THE HIGH COURT

[2023] IEHC 22

Record No. 2022/4507P

BETWEEN

THE BOARD OF MANAGEMENT OF WILSON'S HOSPITAL SCHOOL

PLAINTIFF

AND

ENOCH BURKE

DEFENDANT

Judgment of Mr Justice Dignam delivered on the 17th day of January 2022.

Background

1. The defendant seeks the following interlocutory reliefs:

(i) An injunction restraining the Board of Management of the Plaintiff, its servants or agents, from holding the disciplinary meeting at Mullingar Park Hotel, Co. Westmeath on Thursday 19th January 2023 or any other date;

(ii) An injunction restraining the Board of Management of the Plaintiff, its servants or agents, from the conduct of any disciplinary or investigation process in respect of the Defendant;

(iii) An injunction restraining the Board of Management of the Plaintiff, its servants or agents from dismissing the Defendant.

2. In summary, the background to this application is as follows.

3. The defendant is a teacher in the plaintiff's school. He started teaching there in 2018 and was given a permanent contract of indefinite duration on the 19th May 2020. He teaches German and History and the evidence before the Court shows that he had an unblemished employment history in the school and was a well-regarded teacher both in relation to his teaching and his contribution to the extra-curricular life of the school and his students.

4. On the 9th May 2022, staff at the school, including the defendant, received an e-mail from the principal of the school, informing them a third year student would be making a social transition in their gender identity from the next day and stating that from then the student would become known by a different name and that "*they*" should be used in place of the gender-specific pronoun that had been used up to the point. I am not referring to the pronoun that had been used. The Court, and indeed, all parties, must appreciate and be sensitive to the fact that the dispute that arose between the school and the defendant concerns a young person who is not part of this litigation. The issues in this case are issues between the plaintiff and the defendant but what is said and done during the course of this litigation has the potential to impact on this young person. The Court has an obligation to protect and have regard to that child's privacy and welfare in how it words this judgment.

5. The defendant immediately objected to the principal's instruction. He emailed the principal the very next day inquiring:

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

6. The principal replied:

> *"All due care has been taken.*
>
> *There is no 'agreement' required from Chaplain.*

There is no suggestion of "force" by or for anyone involved.

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

7. The defendant replied to say:

"It is wrong that this belief system would be forced upon students and I will be taking this further.

It is an abuse of children and their constitutional rights."

8. This email exchange occurred over the course of just over an hour and a half on the morning of the 10th May 2022.

9. Later that day, there was a scheduled staff meeting and the defendant raised the matter. The timing and manner in which he did so are part of the disciplinary process the subject of these proceedings and not matters to be resolved at this stage. In essence, the defendant claims that it was perfectly appropriate for him to raise this issue at the meeting and that he did so in an appropriate manner and at an appropriate time.

10. The defendant then raised the issue with the bishop of the diocese on the 13th May and there was an exchange of correspondence between that date and the 21st May 2022.

11. In the meantime, there had been a meeting on the 19th May between the defendant, the principal and the deputy principal to discuss the issue.

12. On 27th May, the principal emailed the defendant stating, inter alia:

"I am writing to you following on from the meeting last week (Wednesday 19th May) regarding the request by a student and the student's parents that the student be addressed as [name] rather than [name] and that the identifying pronoun of they/their be used going forward.

I wish to clarify the approach of Wilson's Hospital to such request. The ethos of our school is inclusive and ensuring the welfare of students is paramount. As set out in the school's Admission Policy, one of the core values of the school is

'Caring: Focusing on the experience of the young person to ensure that their experience of their time in school is accepting, happy and positive.'

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

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

13. The defendant replied on the 27th May:

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

In the staff meeting the next day on Tuesday 10 May and also the meeting you requested last week on Wednesday 19 May I explained to you clearly where I stand on the matter."

14. Matters appear to have rested there until on the 21st June, a service was held in the school chapel. There does not appear to be any dispute but that this was attended by some past students, staff, board members, parents, clergy and some sixth-year students. There is a dispute about precisely what happened and as this is also the subject of the disciplinary process this dispute does not require to be resolved at this stage and it would not be appropriate to do so. What is not in dispute is that at the end

of the service the defendant stood up and spoke, setting out that he would not accept transgenderism and putting it to the principal to withdraw her instruction of the 9th May. The defendant sets out what he describes as "*[T]he exact transcript of his contribution*" in his affidavit. It is unclear to me how he maintained a "*transcript*" but I presume that he had written out what he intended to say and read it at the service. In any event, there is no substantive dispute about what the defendant said. The dispute lies in a conflict about the appropriateness of him speaking and raising a school matter in a public forum (albeit with relatively small numbers) and in front of students. Nor is there a dispute that the sixth-year students walked out though the defendant makes the point that there was only a small number of students there.

15. The service was followed by a dinner in the dining hall. There is also a dispute about precisely what occurred at this event which is also the subject of the disciplinary process and does not require to be resolved in the context of this application. There is no dispute that the defendant raised with the principal the question of her request and the possibility of her withdrawing it. The main dispute again lies in a conflict about the appropriateness of the defendant raising the issue and his behaviour in doing so.

16. On the 15th August 2022, immediately before the principal left her post in the school, she sent to the defendant and to the chairperson of Board of Management a copy of a comprehensive report which was prepared by her in accordance with Stage 4 of the Revised Procedures for the Suspension and Dismissal of Teachers pursuant to Section 24(3) of the Education Act 1998 as provided for in DES Circular 49/2018.

17. The Board met on the same day, the 15th August, in extraordinary meeting. There is a significant issue in relation to this meeting and I return to it below.

18. The following day, the 16th August, the Chair of the Board of Management wrote to the defendant stating, inter alia, that he had received a report from the principal which contained very serious allegations which, if substantiated might constitute serious misconduct, that the principal had initiated the disciplinary procedure at Stage 4, that a meeting had been arranged for the 14th September 2022 and he would be given an opportunity to respond to the allegations. The letter stated that if a case of serious misconduct is upheld the normal consequence will be dismissal.

19. Then on the 18th August 2022 the chairperson of the Board wrote to the defendant stating, inter alia, that he believed the Board should give consideration to

placing the defendant on paid administrative leave and inviting the defendant's views before any decision was made.

20. A meeting was arranged for that purpose on the 22nd August. I refer further to this meeting below. Following the meeting, the defendant was informed by letter of the 24th August 2022 that the Board had decided to put him on paid administrative leave. The defendant replied on the 25th August, inter alia, taking issue with this decision and the manner in which the meeting was conducted and making the point that he considered the initiation of the disciplinary process and the decision of the Board to suspend him to be unreasonable, unjust and unlawful.

21. The next step in relation to the proposed disciplinary meeting of the 14th September was that the defendant applied on the 11th September for several Orders (in these proceedings which had been issued by the plaintiff on the 30th August) including an injunction restraining the holding of the meeting. On the return date of the 11th September the plaintiff gave an undertaking not to hold the meeting and that no such meeting would take place without three clear days' notice to the defendant. It is incorrectly stated in the replying affidavit filed on behalf of the plaintiff that the Court refused this injunction restraining the holding of the meeting. In fact, in circumstances where that undertaking was given it was not necessary for the Court to determine the application. The consideration of other relief was adjourned and, I understand, later refused.

22. The plaintiff school then wrote to the defendant on the 22nd December 2022 giving him notice that a disciplinary meeting would be held on the 19th January 2023 and the defendant then issued the instant motion.

23. That is how the matter comes before the Court now. There is, however, a particular feature of the overall background to which specific reference must be made.

24. Following the decision of the plaintiff to place the defendant on administrative leave the defendant continued to attend the school. It seems he did so on the 25th August (after the decision to place him on paid administrative leave was communicated to him by letter of the 24th August) and did so each school day after that.

25. The plaintiff issued these proceedings by Plenary Summons of the 30th August 2022 and applied for interim relief on the 30th August 2022. Stack J granted an interim Order restraining the defendant from attending at the school and from attempting to

teach any classes or any students at the school. Notwithstanding this Order, the defendant continued to attend the school. The plaintiff then made an application for attachment and committal in light of the breach by the defendant of Stack J's Order and O' Regan J made an attachment Order against the defendant on the 2nd September. By Order of Quinn J of the 5th September the defendant was committed to Mountjoy Prison for his breach of the Order made by Stack J. Interlocutory Orders were then made by Barrett J on the 7th September restraining the defendant from attending the school for the duration of his paid administrative leave, from attempting to teach any classes or any students at the school for that period, from interfering with the appointed substitute teacher's duties and teaching, from failing to comply with the directions of the board, and from trespassing on the property of the school.

