, in its summary of the evidence of Mr. O'Suird, said "*He accepts, he said, that there was a degree of inflation in the numbers he returned that year. He specifically recalled including three (named) children who had been enrolled but whose whereabouts were unknown as well as other children who had attended an induction day in June*". Some of those pupils had only attended for a few days in September but Mr. O'Suird said the names of nine such children were removed from the roll. In his evidence he said that "*there were nine additional pupils included on the return of children who were not genuinely continuing to attend the school. But all were actual persons who had been registered or enrolled in the school*". (See Labour Court p. 1491-2). The Labour Court accepted his evidence that it was only nine children and rejected the findings set out in the Mags Jordan report that there were eighteen such pupils. In my view, there was ample evidence before the Labour Court to justify it coming to that conclusion.

**327.** It appears therefore, when all of this is boiled down to its essentials, that Mr. O'Suird was dismissed because he included nine children in the enrolment returns to the Department in September/Oct 2009; all nine children not only existed in real life, they had all actually attended the school but were no longer attending. He did so, with the full knowledge, consent and approval of the Board and he did so based on advice received from the NEWB and the IPPN - which was required because of the legislative confusion surrounding these matters

which existed at the time. He did so for the benefit of the school and not for any personal benefit to himself.

### **Evidence of Mr. Brian O'Reilly**

**328.** Mr. O'Suird was not the only person to give evidence of the "grey area" in relation to this matter. Mr. Brian O'Reilly also gave similar evidence, in defence of Mr. O'Suird. Mr. O'Reilly is a retired school principal.

**329.** Mr. O'Reilly gave evidence about the arrangements that applied to school enrolment figures prior to 2000, between 2000 – 2013 and after the Department circular of 2013. He also referred to the Education (Welfare) Act, 2000 and the new requirement under the Act to retain pupils on a school's roll - even if they were not attending - until the school had been notified by a subsequent school that they had been enrolled there. This meant according to Mr. O'Reilly that a school remained responsible for the welfare of a pupil where no notification was given.

**330.** He said in his evidence, in relation *"to the issue of counting non-attending pupils who remained on the roll on 30 September each year for capitation purposes"*, that *"if you were on the edge of a number for the retention of another teacher ..... and if you had the hope of any of the little cluster of pupils you were retaining on the roll under the Education Welfare legislation coming back .... He gave the example of traveller children whose family went to Birmingham each year between March and September and who returned in October, that he counted for capitation purposes, because he knew they would come back. He said he always advised his Board of Management of this practice."* (see Labour Court p. 1487).

**331.** Mr. O'Reilly also said that he had one piece of legislation telling him to keep pupils on the roll for their welfare and a circular telling him he could not claim capitation while these pupils were on the roll. He also accepted that although there was no ambiguity in the wording of the 2009 circular, the reality for school principals was very different. Indeed he

pointed to a 2010 circular which, he said, was created because the *“ambiguity the Principals were living with gave rise to a situation where “many schools were behaving in a manner outside the law”*. (Labour Court decision page 1489).

**332.** Mr. O’Reilly also gave evidence that the 2013 circular brought about a major change in practice among primary school principals and the INTO. He said *“the 2013 circular was an announcement ‘in big bold letters’ that the Department would henceforth refer the issue of claiming capitation for non-attending pupils .... to the Garda Siochana for prosecution. He said he welcomed this development as a clear indication that the practices that had been developing in this regard were no longer acceptable”*. (Labour Court page 1486). He said the 2013 Circular had a “seismic” effect *“and made people think twice about taking the law into their own hands.”* (Labour Court p. 1489).

**333.** Mr. O’Reilly also said that the Department had committed, in the 2013 Circular, to establishing a primary pupil on-line database for the first time and this *“proved to be the solution for the problem for primary principals because this system took the responsibility away from a principal in relation to children on the roll who had transferred to another school but whose transfer had not been notified to the former principal.”* (Labour Court p. 1489).

**334.** Importantly, Mr. O’Reilly also gave as his opinion that Mr. O’Suird should not have been dismissed for what occurred in 2009 because of what he referred to as *“the ambiguity of the Education Welfare legislation”*. He said *“By all means sanction him, don’t sack him because he was not unique in what he was doing. That’s my view.”* (Labour Court p. 1487).

### **Evidence of Mr. Enda McEvoy**

**335.** The Labour Court also heard evidence on behalf of the Board of Management from Mr. Enda McEvoy who was an Assistant Principal Officer in the Department of Education. He had worked in the School Governance Section since 2018 and had responsibility for

dealing with cases of enrolment irregularity. However Mr. McEvoy was working with the Prison Service when the events in this case occurred and therefore it appears that his evidence was treated, correctly in my view, with some caution by the Labour Court. His evidence appears to have been based on a review of the files – rather than as in the case of Mr. Brian O’Reilly (and Mr. O’Suird) their lived experience of how the Irish primary school principals had real difficulty managing the conflicting demands of the circular and the legislation.

**Decision of Labour Court in relation to the “grey area”**

**336.** The Labour Court held that it was “mindful” of the “*very powerful evidence given by Mr. O’Reilly to the effect that there was a marked difference between the Department’s approach to enrolment numbers from 2013 onwards compared to previously*”. (Labour Court p.1509). It is clear that the Labour Court was persuaded by Mr. O’Reilly’s evidence that similar practices were prevalent in primary schools at that time because of the confusion and apparent conflict between the Department Circular and the Education (Welfare) Act, 2000. Again the Labour Court had ample evidence to come to this conclusion

**337.** The Labour Court concluded that this issue also, led to its conclusion that the sanction of dismissal was disproportionate and not within the band of reasonable responses open to a reasonable employer. In my view, there was ample, if not overwhelming evidence to justify this conclusion also.

**The conclusion of the Labour Court on the issue of the overstatement of the enrolment figures**

**338.** It is also important to keep in context the alleged wrongdoing at the centre of this case. The allegations made by Ms. Ní Dhuinn were (i) that Mr. O’Suird fraudulently misrepresented to the Department that there were eighteen “non-existent” pupils in the school, (ii) and that Mr. O’Suird personally benefitted from this fraudulent misrepresentation

because he got an increase in his salary because the school got an extra teacher. It is clear from the evidence before the Labour Court that these allegations were completely unfounded.

**339.** First, as set out above, the allegation that Mr. O’Suird personally benefitted from this arrangement was not only false, but demonstrably false. He did not. If Ms. Ní Dhuinn and the Board had made even the most cursory of enquiries of Mr. O’Suird, they would have realised this. This was eventually accepted by Ms. Ní Dhuinn. But it is clear that it played a part in the decisions of the Board of Management and the Disciplinary Appeals Panel.

