AN CHÚIRT UACHTARACH

THE SUPREME COURT

S:AP:IE:2023:000111

[2024] IESC 38

O'Donnell C.J.

O'Malley J.

Hogan J.

Murray J.

Collins J.

Between/

AN BORD BANISTÍOCHTA, GAELSCOIL MOSHÍOLÓG

Appellant

and

THE LABOUR COURT

Respondent

and

AODHAGÁN Ó SÚIRD AND THE DEPARTMENT OF EDUCATION

Notice Parties

Judgment of Mr. Justice O'Donnell, Chief Justice delivered on the 31st day of July, 2024.

Introduction

1. This appeal arises out of a long, complex and highly contentious dispute relating to the conduct of the first named notice party Aodhagán Ó Súird while principal ("the Principal") of Gaelscoil Moshíológ ("the school") under the management of the appellant board of management ("the Board of Management") in respect of the management of enrolment in the school for the school year 2009-2010.

2. The Principal was initially placed on administrative leave in January, 2012 and later suspended on full pay on 29 May, 2013. Following a disciplinary hearing over three separate days between November, 2014 and June, 2015, he was dismissed with effect from 30 November, 2015.

3. The dismissal of the Principal by the Board of Management was upheld by a Disciplinary Appeal Panel established pursuant to agreed procedures as provided for in the Education Act, 1998, which delivered its decision on 14 November, 2015 so that the dismissal took effect on the 30 November, 2015 in accordance with the decision of the Board of Management.

4. The Principal initiated a complaint to the Workplace Relations Commission ("WRC") on 8 February, 2016. In June, 2016 the Board of Management advertised for the post of principal of the school and in July, 2016 an existing teacher at the school was appointed principal of the school.

5. The Adjudication Officer of the WRC delivered her decision on 25 April, 2018 and found that the dismissal was unfair and considering that compensation was an inadequate remedy having regard to the fact that it was capped at 104 weeks' pay by the provisions of s. 7(1)(c)(i) of the Unfair Dismissals Act, 1977 (the "1977 Act"), concluded that reengagement under s. 7(1)(b) was a more

appropriate remedy. Accordingly, she directed the reengagement of the Principal as principal in the school with effect from 1 January, 2018 on the same terms and conditions as he held prior to dismissal. This meant that the Principal would recover arrears of salary for the period from that date, but not for the period between dismissal (30 November, 2015) and 1 January, 2018.

6. This decision was appealed to the Labour Court in June, 2018, which heard the appeal over eleven days between November, 2018 and July, 2021. In a ruling of 3 June, 2022, the Labour Court dismissed the Board of Management's appeal, and found that the Principal was unfairly dismissed and directed reengagement with effect from 1 September, 2017 (being four months earlier than the date set by the WRC) with the period from the date of dismissal to that date being regarded as a period of unpaid suspension.

7. The Board of Management appealed to the High Court pursuant to s. 46 of the Workplace Relations Act, 2015 ("the 2015 Act"). Section 46 provides as follows:-

> "*A party to proceedings before the Labour Court under this Part may, not later than 42 days from the service on that party of notice of the decision of the Labour Court in those proceedings, appeal that decision to the High Court on a point of law, and the decision of the High Court in relation thereto shall be final and conclusive.*"

8. After a three-day hearing in March, 2023 the High Court delivered an extensive judgment, dismissing the appeal by the Board of Management (*An Bord Banistíochta Gaelscoil Moshíológ v. The Labour Court* [2023] IEHC 484, (Unreported, Cregan J., 14 July, 2023) ("the first judgment")). The High Court

judge concluded that the Labour Court had been in error in directing reengagement from September 2017, and instead initially directed reinstatement of the Principal as principal with effect from 30 January, 2013, being the date on which it was considered the administrative leave should have ended.

9. After subsequent hearings in the High Court, Cregan J. delivered a further extensive judgment of 3 August, 2023, (*An Bord Banistíochta Gaelscoil Moshíológ v. The Labour Court* [2023] IEHC 497 (Unreported), ("the second judgment")) directing that the Principal be put back on the payroll with effect from 1 August, 2023; be deemed to be reengaged as Principal with effect from 30 November 2015 (being the date of his dismissal) and restored to his duties with effect from 4 August, 2023; paid arrears of salary from 30 November, 2015; and have all previous entitlements restored from 30 November, 2015. In effect, this removed any period of unpaid suspension imposed by the Labour Court.

10. The High Court refused the Board of Management's application for a stay on the order pending appeal and directed that all arrears of pay from 30 November, 2015 to 1 August, 2023 be paid by 15 September, 2023. The Court also ordered that the Board of Management should pay the Principal's legal costs on a legal practitioner and client basis.