26. The defendant refused to purge his contempt and refused to indicate that he would stay away from the school or that he would comply with the Order of Barrett J. His detention was reviewed on the 13th December and he refused to purge his contempt. The matter was then relisted for mention by the Court on the 16th December for the purpose of asking the parties to address it on the question of his continued detention in light of the fact that the school would be closing for the school holidays. It was then listed for the 21st December. This is dealt with in a ruling of O' Moore J of the 21st December 2022. For present purposes it is sufficient to note that on none of these occasions did the defendant indicate that he would comply with the Order of Barrett J. Indeed, a person who is in contempt can at any stage come before the Court to purge his contempt and the defendant did not do so. O' Moore J released the defendant from detention on the 21st December for the reasons set out in his ruling of that day. On the 5th January 2023, when the school reopened after the school holidays, the defendant once again attended at the school and did so again on the 6th, 9th and 10th January. During the course of the hearing of this motion, the defendant made it clear that it was not his intention to comply with the Court Orders. I deal with the defendant's stated reasons for refusing to do so below.

27. I set this out as part of the background because it is one of the central issues to be considered in this application. There is old authority to the effect that a person who is in contempt of Court ("*contemnor*") is not entitled to be heard or to take proceedings while in contempt of Court. The more modern position appears to be that the Court has a discretion as to whether or not to entertain an application by a contemnor but that this discretion should, save in exceptional circumstances, be exercised against entertaining such an application. The significant point is that this discretion is to be exercised at the outset, to determine whether an application by the contemnor should be even

entertained. However, the plaintiff did not rely on these authorities but rather on the maxims of equity that he who comes to equity must do equity and that he who comes to equity must come with clean hands. It is long-established that if the Court finds that an applicant has acted contrary to equity then it has a discretion to refuse relief even if the applicant might otherwise be entitled to it. These are sometimes considered as a preliminary matter, i.e. whether the respondent should be permitted to seek relief at all or whether the Court should even consider granting relief. In other cases, they are considered as part of the assessment of the balance of convenience. In others they are considered by the Court in the exercise of its discretion as to whether to grant relief even if the applicant has satisfied the other elements for the grant of an injunction. It seems to me that in the circumstances of this case, I should not consider them as a preliminary matter; not least because the defendant argues that the Court can not refuse the relief because the breaches of his rights are so fundamental and so egregious, the damage to him would be so grave, and because of the conduct of the plaintiff in the disciplinary process (which is the same as the first point) and in the litigation. These can only properly be considered when I have considered whether the defendant has met the required test (i.e. a fair issue to be tried or a strong case). Furthermore, it seems to me that it is arguable that before the Court could apply the law in relation to contemnors there would have to be a finding that the defendant is currently in contempt of Court. I have been told that the plaintiff has brought a motion to have the defendant's assets sequestered for contempt. It seems to me that a finding as to whether the defendant is currently in contempt should be made in that motion. Of course, this may be somewhat academic in circumstances where the defendant accepts that he is attending the school and has stated that he is going to continue attending, accepts that this is in breach of the Court Orders but says that he is not obliged or should not be obliged to comply with them. The acceptance of these facts can be considered as part of the Court's application of the maxims of equity if it is satisfied that the defendant has met the required standard for an injunction. I therefore propose to consider this factor after considering whether the defendant has satisfied the relevant test, i.e. a fair issue to be tried or a strong case.

28. The defendant has also refused to give an undertaking as to damages and I also consider this below.

Legal principles in respect of interlocutory injunctions

29. There is relatively little dispute between the parties as to the relevant legal principles in respect of the grant of interlocutory injunctions. Nonetheless, it may be

helpful to set out those principles and to make particular reference to injunctions in an employment/disciplinary context and a schools/disciplinary context.

30. The modern approach to the consideration of interlocutory injunctions is set out in *Merck Sharp and Dohme v Clonmel Healthcare [2019] IESC 65*, including setting out an eight step approach.

31. In light of the way this case was argued, I do not need to consider all of these steps. Essentially the case turns on whether the plaintiff has satisfied the appropriate standard or threshold test, whether the balance of convenience or justice favours the grant or refusal of the injunctions sought, and whether relief should be granted or refused due to the defendant's refusal to give an undertaking as to damages and his refusal in the past to comply with the Court Orders and his stated intention to continue to refuse to do so.

32. The parties were agreed that the appropriate "*threshold test*" was the test laid down in *Maha Lingham v Health Service Executive [2005] IESC 89*. I queried this at the hearing in light of the nature of some of the relief being sought and inquired whether the traditional, fair issue to be tried, test was in fact the appropriate one but both parties were of the view, and in fact made submissions that the higher *Maha Lingham* test should be applied (see, for example, *Bergin v Galway Clinic Doughiska Ltd [2008] IR 205)*. I have therefore applied that test: whether the applicant had established a strong case that he would be likely to succeed at trial, i.e. the test for a mandatory injunction.

33. There is an additional element to the test in the context of an injunction to restrain an ongoing disciplinary process. Clarke J explained in *Carroll v. Bus Átha Cliath [2005] 4 IR 184*, that the courts should be reluctant to restrain an ongoing disciplinary process. He said:

> "*It seems to me that a court should be reluctant to intervene and in particular to intervene at an interlocutory stage, in an as yet incomplete disciplinary process. To do so would be to invite a situation where recourse might well be had to the courts at many stages in the course of what would otherwise be a relatively straightforward and expeditious set of disciplinary procedures."*

34. He then added to this in *Minnock v Irish Casing Company Ltd and Stewart [2007] 18 ELR 229* and outlined the circumstances in which the Court might intervene. He held:

> "*It seems to me, firstly, as a matter of law that the authorities are now beginning to settle upon a test as to the appropriate attitude to be taken or the test to be applied in cases such as this. It clearly is the case that in the ordinary way, the court will not intervene necessarily in the course of a disciplinary process unless a clear case has been made out that there is a serious risk that the process is sufficiently flawed and incapable of being cured, that it might cause irreparable harm to the plaintiff if the process is permitted to continue*."

35. See also *O'Connor v Adigun Limited [2017] IEHC 123* and *O'Neill v The Commissioner of An Garda Síochána [2020] IEHC 448*.

36. These general principles are reflected in the judgment of Butler J in *Lally v Board of Management of Rosmini Community School [2021] IEHC 633*, given in the context of schools' disciplinary processes and particularly the Circular that is at the heart of this case, where Butler J said.

> "*5***. ...***The settled case law makes it clear that in normal course an ongoing disciplinary process should be allowed to proceed unless it is clear that the process has gone irremediably wrong such that any conclusion reached adverse to the employee would be bound to be legally unsustainable (per Clarke J., as he then was, in Rowland v. An Post [2017] IR 355). That said, there are also a number of cases in the education sector involving the application of these procedures (i.e. DES Circular 49/2018 or its predecessors) where the teacher concerned succeeded in establishing that the threshold had been reached. As each case depends on its individual facts, it will be necessary to look at the facts of this case in some detail.*"

37. In *Lally*, Butler J considered the interaction between the traditional threshold test and the requirement not to intervene unless it is clear that the process has gone irremediably wrong. In *Lally* there was no dispute that the appropriate threshold test was the fair issue test and Butler J held that "*as the matter has not been placed in issue in in this case, I am satisfied that the legal onus on the plaintiff is to establish that there is a fair question to be tried*". She went on to say:

> "*61. This is not, however, the end of the matter because separate to the jurisprudence concerning the standard applicable to the grant of interlocutory injunctions, there is a line of case law relied on by the school to the effect that a*

court should not intervene in an ongoing disciplinary process unless it is clear that the process has gone irremediably wrong and it was more or less inevitable that any adverse conclusion reached against the plaintiff would be unsustainable in law. If the plaintiff cannot establish that the case reaches the standard, then the disciplinary process should be allowed to continue to its natural conclusion (see Rowland v. An Post [2017] 1 IR 355). This means that in establishing a "fair question to be tried", it is not sufficient for the plaintiff simply to show that she has a stateable case on fair procedures or a breach of Circular 49/2018 or objective bias on the part of the decision maker. She must show that she has raised issues which suggest that the process has gone irremediably wrong and that any conclusion ultimately reached against her will be legally unsustainable. Whilst the fair question threshold has often been described as a light one, it becomes a more exacting threshold in a case of this nature by virtue of the fact that it must be applied to legal proceedings which themselves attract a specific and higher standard for the grant of a permanent injunction.