**340.** Secondly, the pupils were not “non-existent” as was alleged; each of the pupils were real persons all of whom had actually enrolled in the school and all were pupils whose parents had been interviewed by Mr. O’Suird. The suggestion therefore that Mr. O’Suird was plucking numbers out of thin air was false.

**341.** Thirdly, although Ms. Ní Dhuinn referred to a number of eighteen pupils, the Labour Court found that “*no evidence was put before the court that the number of pupils enrolled in 2009 was overstated in the return to the Department by eighteen*”. The Labour Court accepted Mr. O’Suird’s evidence that the overstatement of the number of pupils was only nine. In my view, there was sufficient evidence for the Labour Court to come to this view.

**342.** Fourthly, it is clear from Mr. O’Reilly’s evidence which the Labour Court accepted, that the practice of overstating pupil numbers was not unique to this school but was a practice prevalent in other schools also. It is clear that other primary schools “*retained the names of pupils on the roll who weren’t physically present as at the date of the annual return to the Department but in respect of whom [Mr. O’Reilly] had an expectation that they would return to this school in the future*”.

**343.** Fifthly, Ms. Ní Dhuinn also accepted in her evidence that she was not aware that there was a latitude in relation to how enrolment figures were handled by principals of primary schools at that time. She said that her “*understanding, my experience would be that, you*

*know, enrolment had to be valid and that there wasn't latitude.*" (day 6 page 22). This evidence was flatly contradicted by Mr. Ó Suid and his two expert witnesses. This misunderstanding by Ms. Ní Dhuinn appears to be at the very heart of why this case went so dramatically off the rails.

**344.** Indeed, the Labour Court concluded on this issue that *"the deliberately overstated and suggestive formulation of this allegation against [Mr. O'Suid] further adds to the court's concerns that the [Board] was overly zealous in its desire to establish a basis upon which to justify [Mr. O'Suid's] dismissal"*.

**345.** In my view, there was ample evidence before the Labour Court to justify it coming to this conclusion also. Indeed it is clear that the Labour Court regarded allegations of fraud and the making of false enrolment returns as "deliberately overstated" and a "suggestive formulation" which shows that the Board was "overly zealous in its desire to establish a basis upon which to justify Mr. O'Suid's dismissal".

**346.** In my view, this conclusion by the Labour Court is devastating. In substance, it states that Ms. Ní Dhuinn put forward exaggerated charges of fraud against Mr. O'Suid and the Board was "overly zealous" to find a reason to justify dismissal.

### **The eight other issues**

**347.** Ms. Ní Dhuinn also confirmed that the investigation into the other eight matters was now effectively at an end – again without any proper investigation or opportunity for Mr. Ó Suid to clear his name. (Transcript day 5 page 13).

**348.** For the sake of completeness, and in fairness to Mr. O'Suid, and in order that he be completely exonerated in this process, Mr. O'Suid gave evidence in relation to the eight other allegations.

**349.** It is not necessary in this judgment to deal with all of them. However in relation to the allegation about the school accounts, Mr. O'Suid said that the school accounts had been



certified each year in accordance with the rules that pertained to primary schools and had been described by the accountant who had been appointed most recently to manage them, as “exemplary” (Labour Court decision page 1495). It is clear therefore that there was never any substance to this allegation and it should never have been made.

**350.** Other issues included the amount of time a school should close to facilitate parent teacher meetings; whether there was compliance by the school with additional teaching hours required by the Croke Park agreement; and whether there was a failure by the school to develop policies required by the Department (which Mr. O’Suird said had been fulfilled).

**351.** It is clear from the evidence, the submissions and the Labour Court decision that all of these matters either had no substance or were normal operational issues for a board to consider. None of them were significant. Indeed Ms. Ní Dhuinn never even prepared a comprehensive report for the Board in relation to them.

**352.** The issue however is that these allegations continued to hang over Mr. O’Suird throughout the process and tainted the process. It was only in the later stages of the Labour Court hearing that Ms. Ní Dhuinn accepted there would be no further investigation into these matters and that they were effectively being dropped. She said in her evidence that he had “a clean slate” in relation to these matters.

### **Consideration of the Disciplinary Appeal Panel by the Labour Court**

**353.** The Labour Court summarised the evidence of Dr. Carl O’Dalaigh - who gave evidence before the Labour Court – and who was the chairman of the Disciplinary Appeal Panel – as follows:

*“Evidence of Dr. Carl O’Dalaigh*

*This witness – a former deputy chief inspector in the Department of Education – outlined the composition of the expert panel that heard the complainant appeal from the disciplinary panel’s decision to dismiss him. The panel comprised the witness, Mr.*

*Michael McGarry of the INTO and Mr. Seamus Caomhanach, who retired department inspector. The witness also gave evidence in relation to the conduct of the appeal and the grounds of defence advanced by the complainant at that”.*

**354.** There were however a number of significant features of Mr. O’Dalaigh’s evidence before the Labour Court which, in my view, are relevant to this matter. The first issue is that it is clear from Mr. O’Dalaigh’s evidence that two members of the Disciplinary Appeal Panel were former inspectors in the Department of Education and Skills. Given that the issue about which Mr. O’Suird was being investigated related to the alleged falsification of enrolment figures to the Department of Education, and that the main evidence before the Panel was the report of Ms. Mags Jordan, a former colleague, I am firmly of the view that both Mr. O’Dalaigh and Mr. Caomhanach were not sufficiently impartial or independent of the Department of Education in this matter and should not have been members of the Disciplinary Appeals Panel - as counsel for Mr. Ó Suird complained about. I am of the view that their lengthy careers in the Department of Education were such as to render them not sufficiently impartial to sit on a Disciplinary Appeal Panel investigating into allegations of this nature.

**355.** The second issue about which this Court is concerned is that although the transcripts of the Disciplinary Panel of the Board of Management (i.e. the first disciplinary hearing) were before the Disciplinary Appeal Panel, and although I assume that each member of the Disciplinary Appeal Panel read those transcripts, (from which it is abundantly clear that the evidence given was all to the effect that the previous Board of Management consented to, had full knowledge of and were entirely complicit in the enrolment figures to the Department), the Disciplinary Appeal Panel never seemed to have once considered that evidence or weighed it in any way.

**356.** Thus Mr. O’Dalaigh was asked in his evidence before the Labour Court:

*“With regard to enrolments Aodagan Swords repeatedly gave evidence that at all times he was acting with the full knowledge and cooperation of the board’s management.”*

*Dr. O’Dalaigh did you find that there was evidence of full knowledge and cooperation of the board’s management.?*

*Answer: No.*

*Question: Pardon?*

*Answer: No.*

**357.** With all due respect to Dr. O’Dalaigh that evidence again flies in the face of all the evidence given. I have set out above in detail the evidence given by Mr. O’Suird, Ms. Rachel Fitzpatrick and Ms. Grainne Quirke. All their evidence was to the effect that the board did have full knowledge of the enrolment practices of Mr. O’Suird.