11. It is now well established, notwithstanding the language of s. 46 of the 2015 Act (and specifically the use of the phrase "*final and conclusive*"), that the decision of the High Court is one which, pursuant to the provisions of Article 34.5.4° of the Constitution, may be appealed to the Supreme Court – see *Grace and Sweetman v. An Bord Pleanála* [2017] IESC 10, [2020] 3 I.R. 286. In a

determination of 31 October, 2023 ([2023] IESCDET 128) this Court granted leave to appeal to this Court identifying the following issues as matters to be considered in the appeal:-

1. "*In an appeal on a point of law against the dismissal and reengagement of an employee, is the High Court at large when assessing the reasonableness of the dismissal and thus entitled to take a view on the actions of the employer in the investigation of the alleged misconduct, in the disciplinary proceedings and in the procedures before the relevant statutory employment bodies?*

2. *In assessing the reasonableness of a dismissal of a school principal in circumstances of an admitted overstatement of pupil enrolment figures to the Department of Education, what are relevant factors that ought to be taken into account?*

3. *What are the principles to be applied when deciding to order reengagement rather than reinstatement?*

    a) *To what extent, if any, does an employer's asserted lack of trust in an employee whom they have unfairly dismissed factor into the consideration as to whether the remedy of reengagement ought to be ordered?*

    b) *What, if any, relevance to the remedy of reengagement has the fact that, following the dismissal but prior to the conclusion of the employment law proceedings, the employer has appointed another person to the post on a permanent basis?*

4. In what circumstances ought the High Court make an order for costs against an employer and in particular the circumstances in which costs on a legal practitioner and client basis ought to be made?"

Background

12. The Principal is from Gorey, Co. Wexford and is now 64 years old. He taught as a teacher first in Dublin, then as a principal in a school in Wexford, and subsequently was employed as a teacher in a gaelscoil in Wexford town. His dream was to open an inter-denominational gaelscoil in his hometown, and he was centrally involved in discussions in establishing Gaelscoil Moshíológ, which opened in 2002, and he was appointed as principal in the newly founded school. He was a member of the Board of Management along with a number of parents, teachers and community representatives.

13. In 2011, it appears that the Principal approached Dr Melanie Ní Dhuinn to become chair of the incoming Board of Management. She took office in December of that year. Dr Ní Dhuinn was a post-primary teacher and an Assistant Professor of Education at Trinity College, Dublin and a Director of the Professional Masters of Education programme there. She was known to the Principal, their children were friends, she had previously carried out some work as an educational specialist in the school at the Principal's invitation and was known to the Principal's wife professionally.

14. Very soon afterwards an incident occurred at the school, described as 'the single child incident'. On 11 January, 2012 the Principal was teaching first class, and had just disciplined a pupil, who then returned to his seat and deliberately stamped his feet. The Principal lost his temper, approached the pupil, banged

the table in front of him and physically pulled the child towards him by his jumper, and/or lifted him and put him back down.

15. It appears that the parents of five children in the class made written complaints to the Board of Management. The Principal reported the matter to Dr Ní Dhuinn and met with the parents of the child in question, who accepted his apology and said that they considered the incident a minor one.

16. The chairperson of the Board of Management sought advice from An Foras Pátrúnachta, the Department of Education and the school's legal advisors. (An Foras Pátrúnachta is a body established to provide a patronage model for gaelscoileanna for the purposes of the structure created by the Education Act, 1998). The Principal was put on administrative leave which meant that he continued to carry on administrative duties but did not attend the school in person during the school day. The incident was referred to the HSE. At that point, the solicitors for the parents of the child wrote to the Board of Management on 25 January, 2012 stating that they were satisfied that the incident was a minor one, and that they were alarmed that their son had been referred to in complaints made by others and that the matter had been referred to the HSE. This correspondence was not provided to the Principal or his representatives until much later, and was not replied to at the time or for some time thereafter.

17. On 24 October 2012, the HSE wrote to Dr Ní Dhuinn as chairperson of the Board of Management stating that they did not consider that any child protection intervention was warranted. The letter also stated that "*the HSE will now be writing to the school Board of Management requesting that a comprehensive*

and thorough investigation of the incident be completed with a view to ensuring prevention of other incidents." On 5 November, 2012 the HSE wrote to the Principal in similar terms. The chairperson of the Board of Management sought clarification from the HSE in relation to certain matters, which were responded to on 15 January, 2013. The Board of Management requested that the Principal's administrative leave be extended until 31 January, 2013.