62. The judgment in Rowland v An Post was given in the substantive proceedings, interim and interlocutory injunctions having been granted at an earlier stage. Thus, the legal test under discussion by the Supreme Court was that to be applied to the question of whether the party in the position of the employer (strictly speaking it was not an employment case), should be permanently injuncted from continuing with a disciplinary process for the reasons advanced. However, in light of the fact that generally an interlocutory injunction should not be granted if a permanent injunction is unlikely to issue, for the reasons discussed in the preceding paragraph the legal test for the grant of a permanent injunction becomes relevant to the issue as to whether the plaintiff has established a fair question to be tried. In looking at that test as regards disciplinary procedures, Clarke J. (as he then was) stated starting at para. 11 of that judgment: -

> *"11. …In many cases the proper approach of a court when called on to consider the validity of a disciplinary-like process is to look at the entirety of the procedure and determine whether, taken as a whole, the ultimate conclusion can be sustained having regard to the principles of constitutional justice. Many errors of procedure can be corrected by appropriate measures being taken before the process comes to an end. Decision makers in such a process have a significant margin of appreciation as to how the process is to be conducted (subject to any specific rules applying by reason of the*

contractual or legal terms governing the process concerned). Thus the exact point at which parties may become entitled to exercise rights such as the entitlement to know in sufficient detail the case against them, the entitlement in appropriate cases to challenge the credibility of evidence and the right to make submissions are, at least to a material extent, matters of detail to be decided by the decision maker in question provided that the procedures adopted do not, to an impermissible extent, impair the effectiveness of the exercise of the rights concerned.

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

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

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

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

38. Thus, in the specific context of this case, i.e. an application for an interlocutory injunction to restrain an ongoing employment disciplinary process, the defendant must show that he has a strong case that he is likely to succeed at trial, taking account of the

requirement to prove at trial that the process has gone irremediably wrong, i.e. that there have been flaws in the process and that those flaws mean that there is a serious risk that the process has gone irremediably wrong. Of course, as noted by Butler J, sight should not be lost of the fact that this is an interlocutory application. The defendant does not have to show that he will succeed in his case. The test at this stage is lower than at the substantive stage and it will be a matter for the trial judge to decide whether the defendant has proven his case to the required standard.

39. These are the general principles applicable at this stage (save for the principles applicable to the consideration of the Court's discretion having regard to the defendant's refusal to give an undertaking as to damages, his past conduct and his stated intentions – which I consider below). The parties lay emphasis on certain portions of these judgments, particularly, though not exclusively, the *Lally* case and *Joyce v Coláiste Iognáid* in relation to the specific grounds raised by the defendant and I will return to the judgments in that context below.

Whether the defendant has met the threshold

40. The defendant raises seven grounds upon which he claims the disciplinary process is unconstitutional, flawed and invalid:

(i) It is in breach of, and an unlawful interference with, the Defendant's rights under Articles 40.6(i), 44.1 and 44.2 of the Constitution;

(ii) There is no serious misconduct to warrant a Stage 4 disciplinary process;

(iii) There has been no consideration of the defendant's unblemished employment record, his excellent service at the school, or his good name and employment prospects;

(iv) The Report contains findings and conclusions which have been made without affording the defendant any opportunity to respond, thereby depriving him of natural justice and fair procedures;

(v) The Report has not ascertained and presented the facts fairly, thereby depriving the defendant of natural justice and fair procedures;

(vi) The Report was read and discussed at a Board meeting attended by the Principal to which the defendant was not invited, thereby depriving the defendant of natural justice and fair procedures;

(vii) The outcome of the disciplinary process has been predetermined.

41. I have concluded that the defendant has satisfied the standard for an injunction on the basis of a combination of numbers (iv) and (vi) for the reasons which will be discussed presently. In those circumstances it is unnecessary to determine the other grounds and, while I have fully considered them and the submissions made by the parties, I will refrain from commenting on them, particularly in light of the fact that this matter had to be determined very urgently. I will, however, make further reference to them towards the end of this judgment.

Disciplinary process – Circular 49/2018

42. Before addressing grounds (iv) and (vi) (I in fact deal with them in reverse order) it would be helpful to set out the terms of the disciplinary procedures contained in Circular 49/2018 "*Revised Procedures for Suspension and Dismissal of Teachers and Principals"* as the plaintiff is bound to apply those procedures. Of course, they must do so in a manner consistent with fair procedures.

43. The Circular provides, inter alia:

"Stage 4:

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

The board of management will consider the matter and will seek the views of the teacher in writing the report prepared by the Principal. The board of management shall afford the teacher an opportunity to make a formal presentation of his/her case. The teacher should be given at least ten school days' written notice of the meeting. The notice should state the purpose of the meeting and the specific nature of the complaint and nay supporting

documentation will be furnished to the teacher. The teacher concerned may be accompanied at any such meeting by a representative, normally his/her trade union representative/s or a colleague/s subject to a maximum of two. The teacher will be given an opportunity to respond and state his/her case fully and to challenge any evidence that is being relied upon for a decision and be given an opportunity to respond. Having considered the response the board of management will decide on the appropriate action to be taken. Where it is decided that no action is warranted the teacher will be so informed in writing within five school days. Where following the hearing it is decided that further disciplinary action is warranted the board of management may avail any of the following options;

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

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

Where the disciplinary action short of dismissal is proposed the case will be reviewed by the board of management within a specified time period to consider whether further disciplinary action, if any, is required."

44. This Circular and its operation was considered by Binchy J in *Joyce v Coláiste Iognáid [2015] IEHC 809* and by Butler J in the *Lally* case.

45. Two features of the procedures bear note in the current context: (i) it is the principal who commences the disciplinary process, i.e. it is not a two-stage process whereby the principal delivers a comprehensive report to the board and then the board decides whether or not to instigate the disciplinary process – it is instigated by the principal by the delivery of the report to the board (*Joyce*, para.78 and *Lally*, paras. 52-54); (ii) there is no obligation to seek any response from the teacher before completing

or delivering the report. (This has obvious consequences in respect of the requirements of fair procedures); and (iii) the principal is a member of the board of management.

46. The fact that it is the principal who must prepare and deliver the report presents challenges where the principal is also the complainant or a person who has been involved in the incident(s) giving rise to the report. This, together with the fact that the teacher's input is not required, reinforces the burden on the principal to ensure that the report is fair and balanced. The principal of a school is a member of the Board of Management and, I would expect, a member whose views are valued and bear a certain amount of weight. This will, of course, vary from school to school but, after all, the Board entrusts the principal with the day-to-day running of the school. Thus, a report from the principal can be expected to carry a certain amount of weight and it is therefore essential that the report be fair and proper. I agree with the views of Butler J in paragraphs 74 and 75 of the *Lally* judgment:

> *"74.…The report is a mandatory step in the process. In my view there is an obligation on the principal to act fairly in the preparation of a report, particularly one which is intended to start a disciplinary process at stage 4. This means that the facts set out in the report must be both ascertained and presented fairly. If there are facts or circumstances known to the principal which tend to disprove the allegations or to minimise the seriousness of what is alleged, these should be brought to the attention of the Board of Management in the report.*
>
> *75…. 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."*

The Report was read and discussed at a Board meeting attended by the Principal to which the Defendant was not invited, thereby depriving the Defendant of natural justice and fair procedures

47. There are two limbs to the defendant's argument relating to the meeting of the plaintiff Board on the 15th August. The first is that the Board should not have discussed the report at the meeting without first providing the defendant with an opportunity to

respond. Indeed, the defendant goes further and submits that the meeting should not have taken place at all. The second is that the principal, as the author of the report, should not have been present at such meeting.

48. In relation to the first limb the defendant must establish a strong case that he is likely to succeed in showing that the Report was discussed at the meeting. I am fully satisfied that the defendant has done so. This was a point of particular controversy at the hearing.