**358.** Dr. O’Dalaigh’s evidence is entirely inaccurate and fails to reflect the unequivocal and unambiguous evidence given that the previous Board of Management were aware of, encouraged and approved the submission of exaggerated enrolment figures to the Department.

**359.** Mr. O’Callanan S.C. in cross examination of Mr. O’Dalaigh came back to this issue of the Board of Management ’s knowledge of Mr. O’Suird’s practices in relation to enrolment, as follows:

*Question: But it doesn’t really address the substance of the point which is that the Board of Management knew about this and assented to it.*

*Answer: We didn’t receive evidence to suggest that was the case.*

*Question: But the Board of Management did that was the evidence before the Board of Management and you had the transcripts?*

*Answer: Yes I remember the transcripts at the time, yes.”*

**360.** Again in my view, the statement that “we didn’t receive evidence to suggest that” - that the Board of Management knew about it - is simply wrong.

**361.** The third issue that is of concern is that Mr. O’Dalaigh gave evidence that the discretion of the Disciplinary Appeals Panel to recommend a less severe sanction than dismissal was very limited and that the discretion of the panel was “limited enough” by these matters. (See page 123 Labour Court hearing).

**362.** In response to another question Mr. O’Dalaigh gave evidence that he felt “his hands were tied” by virtue of the Circular, and that they could not do anything else except dismiss. He said that “to the best of my knowledge we did not discuss that” i.e. a less severe sanction. Again, this shows a clear lack of understanding of the provisions of the Circular which absolutely allows a lesser sanction.

**363.** The Board of Management submitted that the Labour Court - should have given more weight to the decision of the Disciplinary Appeal Panel . In this regard, they relied on dicta of O’Malley J. in *Kelly v. Board of Management of St. Josephs National School Valleymount County Wicklow* [2013] IEHC 392 where (at para. 165 and 166 of the decision) O’Malley J. stated as follows:

*“165. .... However, the role of the Panel deserves more respect than it was given.*

*166. This is a body drawn from the fields of teaching and management, with an experience of these areas that is unlikely to be matched or exceeded by Board members. It has an independent chair. The members are not involved in the dispute and can bring their expertise to bear with an objectivity that is likely to be lacking amongst the parties to the dispute. Although not a statutory body, it is established as part of the statutory regime.*

*167. It is, therefore, a body of the sort to which the courts generally display a high level of deference on issues within its area of expertise. Its recommendations should,*

*accordingly, carry very substantial weight with boards of management. While a board is not bound to carry out its recommendation, it should in my view depart from it only for very good reasons.”*

**364.** However that decision must be seen in the context of the facts of that particular case. On the facts of this case, it is clear that all the evidence was one way (i.e. to the effect that the previous Board of Management was aware of, encouraged, and participated in the enrolment figures submitted by Mr. O’Suird to the Department of Education). There is no evidence to the contrary. In those circumstances, it is clear that the Disciplinary Appeal Panel failed to have regard to all of the evidence before the original disciplinary panel of the Board of Management. Moreover the Disciplinary Appeal Panel took into account a matter which was demonstrably false i.e. that Mr. Swords had personally benefitted from the increase in teachers when this was not true.

**Consultation with the Department of Education and other bodies in the decision to place Mr. Ó Suird on administrative leave.**

**365.** Ms. Ni Dhuinn also said in her evidence to the Labour Court (day 3 page 32) that the decision to suspend Mr. Ó Suird in May 2013 was made by the Board of Management and “was informed by consultation with the Board of Management, with the legal advisors, with the patron body, and with the Department of Education and Skills, so there was extensive consultation”.

**366.** In many ways this is extraordinary evidence. It is hard to avoid the inference that the patron body and the Department had some influence on this process – even though Ms. Mags Jordan’s report had not been completed and was not completed until January 2014. Moreover under the Circular 60/2009, it is a decision for the Board of Management – and the Board of Management alone – to make a decision as to whether to suspend Mr. Ó Suird.

**367.** Indeed Ms. Ní Dhuinn accepted in her evidence to the Labour Court that she was told by the Department of Education to place Mr. Ó Suird on administrative leave (day 3 page 48). Again this is extraordinary evidence in circumstances where the Board of Management was Mr. Ó Suird's employer.

**Continued suppression of evidence**

**368.** It is also clear that Ms. Ní Dhuinn and the Board continued to suppress evidence favourable to Mr. O'Suird right up until the hearing before the Labour Court.

**369.** The evidence on this is set out below. On 23<sup>rd</sup> August, 2013, Mason Hayes and Curran solicitors, on behalf of the Board of Management , replied to the solicitors for the parents of pupil A. This reply came eighteen months after the first letter had been sent.

**370.** This letter states:

*"We sincerely regret the delay replying to your earlier letters.*

*We would like to state at the outset that the chairperson of the Board of Management , Melanie Ni Dhuinn would very much like to meet with your clients. We suggest that this might be in the best interests of our respective clients. If your clients still wish to meet the chairperson of the Board of Management you might please contact us (Liam Riordan) and the necessary arrangements can be made very quickly.*

*While our clients very much appreciate your clients concerns for their son's welfare we hope they will understand that the school has a wider obligation in dealing with incidents such as the one concerning your client's son which gave rise to the referral to the HSE. There are in place nationally agreed procedures in relation to child protection. Schools are obliged to comply with these procedures in the interests of all the children.*

*Yours faithfully".*

**371.** On 10<sup>th</sup> September, 2013, the solicitors for the parents of pupil A replied to this letter saying that *“they had no difficulty in meeting directly with your client. However, our clients must meet with the full Board of Management”*.

**372.** This letter also said:

*“Essentially our clients require answers to the following questions.*

- 1. Why is it that our clients did not receive an initial incident report at the minutes of their meetings. It had been clearly indicated to our clients these items would be made available to them.*
- 2. Why is it that our client’s son’s name is included in referral to the HSE without any prior authorisation from our clients or any request for their permission. We believe this to be in contravention to the data protection legislation.*
- 3. Why is that our initial letter dated 25<sup>th</sup> August, 2012 had not been responded to until your own letter of the 23<sup>rd</sup> August, 2013. In that the board were well aware of our client’s deep concerns regarding the handling of this matter particularly given that the HSE have written to our clients last November confirming that they were satisfied that there was no child protection issue as far as they were concerned. [check text]*

*We should be obliged to hear from you in very early course.”*

**373.** It appears that Mr. O’Suird was never given these letters by Ms. Ni Dhuinn, or the Board of Management or by Mason Hayes & Curran. Indeed Mr. Robert Dore of Dore & Co. Solicitors wrote to Mason Hayes & Curran on 5<sup>th</sup> November, 2018, just before the Labour Court hearing requesting a copy of these letters. There was no reply to this letter.

**374.** Mr. Dore wrote again on 6<sup>th</sup> November, 2018 to Mason Hayes & Curran saying:

*“Dear Sir,*

*For whatever reason you steadfastly refuse to revert to me concerning the letters that [Parent of Pupil A] says were sent to your firm throughout 2012 concerning the single child incident.*

*“You will neither confirm no such letters were received by your firm nor will you copy me with them if they were in fact sent to your firm.”*

*You can explain the position concerning these letters and your withholding of them to the Labour Court”.*

**375.** The letter also stated:

*“if it is the case that these letters have been withheld, this is nothing short of disgraceful and is absolutely indicative of the manner in which Melanie Ni Dhuinn was and remains prepared to treat my client.”*

**376.** On 11<sup>th</sup> December, 2018, Mr. Dore had to write again to Mr. Riordan of Mason Hayes & Curran demanding copies of these letters from the solicitors of the parents of pupil A and a number of other documents which were of importance to the disciplinary hearing, and also the Labour Court hearing.

**377.** The Labour Court hearing was adjourned to 18<sup>th</sup> February, 2019.

**378.** Mr. Dore wrote again on 7<sup>th</sup> January, 2019 to Mr. Riordan of Mason Hayes & Curran saying in relation to the letters from the solicitors of parents of pupil A:

*“If it is the case that your firm was in receipt of these letters during the course of 2012 and that their existence was suppressed this is extremely serious and requires an immediate explanation”.*

*Obviously, I should have been in possession of these letters in advance of the commencement of the disciplinary hearing to assist me in my cross examination of Melanie Ni Dhuinn and their obvious central relevance would have become apparent to you during the course of my cross examination which was witnessed by you in your*



*capacity as legal advisor to the chairman of the members of the Board of Management appointed to adjudicate at the disciplinary hearing.*

*Had these letters been available to me, it may be that a different decision would have been arrived at, although I very much doubt it.*

*Not alone are these letters not being available to me, it is scandalous that they are being suppressed from the members of the Labour Court.*

*Accordingly I now call on you to confirm whether your firm was in receipt of letters from [Parents of Child A] or his solicitor during the course of 2012.*

*If your firm was in receipt of such letters they must be copied to me immediately together with a written explanation as to why these letters have been withheld to date. You must furnish me with copies of any replies to these letters or if they were ignored explain in writing why.*

*This matter must be cleared up by close of business on Friday 11<sup>th</sup> January, 2019.”*

**379.** Amazingly these letters were not replied to by Mason Hayes & Curran and on 30<sup>th</sup> January, 2019 Mr. Dore had occasion to write again stating:

*“Dear Sirs,*

*Melanie Ni Dhuinn’s utter contempt of my client is borne out by the fact that my eight letters sent to you since 5<sup>th</sup> November, 2018 have been ignored.*

*You steadfastly refused to confirm the position regarding three letters sent to your firm regarding the single child incident during the course of 2012 which if they were in fact received, have been suppressed. There can be no controversy about this. You either received the letters or you did not. But your failure to engage in this regard is totally unprofessional and borders on being unethical”.*

*Your client's part heard appeal is now listed before the Labour Court for the week commencing 25<sup>th</sup> March, 2019 and my client and his legal team will continue to be deliberately blackguarded by Melanie Ni Dhuinn/the Board of Management .*

*Your refusal to address the request made in my correspondence is of a piece with a vicious and gratuitous onslaught on Mr. Sword.*

**380.** In my view, the refusal by Ms. Ni Dhuinn, and the Board of Management, to provide these letters to Mr. Dore and his client in advance of the hearing of the Disciplinary Panel of the Board of Management and/or the Disciplinary Appeal Panel is indefensible. It raises serious questions in the eyes of this Court as to whether Ms. Ni Dhuinn and the Board of Management were deliberately engineering a situation to find any pretext upon which to suspend and eventually dismiss Mr. O'Suird – regardless of the substantive merits of the underlying single child incident - and in complete breach of his natural and constitutional rights to fair procedures and in flagrant breach of the provisions of Circular 60/2009, which requires that all relevant documentation be provided to the principal and that the chairperson of the Board of Management and the Board of Management act reasonably at all times. There was no explanation either in the correspondence or provided to this court as to why these documents were not provided. I must therefore conclude that they were deliberately suppressed and not provided to Mr. O'Suird or his legal advisors. There was a hint in the oral submissions to the court that they were not provided because any further investigation of the single child incident was not being proceeded with and therefore the documents were not relevant. This is nonsense. These documents were clearly exculpatory of Mr. O'Suird and he had an absolute entitlement to see the documents.

**381.** It is clear therefore in my view that the suppression of this important evidence tainted the original disciplinary hearing and indeed the appeal before the Disciplinary Appeals Panel.

**The issue of animus**

**382.** Mr. O’Suird, through his counsel, pursued a line of cross-examination of Ms. Ní Dhuinn and other witnesses, to suggest that Ms. Dhuinn was motivated by “some kind of animus” against Mr. O’Suird. This was denied by Ms. Ní Dhuinn.

**383.** However it is clear from the Labour Court decision that the Labour Court came to the conclusion that, viewed objectively, Mr. Ní Dhuinn was indeed motivated by an “animus” against Mr. O’Suird. It set out the facts which led to its conclusion under the heading “Multiplicity of allegations” in its decision.

**384.** The Labour Court concluded that, *inter alia*, the Board of Management under Ms. Ní Dhuinn’s leadership:

- (i) “Maintained [Mr. O’Suird] on administrative leave ostensibly for the purpose of carrying out an internal investigation into the single child incident” but “no such internal investigation was ever commenced”;
- (ii) No reasons were given to justify suspending Mr. O’Suird on 29<sup>th</sup> May, 2013;
- (iii) Even though Ms. Ní Dhuinn accepted that she was informed of the 2009 enrolment issue in January 2013, Mr. O’Suird was not informed of these allegations until 29 May 2013 – at which time Mr. O’Suird had been on administrative leave for sixteen months and had “been kept in the dark” by Ms. Ní Dhuinn about this on-going investigation into the enrolment figures.
- (iv) Ms. Ní Dhuinn was “clearly being somewhat economical with the truth” when she stated in her letter of 29<sup>th</sup> May, 2013 that the enrolment issue had “just recently come to her attention”.