49. The defendant deposes in paragraph 33 of his grounding affidavit that:

> *"At the meeting on 22 August 2022, after questioning Mr. Rogers, he informed me that the Board had had "an extraordinary meeting" on 15 August 2022 to read and discuss the Report. He also informed me that Principal Niamh McShane was present at that meeting. Mr. Rogers also confirmed that the Report in its entirety was read at the meeting and that it was "part of the agenda to discuss that Report."* [emphasis added]

50. In fact, in a letter as early as the 25th August 2022 (in relation to the decision to place him on administrative leave) the defendant had stated:

> *"…During the meeting:*
>
> *1. The Chairperson confirmed, when questioned, that the Board had received the Report from the Principal at an extraordinary meeting on 15 August 2022 attended by Ms. McShane and that the Report was read and discussed at the meeting."* [emphasis added]

51. The only response to the averment in paragraph 33 of the defendant's affidavit is contained in paragraph 15 of the replying affidavit of Mr. John Rogers, chair of the Board, where he said:

> "*The Principal's report was received by the Board of Management and was read out at the Board of Management meeting on 15 August. The report was not discussed at this meeting…*" [emphasis added]

52. However, this is directly at odds with the minutes of the second meeting (on the 22nd August), attended by the defendant, which were prepared by a representative of

the Board and which are exhibited to Mr. Rogers affidavit. The following exchange is recorded:

> *"JRO: Meeting is to discuss paid administrative leave. The board will decide on whether or not to instigate this after hearing representations from EBU. One item agenda only, nothing to be introduced regarding the Warden's report.*
>
> *EBU: Please confirm that this is the first meeting since the issuing of the report.*
>
> *JRO: There was a meeting on 15/8 where it was discussed.*
>
> *EBU: Was the report discussed at that meeting?*
>
> *JRO: Yes"*

Thus, Mr. Rogers is clearly recorded as having stated on the 22nd August that the report was discussed at the meeting of the 15th August, contrary to what he says on paragraph 15 of his affidavit.

53. The defendant forcefully submitted that the averment in paragraph 33 of Mr. Rogers' affidavit was a lie and suggested that that should be the end of the matter. He challenged the Court that it was not showing sufficient concern that someone had lied to the Court and questioned the Court as to whether it was acceptable that someone lie to the High Court and as to what the consequences for lying were. One of his advisors and members of his family also sought to make some of the same points. I can only assume that this comes from a misunderstanding of the Court's decision-making function, the obligation to hear both sides of the case before making any findings and of the limits on the Court's function in hearing an interlocutory application on affidavit. The defendant may well be correct or he may be incorrect that this constitutes a lie. Mr. Rogers may have an explanation for the contradiction between his averment and the minutes (as contradiction it undoubtedly is) which might show that he has not told a lie. Or he might not. Whether or not Mr. Rogers lied is a matter for the substantive trial at which all parties will be available to be cross-examined. It would be improper for me to make a finding that this contradiction is a lie, just as it would be improper of me to make any finding on the allegations against the defendant made by the plaintiff. This is particularly so where it is unnecessary to do so to decide this application. Irrespective of what Mr. Rogers says in his affidavit or might have said in a further affidavit, the minutes record him telling the defendant at the meeting on the 22nd August that the report was discussed at the meeting of the 15th August and the plaintiff has never challenged the

defendant's statement in the letter of the 25th August. That is more than sufficient to establish a strong case that the defendant is likely to succeed in showing that the report was discussed at the meeting.

54. The defendant must also establish that there is a strong case that he is likely to succeed in showing that the Board acted wrongfully in discussing the Report. The defendant's case in this regard is black and white: a board of management is not entitled to discuss a Report at all prior to seeking (or receiving) the views of the teacher.

55. He relies on paragraph 78 of *Joyce* and paragraph 53 and 54 of *Lally*. Binchy J said at paragraph 78 (bearing in mind that it concerned a chairperson's report about a principal):

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

56. Butler J said in paragraphs 53 and 54 of *Lally* that:

> "53. *The disciplinary process at stage 4 is commenced by the preparation of a comprehensive report by the principal and the forwarding of that report to the Board of Management and the teacher concerned. Once the report is received by the Board of Management, its function is to seek the views of the teacher both in writing and by affording him or her an oral hearing at which he or she can*

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

54. Leaving aside for the moment the suggestion of prejudgment, in my view, the procedure adopted by the school in relation to the first comprehensive report was more reflective of Circular 49/2018 than that which is now proposed and, indeed, what is suggested in the more recent correspondence from the school's solicitor. The principal sent the plaintiff the first comprehensive report on 13th April, 2021. The Board met on 15th April and set a date for an oral hearing on 10th May. The chairperson then wrote to the plaintiff on 16th April advising that the principal had initiated a disciplinary process. She sought the plaintiff's views in writing on the comprehensive report and advised the plaintiff of the meeting scheduled for 10th May at which she was to be given an opportunity to make a formal presentation. This is what the procedure requires. Whilst it must always be open to a board of management to reject the allegations made in a comprehensive report either because they are not substantiated by the report itself or they are not sufficiently serious to warrant pursuing the process at stage 4, the teacher must still be allowed the opportunity to address the board of management in writing and orally before any decision is made. If it had been intended that the procedure before the Board of Management would comprise two stages, then no doubt those two stages would have been clearly set out in Circular 49/2018. Any such two-stage

procedure immediately gives rise to issues such as those which have been addressed in more formal statutory contexts by the distribution of functions between preliminary investigation committees, fitness to practice committees and the boards or bodies with ultimate responsibility for the imposition of any sanction. This does not arise here because the procedure set out in Circular 49/2018 does not envisage that the Board of Management will actively consider the substance or merits of the allegations against a teacher, even on a threshold basis, before the teacher is afforded a right to be heard."

57. I am not at all convinced that the Circular or these passages preclude a Board from discussing a report at all in advance of hearing from the teacher. What was being discussed in the passages is whether the board has any role in the institution of the disciplinary process or in determining whether the report raises sufficient concerns to warrant the initiation of such a process or to continue the process, not whether a board may or may not have any discussion. What is clear is that there must not be any active discussion of the substance or merits of the allegations. That is a basic principle of fairness because the teacher has not been heard at that stage. But that does not preclude all discussion of the report. The Circular itself expressly provides that "*[T]he board of management will consider the matter and will seek the views of the teacher in writing of the report prepared by the Principal.*" [emphasis added]. In order for a board, which is a collective body, to "*consider the matter*" it must be entitled to discuss it. The precise meaning of this provision will have to be determined at trial. For example, an argument could possibly be made that this sentence must be understood as limiting the obligation to "*consider the matter*" to a point in time after "*the views of the teacher*" have been received but it seems to me at this stage that this strains the language to breaking point, particularly when the sentence is read in the context of the previous paragraph and the subsequent sentences. In any event it falls a long way short of a strong case. Indeed, it is difficult to imagine how a board could function without some discussion. On a very basic, practical level, how could a board arrange a disciplinary meeting without some consideration of the report at least by some member(s) of the board. Would the meeting take 1, 2, 3 or 4 hours for example? If they have to book a meeting room, how long should it be booked for? Much more importantly, the allegations in a particular case may give rise to the need to consider placing a teacher on administrative leave. If the Report may not be considered or discussed at all, how is the Board to know that this need may arise. What of an extreme case where the alleged behaviour of a teacher is, if true, a danger to children? How can the board fulfil its functions of protecting the children in its charge without considering the Report. In a

case where it is necessary to consider placing a teacher on administrative leave, how can the board make its decision without discussing the report. Of course, it will have the views of the teacher at that stage but they will be the teacher's views in relation to suspension rather than on the allegations themselves. Indeed, at an earlier stage, in a case where there may be two (or more) legitimate views as to whether it is necessary to decide whether to place the teacher on administrative leave how can the board reach a view as to whether it should even hold a hearing on the question of possible suspension without discussing the report?

58. It seems to me, subject to full argument at trial, that what is precluded is a discussion or consideration of the substance or merits of the allegations, and not any discussion at all of the report.

59. Thus, I am not satisfied that the defendant has established a strong case that the mere fact that the Board discussed the report at the meeting of the 15th August 2022 is wrongful.