**385.** The Labour Court concluded, based on the above – and numerous other matters – that Ms. Ní Dhuinn’s - and the Board’s - actions “*strongly suggests, in the Court’s view, a determined intention on the part of the [Board of Management] to find a basis for removing*

*[Mr. Ó Suird] from his employment in circumstances where the HSE had concluded that his conduct on 11<sup>th</sup> January, 2012 did not constitute physical abuse of a child. The court is reinforced in this view having regard to Ms. Ní Dhuinn's evidence that all of the allegations against Mr. O'Suird listed in her letter of 29<sup>th</sup> May, 2013 – bar the one that gave rise to the within proceedings – were not investigated by the Board, have been dropped and are no longer extant.”*

**386.** In my view, this is a devastating finding by the Labour Court and one in which it was absolutely justified by the evidence in making. There is no doubt in my mind that Ms. Ní Dhuinn and the Board of Management were determined to get rid of Mr. O'Suird on any pretext. They exaggerated the charges, they suspended him without reasons, they ignored all the evidence he presented, they suppressed evidence and they never gave him a fair hearing.

**387.** The more transcripts I read the more convinced I became that Ms. Ní Dhuinn and the Board developed an animus against Mr. Ó Suird and, as time went on, became increasingly determined that he would never be allowed back into the school – not just as a principal but in any position whatsoever. I have no doubt that by the time it came to the disciplinary hearing, they were irrevocably biased against him and had prejudged the issue. Any fair minded and reasonable person reading all of the evidence given on his behalf – that the Board of Management had full knowledge of the enrolment issue - could not have held him liable to the penalty of dismissal on that issue. It was simply unreasonable.

### **The issue of delay**

**388.** Another completely unacceptable feature of Ms. Ní Dhuinn's, and the Board's, conduct of this case was the extraordinary delay in bringing this matter to a conclusion. Mr. O'Suird was put on administrative leave in a summary manner in January 2012; he was kept on administrative leave from January 2012 until May 2013 when he was suspended with pay without being given proper reasons; thereafter he remained suspended until November 2015

when he was dismissed. To Mr. O’Suird – and to outsiders – being on “administrative leave” and being suspended is a bureaucratic distinction without a difference. He was, in substance, suspended for a period of almost four years before the disciplinary process was complete, his reputation, draining away, month by month, as outsiders thought “there’s no smoke without fire”. It was utterly unreasonable and a complete subversion of the rules and procedures set out in Circular 60/2009.

**389.** The grossly unreasonable delay in this matter was not only oppressive and prejudicial to Mr. O’Suird, it also caused enormous damage to his professional reputation, his standing in the community and indeed his ability to defend himself before the Board of Management and Disciplinary Appeal Panel.

**The issue of the reasonableness of keeping Mr. O’Suird on administrative leave in January 2012 and suspending him in May 2013**

**390.** As was stated by Noonan J. in the *Governor and Company of Bank of Ireland v. Reilly* [2015] IEHC 241 at para. 14:

*“40. 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. As noted by Kearns J. (as he then was) in Morgan v. Trinity College Dublin [2003] 3 I.R. 157, there are two types of suspension, holding and punitive. However, even a holding suspension can have consequences of the kind mentioned. Inevitably, speculation will arise as to the reasons for the suspension on the premise of there being no smoke without fire....*

*41. 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. It 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. It may perhaps be necessary to protect the employer's own business and reputation where the conduct in issue is known by those doing business with the employer. In general, however, it ought to be seen as a measure designed to facilitate the proper conduct of the investigation and any consequent disciplinary process."*

**391.** In the present case, it is not clear that any proper consideration was given by the Board of Management as to whether the circumstances of this case warranted Mr. O'Suird being placed on administrative leave in January 2012. The decision appears to have been made initially by Ms. Ni Dhuinn, and subsequently ratified by the Board of Management. Presumably Ms. Ni Dhuinn reported on these matters to the Board of Management before the Board made its decision. There is no evidence that the Board ever considered or obtained a written statement from Mr. O'Suird in relation to the matter or heard his side of the story. There is no evidence that the Board properly considered the letter from the parents of Child A's solicitor. There was nothing to suggest that there would be a repetition of the conduct complained of - as Mr. O'Suird gave up teaching; there is certainly no suggestion that he would interfere with evidence or that his suspension was necessary to protect persons at risk from such conduct. Whilst I appreciate that it was an incident involving a child, the parents, most concerned by the matter, were satisfied that it was minor in nature, they accepted Mr. O'Suird's apology and they did not want the matter taken any further. A decision by the Board of Management that Mr. O'Suird should not take any further teaching classes until this matter had been fully investigated would appear to have been a more proportionate option to be considered by the Board of Management at that time.

**392.** Whilst it is the case that, under circular 60/2009, a principal could be put on administrative leave whilst an investigation was continuing it is clear that after the HSE had issued its report in November 2012, it was now incumbent upon Ms. Ní Dhuinn to complete her investigation urgently.

**393.** Given that she asked for an extension of paid leave for Mr. O’Suird from the Department to end January 2013, it is reasonable to surmise that she should have been able to complete her investigation immediately into the child incident by the end of January 2013 – at the very latest. If that had been done there can be no doubt but that the only punishment which Mr. O’Suird could have received would have been a very minor one - if he received a punishment at all. In my view therefore it is reasonable to conclude that if the Board of Management were acting reasonably – as they were obliged to do - Mr. O’Suird’s administrative leave should have ended no later than 31<sup>st</sup> January, 2013.

**394.** However it is clear that in January 2013 Ms. Ni Dhuinn decided to investigate a whole raft of additional matters including the enrolment figures. However this investigation was at its earliest stages and she had no idea at this stage of the scope and parameters of this investigation. Indeed she had no such indication until she issued her letter of 13<sup>th</sup> May, 2013 formally suspending Mr. O’Suird. In my view, it is abundantly clear therefore that the circumstances could not reasonably warrant Mr. O’Suird being placed on administrative leave from 31<sup>st</sup> January 2013 onwards pending this investigation. It was, in my view, wholly improper and unreasonable to continue his administrative leave after 31<sup>st</sup> January, 2013. The circular says, “*The procedures are intended to comply with the general principle of natural justice*” and provide that “*There will be a presumption of innocence*”. It also says, “*no decision regarding disciplinary action can be made until a formal disciplinary meeting has been convened and the employee has been afforded the opportunity to respond to the allegations raised*”.

**395.** It is abundantly clear that what happened between January 2013 and May 2013 was that Ms. Ni Dhuinn went searching for evidence on issues that she thought constituted failings of Mr. O’Suird. Whether she was right or wrong on those issues, the reasonable course of action for her and the Board of Management was to have reinstated Mr. O’Suird in his position as principal by end January 2013 – at the very latest. If they had done so, he would have been in a position to continue his work and recover his reputation within the community. He could also have continued this position whilst Ms. Ni Dhuinn and the Board of Management continued with their investigations into various other matters including enrolment figures. These matters were clearly not of a nature that required Mr. O’Suird to be suspended throughout the investigation, as the enrolment figures related to 2009.

**396.** Ms. Ni Dhuinn could, if she wished, have put different procedures in place in order to review the enrolment figures from January 2012/January 2013 onwards and to ensure that the Board of Management had visibility over them.

**397.** It is also clear that the other eight allegations which she raised against Mr. O’Suird were completely unwarranted, in circumstances where no comprehensive report was ever furnished by her, no further disciplinary proceedings were ever brought against Mr. O’Suird in respect of these matters, and they were eventually dropped.

**398.** I am of the view therefore that the continuation of Mr. Ó Suird’s administrative leave from 31<sup>st</sup> January, 2013 until his suspension in May 2013, and his suspension from May 2013 onwards were not warranted by the circumstances, were wholly unreasonable, and reversed the presumption of innocence. As such, these actions were a clear breach of the rules of circular 60/2009. As the procedures specifically stated that Board of Management should comply with general principles of natural justice, I am of the view that they failed in all respects to comply with the principles of natural justice. I have therefore concluded that the continued administrative leave of Mr. O’Suird from 31<sup>st</sup> January, 2013 until May 2013 and



his suspension from May 2013 until the conclusion of the disciplinary process were manifestly unreasonable, a breach of his natural and constitutional rights and a breach of the requirements of circular 60/2009.

**Change of policy requires clear warning**

**399.** It is also clear from Mr. O’Suird’s evidence that whatever he did in relation to the school enrolment was done with the full knowledge, consent, encouragement and participation of the Board of Management. It is also clear that this was a practice prevalent in many schools at the time. It is also clear that Ms. Ni Dhuinn and the new Board of Management decided to adopt a new policy of zero tolerance in relation to such matters.

**400.** However as was stated again by Noonan J. in *Bank of Ireland v. Reilly* at para. 55:

*“ It seems to me that if a policy of zero tolerance was going to be adopted by the bank to breaches of its email policy, its employees were entitled to some notice of this policy shift. This would not have been difficult to achieve. From Mr. Reilly's perspective, it clearly never occurred to him that in sending on chain emails, he was potentially exposing himself to dismissal. I have no doubt that had he known, he is very unlikely to have engaged in this conduct. ”*

**401.** Likewise in the present case, the Board of Management could not simply go from a policy of encouragement and participation in inflated enrolment figures, to a policy of zero tolerance without any warning. To do so is manifestly unfair and unreasonable. To impose a sanction of dismissal because of this move is doubly unfair and unreasonable.

**The failure by Ms. Ní Dhuinn to complete a report on the single child incident**

**402.** Despite the repeated statements in all her evidence that the incident with child A was serious, so serious that it warranted (a) consulting with the patron (b) consulting with the Department (c ) placing Mr. Ó Suird on administrative leave (d) making a referral to the HSE to investigate (e ) receiving a HSE report directing the Board of Management to conduct its

own investigation (f) asking the HSE to revisit its report and (h) continuing Mr. Ó Suid on administrative leave, Ms. Ní Dhuinn failed to even start, let alone complete, any report - let alone a comprehensive report - on the child A incident, failed to bring the matter to the disciplinary panel of the Board of Management, suppressed the vital letter from the parents of the child's solicitor saying that they regarded it as a minor matter, and failed to allow Mr. Ó Suid any opportunity to address the Board of Management in his own defence on this issue.

**403.** When questioned robustly about this issue in the Labour Court hearing, by Mr. Callanan S.C., counsel for Mr. Ó Suid, Ms. Ní Dhuinn had no answer. It was an unacceptable failure on her part to complete the investigation into this incident. She had an absolute obligation to do so. She failed. The consequences for Mr. Ó Suid were devastating: it is clear that she and the Board thought it was a serious incident – despite all the evidence to the contrary from the HSE and the parents of the child. It is also clear that she and the Board were influenced against Mr. Ó Suid because of this incident.

**404.** Ms. Ní Dhuinn was prepared to advise the Board to put Mr. Ó Suid on administrative leave for over a year and a half over this incident but was not prepared to even investigate it.

**405.** Failure by Ms. Ní Dhuinn to start, let alone complete, “a comprehensive report” on the child A incident was not only manifestly unreasonable and a breach of Circular 60/2009, it was a breach of Mr. Ó Suid's constitutional right to vindicate his good name.

**406.** Ms. Ní Dhuinn also confirmed that the matter of the single child incident was now closed – without any opportunity for Mr. Ó Suid to clear his good name.

### **Unfounded allegations of fraud**

**407.** It is obvious that an allegation of fraud against a principal of a school made by anyone, particularly the chairperson of a board of management, is a devastating allegation and should only be made in the clearest of circumstances. In this case the allegations of fraud were manifestly unfounded and demonstrably false.

**408.** It is important in the context of this case – and vitally important in relation to Mr. Ó Suird’s reputation in the school and in the community - that this issue be dealt with fully in this judgment so that his name is cleared, his reputation is restored and his constitutional rights to his good name is vindicated. It is important therefore to trace how this allegation arose and how it was dealt with throughout this case.

**409.** Ms. Ní Suilleabhain gave evidence on day 6 of the Labour Court hearing on behalf of the Board of Management. Ms. Ní Suilleabhain had become acting principal in January 2012 after Mr. Ó Suird had been placed on administrative leave. She gave evidence that the first time she mentioned the enrolment issue to Ms. Ní Dhuinn was after a Board of Management meeting in January 2013. She mentioned to Ms. Ní Dhuinn that Ms. Griffin, another teacher, said that there was an issue about enrolments in 2009 (the year she had started in school), that there were children on the roll book who were never in a class. Ms. Ní Suilleabhain said *“the chairperson had a very serious reaction. She said, you realise that is fraud. That’s fraudulent. I got a fright because I had never realised that it was actually that serious. It certainly wasn’t how it had been portrayed to me at that time”*. (Page 101.)

**410.** It appears from the evidence that Ms. Ní Dhuinn without any further investigation of the facts, the context, the provisions of the Education (Welfare) Act, 2000, and without hearing from Mr. Ó Suird, jumped to the conclusion that what had happened in relation to the enrolment figures was a fraud. This was a disastrous rush to judgment which coloured the rest of the entire disciplinary process to the immense prejudice of Mr. Ó Suird.

**411.** The next time the issue of fraud was mentioned was in Ms. Ní Dhuinn’s letter of 29<sup>th</sup> May, 2013 which set out the enrolment (and other allegations) against Mr. Ó Suird and suspended him pending the investigation.