60. However, one direct consequence of a board being entitled to consider a report in the limited terms set out above is that if the report is not fair and proper then it risks tainting the members of the board and any subsequent decision. Paragraph 75 from *Lally* (quoted above), is instructive in this regard. A consequence of the board being entitled to discuss the report is to reinforce the obligation to ensure that the report is fair and proper and does not, for example, contain findings or conclusions. If it is not, then the fact of it being discussed by the board may be relevant to the question of whether the process has gone irremediably wrong. I will therefore have to return to the fact that the board discussed the report below.

61. The second limb of the defendant's argument is that the principal was in attendance at the meeting of the 15th August and the defendant was not. There is no dispute about these facts.

62. There is no express provision in the Circular which precludes a principal from attending a meeting at which the board considers a report prepared by the principal. However, it is long-established that, insofar as possible and insofar as they allow, procedures must be applied in a manner consistent with and so as to ensure fair procedures. It has long been held that what is required by fair procedures will depend on the facts of the case. It seems to me that on the particular facts of this case, there is a strong case that the defendant is likely to succeed in showing that the attendance of the principal was wrongful. The particular facts are that the principal is the person who decided that it was appropriate to start at Stage 4 and who prepared the report (because she was obliged to do so under the Circular), but is also the person against whom some

of the behaviour which is alleged to constitute serious misconduct was directed and on whose account the report is based, and there was a discussion of her report while she was present. Whether or not this combination of facts will ultimately be found to mean that her attendance was wrongful will depend in many respects on the nature and extent of the discussion of the report at the meeting. This will be the subject of evidence and cross-examination at the trial but I am satisfied that the combination of those facts establishes, at this stage, a strong case to argue that her attendance was wrongful. I consider whether this gives rise to a sufficient risk that the process has gone irremediably wrong below.

The Report contains findings and conclusions which have been made without affording the Defendant any opportunity to respond, thereby depriving the Defendant of natural justice and fair procedures

63. In circumstances where the Circular envisages that the teacher may not have an input into the preparation of the report and that the report may be received by the board before the teacher has had an opportunity to respond, there is an obligation on the principal to ensure that the report does not contain any findings or conclusions. The report is to be a report on the facts of the case. It is in essence to be a pure investigation report or evidence-gathering exercise.

64. The defendant relied on *Minnock v Irish Casing Company Ltd [2007] 18 ELR*, *Mason v ILTB Limited [2021] IEHC 477*, *McLoughlin v Setanta Insurance Services Ltd [2011] IEHC 410* and *Joyce v Coláiste Iognáid*. It is sufficient to refer to *Joyce*. This also has the benefit that it effectively concerned the same disciplinary process (though the principal was the subject of the process and the chair was the author of the report). Binchy J said:

> "*75. Moreover, this is consistent with the jurisprudence in the area, to which the Court has been referred. It is quite clear that the principles of fair procedures and natural justice do not apply to the investigatory stage provided that, in the words of Clarke J. in Minnock 'no findings of any sort are made on behalf of the inquirer other than to determine whether there is sufficient evidence or materials to warrant a formal disciplinary process.'"*

65. He went on to say at paragraph 80:

> "*80. The July report itself contains a number of remarks or comments (set out in paragraphs 25-28) which by any standards could only be regarded as highly prejudicial to the plaintiff. A number of them are most definitely in the nature of conclusions and some are in the nature of rhetorical questions, begging only of an answer adverse to the plaintiff. A considerable amount of time at the hearing was taken up in discussing whether or not those parts of the July report that referred to 'the views of the board' in fact represented the views of the board. However, I am not altogether sure that this really matters; it is clear from the authorities that where the investigator goes beyond the mere gathering of facts in order to determine whether or not there is a case to answer to warrant a formal disciplinary proceedings and makes findings or draws conclusions, the enquiry can not any longer be characterised as one which Clarke J. described in Minnock of a 'pure evidence – gathering type' to which the rules of natural justice do not apply. In that case, Clarke J. held that the second defendant, who was conducting an investigation on behalf of the first defendant employer had purported to make what he described as findings and for that reason he granted an order restraining the continuation of the investigation pending the full trial of the action.*"

66. Binchy J concluded at paragraph 83 that the plaintiff had established that the relevant report "*contains not just a statement of the facts, but also findings and conclusions which have been made without affording the plaintiff any opportunity to respond, thereby depriving the plaintiff of fair procedures and natural justice…*"

67. Care must be taken in considering the outcomes in *Lally* and *Joyce* as they turned very much on their own facts. However, Binchy J held in *Joyce* that a number of statements in the relevant report in that case (set out in paragraphs 25-28) amounted to "*findings and conclusions*". These included "*It is unacceptable that the principal would not support a decision of the board. To link that decision to an allegation of serious misconduct by students, misconduct which turned out not to include criminal damage, is wholly unacceptable*", "*Other examples of actions by the principal which did not meet professional standards include…*", "*Such conduct undermined the board. It also undermines the trust and confidence of the board in the principal, including the essential trust and confidence that the principal would support and execute decisions of the board and be seen to do so.*"

68. The defendant instances 14 examples of what he says are findings and conclusions in the report. A significant portion of them are not findings or conclusions. I

do not propose to go through them all because it is not necessary to do so but I refer to a sample of them:

> *"1. Mr. Burke has treated the decision to accommodate the social transition of a student as a personal decision of mine rather than as a decision of the school. In view of this, his objections have been very personally directed at me rather than the school.*
>
> *2. Mr. Burke has chosen quite deliberately to articulate his objections in public rather than in private, while ignoring all established norms and procedures for addressing concerns of teachers in voluntary secondary schools.*
> *3. …*
> *4. The interruptions at the Chapel and the dinner were made very much in public and were highly personal to and disrespectful of me.*
> *5. Mr. Burke interrupted Bishop Glenfield during a public Church service, which was attended by the stakeholders of the school. His outburst was directed at me personally in front of current students and staff and other members of the school community.*
> *…"*

69. Complaint could perhaps be made of some of the language in these instances but in no way could they be described as anything other than the principal's account of the facts. There is no finding or conclusion. The defendant will be free to challenge the accuracy of these statements or indeed the language used by the principal to describe the events at any disciplinary hearing.

70. However, the principal went further in several instances and did make findings and conclusions. For example, she said "*Once again, after the dinner, Mr. Burke challenged me about the issue in front of members of the wider school community. He was agitated and followed me around the room as I tried to move away from him. It was completely inappropriate for Mr. Burke to address me in such a manner, once again in a public place.*" No complaint could be made of the first two sentences (and the defendant does not make a complaint) or indeed, the final clause. However, a strong case is established that the statement that "[*I]t was completely inappropriate for Mr. Burke to address me in such a manner…*" does amount to a finding. It reflects the language used in the report in *Joyce*, which was held by Binchy J to amount to a finding or conclusion. Similarly, the principal stated that "*Mr. Burke's position runs counter to the Code of Professional Conduct for Teachers issued by the Teaching Council, which sets out the standards that are expected of all registered teachers regardless of their position*" and

stated that "*In challenging a legitimate instruction of the principal, Mr. Burke has acted in an inappropriate and unacceptable manner. He has shown total disregard for school management not only in front of his colleagues, but also in front of students and the members of the wider school community. It is not acceptable for a teacher to seek to challenge school policy in such a public manner, regardless of the subject matter of the policy.*" There is a strong case that these contain findings and conclusions. The appropriateness or otherwise of the behaviour which is attributed to the defendant is a matter which goes to whether or not he is guilty of the serious misconduct alleged against him. It is a matter for the board to determine.

71. I wish to make it clear that I am not at all satisfied that the inclusion of a phrase that alleged behaviour is "inappropriate" or "unacceptable" necessarily or automatically renders a report flawed. A report must generally be taken in its entirety but I am satisfied that when the several instances cited above are taken cumulatively the defendant has satisfied the burden of showing that he has a strong case that the report is flawed.

72. The question then is whether he has established a strong case that he is likely to succeed at trial having regard to the requirement to show that the ongoing disciplinary process has gone irremediably wrong in light of these issues.