**412.** The letter stated that the increased enrolment figures increased Mr. Ó Suird’s salary and, in effect, implied that this was one of the reasons why Mr. Ó Suird had inflated the

enrolment figures. This statement was not only false but was demonstrably false. Ms. Ní Dhuinn made the statement without even checking with Mr. Ó Suid as to whether it was true or not and as such, she must be regarded as having made this element of the allegation of fraud recklessly and/or negligently.

**413.** The next milestone is the written decision of the Disciplinary Panel of the Board which is in the form of a letter of dismissal dated 31<sup>st</sup> August, 2015. As stated above, this written decision makes no finding of fraud against Mr. Ó Suid. Again, as stated above, if the Board of Management intended to make a finding of fraud against Mr. Ó Suid it could have done so in express terms. However it did not do so and a finding of fraud could never arise by implication.

**414.** It is of course obvious that if the Disciplinary Panel of the Board of Management wanted to make a finding of fraud against Mr. Ó Suid they would have to state this expressly and clearly and give reasons for their decision. However it is clear that they did not do so. The gross misconduct set out in the disciplinary procedures is stated to be “fraud or deliberate falsification of documents” and the Board of Management found him guilty of deliberate falsification of documents but not fraud.

**415.** Likewise, the Disciplinary Appeal Panel made no finding of fraud against Mr. Ó Suid. It said that the enrolment figures as submitted by Mr. Ó Suid were “incorrect”. It also refers to the “falsification of records as an example of severe misconduct”. Again it is clear that if the Disciplinary Appeal Panel wished to make a finding of fraud against Mr. Ó Suid it would have to say this expressly. However it is clear that it did not do so.

**416.** Despite the fact that neither the Disciplinary Panel of the Board of Management or the Disciplinary Appeal Panel had made a finding of fraud, Mr. Malcolm Byrne in his evidence to the Labour Court as summarised by the Labour Court’s decision said:

*“The panel therefore took the decision to dismiss the complainant, he said, as the board no longer had any trust or confidence in him as a consequence of the fraud he had committed”.*

This evidence was most improper. If the Board of Management and the Disciplinary Appeal Panel had failed to make a finding of fraud against Mr. Ó Suid, it was completely unreasonable to argue the case in front of the Labour Court on the basis that he had committed a fraud. Indeed, if the Board of Management had given a proper reasoned decision, it would not have been necessary for Mr. Byrne to give evidence at all. It didn't.

**417.** Moreover in an affidavit filed in the High Court in respect of this appeal, Mr. Riordan, a solicitor with Mason, Hayes and Curran, legal advisors to the Board, swore an affidavit on 13 July, 2022. In this affidavit, he states at paragraph 4:

*“I say the Notice Party was dismissed from his role as Principal at the appellant's school with effect from 31 November, 2015. He had admitted to fraudulently making false returns of pupil enrolment numbers to the Department of Education and Skills but stated that this had been done with the knowledge and approval of the then Board of Management.”*

**418.** This averment is not only manifestly false, it is also most improper. Mr. Ó Suid, as the evidence set out above shows, never admitted to “fraudulently making false returns”. In addition, it is most improper because the Disciplinary Panel of the Board of Management (and the Disciplinary Appeals Panel) had not made findings of fraud against Mr. Ó Suid and it was improper of Mr. Riordan to imply that they had. It is also improper because solicitors, as legal advisors, should not be swearing allegations as to contested facts -particularly allegations of fraud, (unless they are witnesses to those facts). It is not their role.

**419.** The Labour Court dealt with these allegations of fraud by saying *“The deliberately overstated and suggestive formulation of this allegation against the complainant further adds*

*to the court's concerns that the respondent was overly zealous in its desire to establish a basis upon which to justify the complainant's dismissal".*

**420.** It is clear from the Labour Court's decision that it regarded any allegations of fraud as manifestly unfounded, "*deliberately overstated*" and indicative of an "*overly zealous attitude on the part of the Board to establish a basis upon which to justify Mr. Ó Suid's dismissal*".

There was ample evidence before the Labour Court to justify this conclusion.

**421.** I was also informed by counsel for the Board of Management that the Department of Education had made a complaint to the Gardaí and made statements in relation to this matter. The Gardaí referred the matter to the DPP who declined to prosecute.

**422.** I have no doubt that the matters raised in the allegations made against Mr. Ó Suid do not even remotely rise to the standard of a fraud or a fraudulent misrepresentation. At its height, the most that could be said is that he made a return to the Department of nine pupils who were validly enrolled at the school, but who were not in attendance at the school as at 30<sup>th</sup> September, 2009. He did so in circumstances where under the Education (Welfare) Act, 2000, it is provided that he had to retain those pupils on the rolls until he was informed that they were at another school. It is clear this was a grey area. It is also clear that what he did, he did with the full knowledge, consent and approval of his Board. It is also clear that everything he did he did for the benefit of the school and its pupils. It was also clear that he never benefitted one cent from these enrolment figures personally.

**423.** I am of the view that it is of great importance that this Court state, in the clearest and most emphatic of terms, that the allegations of fraud and fraudulent misrepresentation made against Mr. Ó Suid are manifestly unfounded and that the allegation that he personally benefitted from this arrangement is demonstrably false.

**Discretion of the Board of Management in relation to sanction**

424. Circular 60/2009, at the conclusion of its section on “Gross Misconduct” states as follows:

*“If the investigation upholds a case of serious misconduct, the normal consequence will be dismissal”.*

425. In my view, it is clear from the wording of this section, that although the “normal consequence” will be dismissal, the circular leaves open the possibility that a lesser sanction can be applied depending on the facts of the case.

426. Despite this, the Labour Court decision records that, under cross-examination, Mr. Malcolm Byrne stated that the Disciplinary Panel was of the view that it had no discretion regarding the sanction it imposed on Mr. O’Suird having regard to the seriousness of the allegation against him.

427. It is clear that the Labour Court was of the view that Mr. Byrne was simply wrong about that and in my view, it was correct. The Disciplinary Panel of the Board did have a discretion; it could have imposed a lesser sanction. However it clearly adopted an incorrect interpretation of the circular and imposed an unreasonable sanction on Mr. O’Suird.

**The issue of proportionality of the sanction**

428. The issue of proportionality of the sanction is closely related to the issue of the discretion of the Board in relation to the sanction.

429. The Labour Court found that the sanction of dismissal “*was disproportionate and not within the band of reasonable responses open to a reasonable employer in the circumstances*” for all the reasons set out in the last two pages of its decision.

430. There was, in my view, ample evidence before the Labour Court to allow it to come to this decision.

**431.** In my view, its decision on this issue also was correct: the decision of the Board to dismiss was not only manifestly unreasonable, it was indefensible and the sanction was entirely disproportionate.