73. I would not be at all satisfied that he has done so on the basis of any one of these issues alone. If, for example, this report had simply been sent to the Board and a disciplinary meeting arranged without any discussion then the defendant could have joined issue with the contents, including the principal's conclusions, and could have made the point that the principal's views were expressed without first hearing from him. The Board would have been hearing from both sides at the same time. However, the Court must look at the process so far in its entirety (*Rowland v An Post [2017] 1 IR 355*). In this case the report, containing findings and conclusions, authored by the principal, was discussed (at least to some extent) at the Board meeting of the 15th August which was attended by the principal and who presumably was present during the discussions (however limited or extensive). As noted above, the principal of a school is a member of the board of management and it seems likely that in the general run of things her views will be valued and given weight. It must also be noted that the vast majority of the board members were in attendance on the 15th August. There is a risk that the terms of the report which were read and discussed (in some shape or form) will taint the views of the members of the board who were present. This could perhaps be remedied by the exclusion of the members who were present but there is no evidence before the Court as to whether this is feasible having regard to issues such as the need to have a quorum. There was reference during the hearing to all but one member being

present. The nature and extent of the discussion may well be relevant but there is no evidence on this. I can not conclude that the defendant has failed to discharge the burden of proof in respect of a meeting at which he was not present, particularly in circumstances where the plaintiff has not exhibited any minutes of the meeting. It seems to me that in reaching this conclusion I can and should have regard to the contradiction between the averment in Mr. Rogers affidavit and the minutes of the meeting of the 22nd August. It seems to me that on the basis of the combination of these facts the defendant has established the test for an interlocutory injunction, having regard to the need to show that there is a risk that the process has gone irremediably wrong. Whether or not it has will, of course, be determined at the full trial at which a different test will be applied.

74. I do not accept the plaintiff's argument that the process has not gone irremediably wrong because (a) the Board can deal with all of these issues at a disciplinary meeting, (b) the defendant has an appeal, and (c) the defendant has his remedies in law. Nor do I accept that the application is premature in the circumstances. Dealing with this last point first. It seems to me that once the Court has concluded that the defendant has a strong case having regard to the fact that he will have to show at trial that the process has gone irremediably wrong then it can not be said that the application is premature. I fully accept that where errors have been made but can be remedied during the course of the process then an application for an injunction can be said to be premature. This is the very basis for the Court's traditional reluctance to interfere with an ongoing disciplinary process. Related to this is the point which the plaintiff made that it is not sufficient that the defendant simply have a fear or apprehension of a breach of his rights (see *O'Connor v Adigun [2017] IEHC 123*, *Minnock* and *O'Neill*). It seems to me that implicit in the finding that the defendant has established a strong case is that his case is stronger than a mere fear or apprehension. In relation to point (a), the Court has to have regard to the status of the principal of a school, his or her role in running a school and the weight that should be afforded to his or her views. Where a principal has expressed findings and conclusions in advance of hearing from a teacher and they are before the Board there is a strong case that there is a risk that the board will be unduly influenced by those views. In relation to point (b), I do not believe that the existence of an appeal is a sufficient answer. The defendant is entitled to have the full benefit of all stages of the process and if I have concluded that the there is a real risk of a defect in the first stage it is not sufficient to say that he will have the benefit of a second stage. The same reasoning applies to point (c).

75. Having decided that the defendant has satisfied the standard for an interlocutory injunction, I must consider whether the balance of convenience favours the grant or refusal of an interlocutory injunction. I must also consider whether the defendant's

refusal to give an undertaking as to damages and his refusal to comply and his stated intention not to comply with Court Orders disentitles him to relief, if otherwise entitled to such relief.

Balance of Convenience

76. As is clear from *Merck Sharp & Dohme,* the assessment of the balance of convenience, or balance of justice as it sometimes called, is directed at determining how matters can best be arranged pending trial so as to minimise the risk of injustice.

77. Under *Merck Sharp & Dohme,* the adequacy of damages is no longer to be considered as a separate, determinative factor but rather as part of the overall consideration of the balance of convenience or justice. On one view, damages would be an adequate remedy for the defendant if the disciplinary proceedings are allowed to continue and a sanction is imposed and they are subsequently held to have been wrongful. Of course, it is entirely possible that the defendant would not be found guilty of misconduct and no sanction would be imposed. However, it seems to me that the Court must have regard to the fact that the disciplinary proceedings could result in the imposition of a sanction including dismissal.

78. It was held by Binchy J in *Joyce*, in granting the injunction:

> "*It is well established that in a matter such as this, damages will not be an adequate remedy for a person such as the plaintiff in the event that the investigation proceeds and she is dismissed from her employment, by reason of the reputational damage that the plaintiff wold suffer consequent upon her dismissal.*"

79. Even if it does not result in dismissal but one of the lesser sanctions provided for in the Circular considerable reputational damage would still attach to that. In this regard, it is important to take account of the fact that the defendant has an unblemished record in the school.

80. There is some force in the defendant's argument that the defendant is very much in control of his reputation and that through his actions he has attracted publicity. However, this is not a full answer to the case made by the defendant which is that dismissal of a teacher is very rare and if this was to occur between now and the trial and he were to be successful at the trial his reputation would still have been greatly damaged by the dismissal. I can of course have regard to the fact that the publicity

which his own actions have attracted means that the damage to his reputation may be greater and certainly more public than might otherwise have been the case but the fact remains that a dismissal, even without that element brought on by the defendant himself, would be very damaging to his reputation.

81. I must also consider whether damages would be an adequate remedy for the plaintiff if an injunction were to be granted but the plaintiff ultimately succeeds at trial. The plaintiff has not made the case that the defendant would not be able to satisfy any award of damages against him in those circumstances. A significant factor is the fact that the defendant has declined to give an undertaking as to damages but I do not believe that this goes to the question of whether damages would or would not be an adequate remedy for the plaintiff if the injunction is granted but the plaintiff ultimately succeeds. I consider this as part of my consideration of the Court's discretion.

82. As against that must be balanced the plaintiff's understandable desire to bring the disciplinary proceedings to a conclusion. Their existence must be disruptive to the school and the students. Until they are determined one way or the other the school has to engage a substitute teacher and the students are left not knowing who their teacher will be into the future. To that must be added the disruption caused by the defendant's insistence on attending the school every day notwithstanding that he is on administrative leave and the existence of Court Orders and the consequent need to manage the situation on the ground.

83. However, as part of the weighing of the school's desire to bring the disciplinary process to an end I must have regard to (i) the fact that the school did not take any steps to do so for three and a half months between September and December 2022 and (ii) the fact that the case is being case managed and is likely to be heard in the near future. The plaintiff's reliance on the need to bring the disciplinary proceedings to a conclusion (one way or the other) would be of far greater weight if they had been actively taking steps to do so at an earlier stage, though as part of the balancing I must have regard to the fact that certain practical difficulties arising from the defendant's imprisonment would have had to have been addressed. In relation to the second point, I take the point that the defendant's reliance on the fact that the trial will be heard in the near future rings somewhat hollow in light of his position heretofore, where he sought to delay the trial (see O'Moore J's ruling of the 21st December). However, my understanding is that the pleadings will be closed this week, with a booklet of pleadings to be delivered to the Chief Registrar by the 19th January 2023. The Court can, in any event, make any injunction which might be granted conditional upon the parties complying with any directions designed to get the trial on for hearing. There seems to be no impediment to the trial getting a date in the near future, subject to the ongoing

pressure on court lists due to a shortage of resources, and the fact that it is likely to be heard in the near future has to be weighed in the balance.

84. The defendant placed considerable emphasis on the fact that injunctions were granted in *Lally* and *Joyce*. The plaintiff pointed to specific factors in those cases which distinguish them from this case: firstly that the allegations against the teacher in *Lally* were historic; secondly, the teacher continued to work and was not suspended while facing the disciplinary proceedings; and thirdly, the conduct alleged against the teacher did not reflect on her ability to teach or pose any immediate risk to the pupils whom she teaches. Obviously, in this case, the allegations are not historic in light of the defendant's stated position, he has been placed on administrative leave or suspension and, on the school's account, the conduct is a matter of concern in respect of how he might act in the future. I accept that these are relevant considerations but each case must be determined on its own facts and I do not believe that they significantly affect the balance of justice.

85. The defendant's stated intention to continue to act in breach of the Court Orders restraining him from attending the school must also be weighed in the assessment of where the balance of justice lies. As noted above, the assessment of where the balance of convenience or balance of justice lies is directed towards minimising the risk of injustice pending the trial.

86. I consider the defendant's ongoing refusal to comply with Court Orders and to act in breach of them in greater detail and with a broader focus in the next section dealing with the Court's discretion but I am satisfied that in weighing the respective rights and interests of the parties I am required to have regard to the fact that the defendant's position is that he is not obliged to comply with an Order obtained by the plaintiff but the plaintiff would be obliged to comply with an Order obtained by the defendant. Presumably, the school would comply with any injunctions were they to be granted – subject of course to the school's right to appeal against any such Order. That would give rise to the incongruity of the plaintiff not being able to proceed with the disciplinary process and either have the defendant turning up at the school every day or have to apply to the Court to have its Order enforced, with all the attendant costs and other interference that this causes with their function of managing the school.

87. No one factor in itself is determinative of the balance of justice. This is, however, a factor to be taken into account and it is a significant factor. Weighed against it must be the factors identified by the defendant in relation to the conduct of the plaintiff and the damage that he might suffer if relief were not granted and the reasons he has given for

refusing to comply with the Orders. I discuss these in detail in the next section and have taken them into account in assessing where the balance of convenience lies.

88. Taking all of these factors into account: the damage that would be caused to the defendant's reputation; the desirability of bringing the disciplinary proceedings to a conclusion; the likelihood of a hearing of the full trial in the relatively near future; the fact that the school did not take active steps to bring the disciplinary proceedings to a conclusion sooner (while also having regard to the difficulties in doing so presented by the defendant being in prison); the factors arising from *Lally* and *Joyce*; and the defendant's stated intention to breach the Court Orders (taking account of the points that the defendant makes); it seems to me that were it not for the defendant's stated intention to continue to refuse to comply with the Court Orders the balance of justice would favour the grant of an injunction but that ongoing refusal tips the balance against granting the injunctions sought.

Defendant's ongoing breach of Court Orders and no undertaking as to damages

89. Even if I am wrong that the defendant's intention to continue to breach the Court Orders should be weighed in the assessment of the balance of justice and therefore, in light of my conclusions in respect of that balance, the balance must be held to favour the grant of the relief, I am satisfied that the correct exercise of the Court's discretion means that the injunctions should be refused.

90. The plaintiff submits that the defendant is in breach of the maxims of equity: that he who comes to equity must come with clean hands and that he who seeks equity must do equity. These are not empty formulae or anachronistic legal devices. They are a means by which the rights of parties, particularly at the interlocutory stage, can be carefully balanced and by which the courts can ensure that its processes and the remedies which are available, particularly equitable remedies, are not abused.

91. The plaintiff referred the Court to a number of authorities which clearly acknowledge that as an equitable remedy the courts have a discretion to refuse relief on the basis of an applicant's past or prospective conduct – even if the applicant might otherwise be entitled to relief.

92. In *Chappell and Others v The Times Newspapers Ltd and Others [1975] 2 AII ER 233*, it was held:

"*Furthermore in seeking equitable remedy the plaintiffs had to be prepared to do equity, by refusing to give an undertaking not to disrupt newspaper production they were in effect telling the employers that they must keep their part of the contract even though the plaintiffs were not themselves ready or willing to keep to theirs. Accordingly, even though the plaintiffs might not have been in breach of their individual contracts of employment, they were not entitled to the equitable relief claimed in the interlocutory application and the appeal would be dismissed…".*

93. Lane LJ held:

"Finally, this being equitable relief which is sought, would it be equitable to grant it? The decision in Measures Ltd v Measures and the passages in the judgment of Cozens-Hardy MR make it plain that the burden is on the party seeking the relief to show that he deserves to get it. In this the plaintiffs in the present case have signally failed. Nothing said or done by them or on their behalf has dispelled the clear impression on my mind, at least, that they would, if required- and I quote the words of the union –'give full support, loyalty and co-operation' to the industrial action already resumed by other union members. Such action would perhaps be loyal to the union but certainly disloyal, to say the least to their employers. It ill befits them in these circumstances to come to this court and ask for relief and particularly equitable relief".

94. Denning MR held:

"I return to the decisive point. These men are seeking equity but are not ready to do it themselves. No injunction will be granted on their behalf."

95. In *Ardent Fisheries Limited v The Minister for Tourism, Fisheries and Forestry and the Attorney General No. 10395P/1986* the Court said:

"Counsel for the Defendants also relied upon the equitable principle that he who seeks equity must come with clean hands and he submits that there was deception on the part of the Plaintiff Company and its directors as to their real intentions when they were applying for the sea-fishing licences and for registration of their vessels as Irish vessels. He further submits that on the question of the balance of convenience the real status quo lies with the

Defendants in that the Plaintiffs only commenced fishing relatively recently and they should not be allowed to alter the former position in their own favour.

Obviously if the circumstances of this case were more or less identical with those in the Pesca Valentia case I would be bound by virtue of the Supreme Court decision in that case to grant the interlocutory injunction and that case makes it quite clear that I have power to do so if I think it proper. I have come to the firm conclusion however that the submissions made by Counsel for the Defendants are valid ones and that there is a vast difference so far as the bona fides of the parties is concerned between this case and the Pesca Valentia case.

… In these circumstances, I do not think that the Plaintiff Company comes into Court with clean hands. In coming to this conclusion, I do not have any regard to the arrest and charge of the Saladina as described in paragraph 15 of Mr. Keohane's Affidavit of the 6th January 1987, because that charge is being contested…"

96. In *Jones v Coolmore Stud [2016] IEHC 329* the Court said:

"36. Injunctive relief is equitable relief and a court will not grant equitable relief where the party seeking the relief has himself behaved in an inequitable fashion. In this case the defendant's primary objection is that the plaintiff has acted in breach of the agreement of 12th December, 2014, in publishing the book…"

41. As things stand I must proceed on the basis that there is an existing valid agreement and quite clearly the actions of the plaintiff in publishing this book amount to grave breaches of that agreement…

43. It follows, that if the plaintiff were to obtain the injunctive relief he seeks, the court would be assisting him in relation to clearly established breaches of an agreement which has been performed by both parties and under which the plaintiff received a benefit. It would also involve affording protection to a work which itself infringes the copyright of four individuals. Even if the plaintiff satisfied the tests required in Campus Oil and Maha Lingham, which he has not, in my judgment it would not be appropriate for a court to grant equitable relief in these circumstances."

97. While these cases are not of direct application because they do not deal with the breach of court orders – two of them are concerned with agreements between the

parties where there are mutual obligations – and are not concerned with alleged breaches of constitutional rights, they clearly establish the principle that the Court may, or perhaps should, refuse equitable relief where the applicant has not come with clean hands or is not doing equity. Of course, where constitutional rights are relied upon the balance may well be different.

98. I have no doubt that the defendant's conduct to date amounts to him coming with unclean hands and his stated intention to continue attending the school amounts to him not doing equity.

99. The enforceability of Court Orders is a central plank of any system based on the rule of law. It is part of the constitutional framework which governs us all. A citizen and society is entitled to expect that a person against whom an Order is made will comply with that Order, and will be compelled by the Court to comply with it, while it is valid and subsisting.

100. The defendant's explanation for not complying with the previous Court Orders is that they are "*manifestly unconstitutional and wrongful".* There is no merit at all to this as an explanation for refusing to comply with Orders in a system based on the rule of law. If the Order is wrong then there is an appeal but, until the Order is overturned on appeal, or until an appeal court grants a stay, then there is a valid and subsisting Order. Individuals do not get to pick and choose when they will comply with Court Orders on the basis of their own assessment of the Order's correctness. Their remedy, if aggrieved with the Order is to appeal; their obligation in the meantime is to obey the Order.

101. The basis of the defendant's argument that the Court Orders are unconstitutional is that they are in breach of his religious rights under Articles 40.6.1(i), 44.1 and 44.2 of the Constitution. He is incorrect. I agree with the views expressed by O'Moore J in paragraph 6 of his ruling of the 21st December including that "*…these Orders do not in any way compromise Mr. Burke's religious beliefs or require him to do anything in violation of those beliefs. These Orders did not and do not oblige Mr. Burke to address anyone in a particular way or to use a specific style or title. In essence, they prohibit him from entering the school's premises or interfering with the school's educational activities…*" The Court Orders do not impact on the defendant's religious rights and freedoms at all. I understand his view to be that if he complies with the Court Orders he will somehow be conceding that the instruction given by the principal was valid and will therefore be in breach of his principles. He is incorrect. It is entirely open to him to comply with the Orders strictly on the basis that he believes the Orders to be wrong and the instruction of the principal to be invalid. That is what happens week in week out in the legal system. Orders are made against parties and they believe them to be

fundamentally wrong and they appeal, but they comply with the Orders pending determination of the appeal. That is the constitutional and legal framework in a system based on the rule of law.