**The redress decided on by the Labour Court**

**432.** In the final paragraph of its decision the Labour Court found that Mr. O’Suird was unfairly dismissed.

**433.** However it determined that the appropriate redress in this case was an “award of re-engagement with effect from 1<sup>st</sup> September, 2017, the period from his date of dismissal to that date to be regarded as a period of unpaid suspension thus preserving [Mr. O’Suird’s] continuity of service for all purposes”.

**434.** However, I am of the view that the Labour Court has erred in law in coming to this conclusion.

**435.** I have arrived at this conclusion for a number of reasons:

(1.) It is clear for the reasons set out in this judgment that the decision to keep Mr.

Ó Suird on administrative leave from end January 2013 until May 2013 was not only unreasonable but also unlawful;

(2.) It is also clear for the reasons set out in this judgment that the decision to suspend Mr. O’Suird in May 2013 was not only unreasonable but also unlawful;

(3.) It is also clear for reasons given earlier in this judgment that the decisions of the Board (and on appeal the Disciplinary Appeal Panel) to dismiss Mr. O’Suird in November 2015 were manifestly unreasonable.

**436.** In those circumstances, there is no reason in law why the Labour Court should have directed an award of re-engagement with effect from 1<sup>st</sup> September 2017 or should have imposed a period of unpaid suspension.



**437.** In my view, the proper order to be made in this case is for the immediate reinstatement of Mr. O'Suird to his position of principal with effect from 30<sup>th</sup> January, 2013 (i.e. the date on which his administrative leave should have ended) - with full preservation of his salary and pension entitlements.

**438.** I will hear the parties further on the exact terms of the order, the terms of the reinstatement, the impact on the existing principal of the school, the arrears of pay and the continuity of terms of employment and pension entitlements.

### **Delay in Labour Court decision**

**439.** Unfortunately, it took a period of two years and two months from the date of Mr. Ó Suird's initial complaint to the WRC to obtain the decision of the WRC and a period of almost four years for the Labour Court to deal with this appeal. This means that it took six years for the process under the Unfair Dismissals legislation to work its way through the system. This is quite obviously an appalling delay in the hearing and disposal of this appeal.

**440.** The delay by the Labour Court in hearing this matter and giving judgment is unacceptable to say the least, and raises serious questions as to whether the Labour Court has breached Mr. Ó Suird's rights under Article 6 of the European Convention on Human Rights regarding the right to a fair and expeditious trial. The Labour Court indicated that there was some delay because of the covid pandemic, I do not accept that this can be a valid excuse. Courts and other bodies were able to conduct their business online and conduct hearings online. Indeed I note that although the first lockdown occurred in or about March 2020, the Labour Court had a hearing on 21<sup>st</sup> October, 2020.

**441.** It appears that the Labour Court only assigned two days at a time to hear this matter when that was quite clearly insufficient. There was a four month delay between the first two days hearing and the second two days hearing. There was a nine month delay between days three and four and day five. There was a further two month delay hearing between day five

and day six. There was a further six months delay between day six and day seven. There was a further eight month delay between day seven and day eight. These are entirely unacceptable delays.

**442.** It is a matter for the Labour Court to organise its own procedures and its own hearing dates. However I fail to understand why this matter was not called on for a period of at least ten days and why it was not given a time slot so that all the days hearings could run consecutively and also that a period could be allowed for extra days if it were required. That is the procedure adopted by the Courts in all their hearings and I fail to understand why the Labour Court does not adopt a similar procedure. If it does not change this procedure then it runs the real risk of exposing the State to claims for damages for breach of Article 6 of the European Convention on Human Rights.

### **Summary and conclusion**

**443.** The persons responsible for this debacle are Ms. Ní Dhuinn and the Board of Management. Almost every single decision they took leading to Mr. Ó Suid's dismissal was unreasonable. The decision by Ms. Ni Dhuinn not to complete the investigation into the single child incident by end-January 2013 was unreasonable; her decision never to finish the single child investigation was unreasonable; her decision to keep Mr. Ó Suid on administrative leave while she carried out her other investigations was unreasonable; her investigation into these other matters was a rush to judgment; her decision to make allegations against Mr. Ó Suid in respect of eight other matters without a comprehensive report was unreasonable; her decision to let all these other allegations hang over him throughout the hearing was unreasonable and tainted the disciplinary hearing; her allegations of fraud and fraudulent misrepresentation were manifestly unreasonable; her refusal to interview any member of the previous Board in circumstances where Mr. Ó Suid said that everything he did was done with their consent was manifestly unreasonable; her delay was

unreasonable; the Board's decision to dismiss Mr. Ó Suidr was unreasonable; its concealment of evidence was unreasonable; its decision to appoint a new principal even though Mr. Ó Suidr had appealed to WRC was a blatant attempt to pre-empt the jurisdiction of the WRC, the Labour Court and the High Court and to set at nought certain remedies these bodies might order including reinstatement.

**444.** The combination of every link in this chain led the Labour Court to the inevitable conclusion that while subjectively, Ms. Ní Dhuinn and the Board might have thought they were doing the right thing, objectively, they became motivated by an animus against Mr. Ó Suidr and were determined that he would never again serve as principal.

**445.** Their disastrous and unreasonable misjudgements removed the leadership of the school and left it without its founding principal for a number of years; their misjudgements have now created a situation where the school might have two principals; their misjudgements have exposed the school to the significant costs involved in these proceedings; their actions have resulted in enormous damage to Mr. Ó Suidr's reputation by making utterly unfounded allegations of fraud and dismissing him; their actions have also damaged the great progress the school had made between 2002 and 2012. Ms. Ni Dhuinn was made chairperson of the Board of Management in December 2011. Within weeks she had destroyed all the work done by her predecessors. It is a shocking legacy.

**446.** An injustice such as this is a festering wound in a school and in a small community such as Gorey. It damages both the reputation of its principal, and the young school which was founded upon the highest of ideals to teach children through Irish, to teach Catholic and Protestant together (and indeed children of all other Christian denominations). As a result of the misjudgements of Ms. Ní Dhuinn, the Board of Management and the Disciplinary Panel, this eleven year injustice has been allowed to fester for far too long.

**447.** Mr. Ó Suidr stated through his counsel that at all times he had trust in the legal process. This legal process has taken an unacceptably long period of time, and it is enormously to his credit that he has persevered. It is also enormously to the credit of his legal team - Robert Dore, Solicitor, the late Frank Callanan S.C., Mr. Hugh McDowell B.L. and Mr. Padraic Lyons S.C. - for representing Mr. Ó Suidr throughout this time.

**448.** The least Mr. Ó Suidr can expect is that his name be cleared, his reputation restored, and that he is re-instated to his former position. Mr. Ó Suidr is entitled to walk back through the front gates of the school with his head held high and to resume the position of which he was so wrongfully deprived eleven years ago.

**449.** The appeal is dismissed.