102. In addition to these broader considerations in relation to the enforceability of court Orders, the defendant's past and future attendances adversely impact on the plaintiff, the party who obtained the Orders that the defendant intends to continue to breach. The defendant relies on *McGrath v Stewart & Anor [2008] IEHC 348* and the well-known quote from Finlay CJ in *Curust Financial Services Ltd v Loewe Lack-Werk [1994] 1 IR 450*:

> "*I accept that, the granting of an injunction being an equitable remedy, the court has a discretion, where it is satisfied that a person has come to the court, as it is so frequently expressed, otherwise than "with clean hands", by that fact alone to refuse the equitable relief of an injunction. It seems to me, however, that this phrase must of necessity involve an element of turpitude and cannot necessarily be equated with a mere breach of contract.*"

103. He went on to suggest that the plaintiff's case was that he had unclean hands because of a "breach of contract" and, on the authority of *Curust Financial Services* this is not sufficient, but, of course, the plaintiff complains, not of breach of contract but of breaches of Court Orders. I am satisfied that deliberate breaches of Court Orders, without any good reason or explanation, have the sufficient element of turpitude to amount to coming to Court with unclean hands. Of course, it does not necessarily follow that the relief must be refused.

104. The defendant submits that he is not coming with unclean hands and that he is doing equity. This appears to be on the basis that the Orders are unconstitutional and wrong. I have previously dealt with this.

105. He also submits that the Court can not refuse relief because the breaches of his rights by the plaintiff are so fundamental and so egregious, the damage to him would be so grave and because of the conduct of the plaintiff in the disciplinary process and in the litigation. I accept that these are all matters which should be taken into account in the exercise of the Court's discretion. As noted above, I have not determined the other grounds of complaint raised by the defendant as it was unnecessary to do so. I have, of course, carefully considered them and the submissions made by the parties and even if I had determined them in the defendant's favour they would not have caused me to reach a different conclusion on the exercise of discretion. For present purposes I assume that

the defendant has made out a strong case on each of the other grounds. I am not satisfied that those breaches of his rights are so egregious or so out of keeping with the types of matters which come before the Court that they outweigh the conduct of the defendant in refusing to comply with valid and subsisting Court Orders.

106. In relation to the damage to the defendant, I have held that damages would not be an adequate remedy due to the risk of damage to the defendant's reputation as a teacher. This is not readily calculable or compensable but it is not of such an unusually grave nature as to justify disregarding the nature and effect of the defendant's intention to continue to breach the Court Orders. The avoidance of any such damage between now and the trial is entirely within the defendant's control.

107. In relation to the third point, the defendant points to what he describes as the lie told by Mr. Rogers. As a matter of principle, a lie by or on behalf of a party would have to weigh very heavily in the exercise of a Court's discretion when it is asked by a party on whose behalf the lie was told to dismiss the application for relief on equitable grounds. For the reasons set out above, I can not make a finding beyond that Mr. Rogers deposed to something that was manifestly incorrect. That in itself must, of course, be taken into account in the Court's exercise of its discretion. However, it must also be recalled that Mr. Rogers, as well as stating that the report had not been discussed at the meeting of the 15th August, was also the one who exhibited the minute of the meeting which showed that the report was in fact discussed.

108. I do not accept the argument that the plaintiff did not raise these equitable maxims in response to the application last September is an answer. This application by the defendant is a new one (albeit seeking some of the same relief) and the plaintiff is entitled to raise these points in relation to this application.

109. The defendant also relies on the headnote in *Carrigaline Community Television Broadcasting Company Ltd v Minister for Transport, Energy and Communications (No. 2) [1997] ILRM 241*. At paragraph 18 of the headnote it states:

> "*The salutary* ex turpi causa non oritur actio *maxim, which recognises the reluctance of the courts to allow those who have themselves repudiated the law to invoke the law when it seems expedient to do so, and the equitable principle that he who comes to equity must come with clean hands, retain their ancient vigour in the law. However, these principles should not be allowed to work a greater injustice by depriving citizens of their constitutional right to natural justice and fair procedures. In this case, the plaintiffs were so deprived by the minister at the initial stage of their application. As such equitable principles*

should not now be used to work against there obtaining their right to natural justice and fair procedures."

110. A number of points arise from this. Firstly, it establishes that the Court retains the discretion to refuse relief where the applicant's conduct warrants it, otherwise Keane J's description of the maxims retaining their "*ancient vigour in the law*" would bear no meaning. Secondly, it makes clear that the Court must be careful not to exercise that discretion in a way which would have the effect of improperly depriving the individual of his or her right to fair procedures and natural justice. Thirdly, it is significant and, it seems to me, distinguishes *Carrigaline* from the instant case, that the impugned conduct did not involve the ongoing breach of Court Orders. It seems to me that *Carrigaline*, in recognising the vigour of the Court's discretion on the basis of equitable principles and the need to ensure that proper regard is had to vindicating the applicant's rights, in fact recognises that the Court must conduct a balancing exercise of the type conducted in this section.

111. I am satisfied, having taken account of all of these matters, that the defendant's conduct, if it persists, is such that the Court must exercise its discretion to refuse to grant the equitable relief sought, even if he otherwise established a basis for securing that relief. In my view, of the two maxims, the more important at this present point is that he comes to equity must do equity. The obligation to come with clean hands generally refers to past conduct and, while the Court may be entitled to refuse the relief on the basis that the defendant had previously breached Court Orders and been found to be in contempt, I am going to focus on the defendant's future conduct. In my view it would not be a proper exercise of the Court's discretion to grant an injunction if the defendant persists in his refusal to comply with the previous Court Orders. Taking account of all of the factors, it would be entirely inimical to the proper administration of justice, the public interest in the enforceability of Court Orders to the benefit of society, the right and interest of the plaintiff to have Orders obtained by them enforced, and would therefore be inequitable if the defendant could secure such relief while refusing to comply with Orders, which as of now, are valid and subsisting.

112. Put simply, the defendant has satisfied the first limb of the test for injunctive relief but the balance of justice is tipped in favour of refusing the relief by his stated intention to continue to breach the Court Orders and, even if the defendant's stated intention is not a proper matter to be taken into account in the assessment of the balance of convenience, I am satisfied that it would not be a proper exercise of the Court's discretion to grant relief to the defendant if he persists in his stated intention. It

seems to me that the Court could simply refuse the relief sought. However, I believe that it would be more appropriate to allow the defendant time to consider whether he will comply with the Court Orders. As discussed above, it is open to him do so on a without prejudice basis to his contention that those Orders are wrong and that the principal's instruction was unlawful. I will therefore list the matter for mention before me at 10am on Wednesday, the 18th January 2023. I appreciate that this is a short period of time (this judgment being delivered on Tuesday afternoon). However, I am conscious that the disciplinary meeting is scheduled for the 19th January.

113. The plaintiff also submits that the relief sought should be refused on the basis that the defendant declines or refuses to give an undertaking as to damages. The defendant has declined to do so on the basis that the flaws in the disciplinary process are "*so stark and so egregious*" and the "*matters so serious, including the matter that was brought to the court's attention yesterday regarding the false affidavit and the chairperson*". I do not believe that these are good reasons to refuse to give an undertaking as to damages. In relation to the second point, the undertaking should be given at the outset of the application and so the applicant can not justify his refusal to provide one on the basis of what happened after that. No authorities were opened to me on the consequences of a refusal to give an undertaking as to damages. My understanding, subject to full argument, is that while an undertaking will almost always be required, the failure to give an undertaking does not have to be fatal. It is a matter for the Court's discretion. In the very particular circumstances of this case, I am going to decline to exercise my discretion to refuse the relief solely on the basis of the refusal of an undertaking as to damages. In reaching this view, I have had regard to the fact that the case is now under case management and is expected to be heard later this term, that the defendant is not suffering any real financial loss because the defendant's salary is paid by the Department of Education, and if an injunction is granted it will be on the basis of the defendant's indication that he will not attend the school pending determination of the proceedings and therefore the inconvenience relied upon by the plaintiff as possibly being a head of damages will not exist.