18. In January 2013 the chairperson of the Board was approached by teachers in the school, including the Acting Principal, Ms Ní Shúilleabháin after a Board meeting in January, 2013 who raised a number of concerns regarding the absence of policies within the school including child protection policies. Ms Ní Shúilleabháin also expressed concerns about the enrolment practices at the school and what she described as the overstatement of numbers enrolled in annual returns to the Department of Education, and consequent additional funding received by the school. She had been approached by another teacher in the school, Ms Caroline Griffin, who had concerns about the enrolment practices there. Ms Ní Shúilleabháin had been delegated by the Principal to manage the school's roll books, but told the chairperson that the Principal had directed her to complete the roll books each year based on a list of pupils' names furnished by him.

19. The chairperson of the Board of Management sought access to the school's roll books and associated documentation and became concerned by a number of matters including the use of Tipp-Ex on the roll books, and the removal of names from the roll books at different points in time. The chairperson was told by Ms

Griffin that she did not receive a roll book until October, 2009 and that it contained the names of children who had not attended her class.

20. The chairperson reviewed the minutes of Board of Management meetings during 2009, the school accounts and the capitation payments received based on the numbers of pupils enrolled. She made a presentation to the Board of Management in March, 2013. Solicitors on behalf of the Board wrote to the Principal's trade union, the Irish National Teachers' Organisation ("INTO"), on 13 March, 2013 stating that "*it is regrettably the case that serious issues have arisen which require to be investigated by the Board of Management. The chairperson Ms. Melanie Ní Dhuinn is preparing a comprehensive report on the issues of concern which will be forwarded to the Board of Management for investigation under the disciplinary procedures*". The letter stated that the Principal would remain on administrative leave pending the outcome of the investigation.

21. On 29 May, 2013 the chairperson wrote to the INTO in respect of the allegations, informing the union as the representative of the Principal, that she had decided to initiate the agreed disciplinary proceedings in relation to a serious matter which she said "*has just recently come to my attention*". It is necessary to set out the terms of this letter. It continued:-

> *"I note that in 2009 the names of 18 non-existent children were added to the school roll in or about September 2009. They remained on the school roll until between October and November 2009 and were removed intermittently during this timeframe. One of the roll books was amended on the 23 October to reflect that 9 pupils had been removed*

from the roll on the 30 September. These pupils had in fact been on the roll up to the 23 October and the roll was taken from the class teacher who was a Newly Qualified Teacher and undertaking her Diploma at that point and amended retrospectively with tippex being used to delete entries after the 30 September. These pupils had never attended the school ... A further 9 pupils remained on the roll through October and November even though they did not attend the school and 6 of these 9 pupils were marked present on the roll intermittently to infer that they were actually attending the school even they were not. All 9 pupils were removed from the roll intermittently in October and November 2009. Capitation grant was claimed in respect of at least 8 non-existent pupils. As a result of this action, the recognised enrolment in the school for the 2009/10 school year amounted to a total of ***199*** *pupils which entitled the school to a Post Forbartha (Buan) (pupil number required was 198) in the 2009/2010 school year to which it would otherwise not have been entitled. This enrolment figure also enhanced the Principal's salary allowance from a Category 2 allowance category of between 6-7 classroom teachers to a Category 3 allowance category of between 8-11 teachers.*

...

I am very concerned about that the insertion in the school roll of the names of 18 non-existent students and the subsequent returns made to the Department of Education and Skills could not have been accidental or otherwise inadvertent. I am concerned that this was a deliberate act

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

...

I consider the Principal to be responsible for any intentional misrepresentation of the position with regard to the enrolment of students in the school during the months of September, October and November 2009 to the Department of Education & Skills. The Principal has a statutory responsibility for the day-to-day management of the school. He is accountable to the Board of Management in relation to his management of the school. Given the seriousness of this issue on its own, I am initiating the disciplinary procedures at Stage 4 of the disciplinary procedures. I have referred this letter with its attachments as the comprehensive report on the facts of the case to the Board of Management. Having considered the matter the Board has directed me, on its behalf, to seek the views of the Principal in writing on this report. A special meeting of the Board of

*Management has been called for the 22nd June next at **2pm**, at the school. The Board meeting will be a formal disciplinary hearing which may give rise to the imposition of a disciplinary sanction on the Principal as provided for in the disciplinary procedures. The Principal is entitled to be accompanied at the disciplinary hearing by his trade union representative and/or by a colleague subject to a maximum of two people. The Principal will be given an opportunity to respond and to state his case fully and to challenge any evidence that is been relied upon for a decision. Please note that the Principal is suspended on full pay pending the outcome of this disciplinary investigation and the conclusion of any appeal process. I confirm that as the complainant in this matter I will not participate in the Board's deliberations in this matter.*

It is my intention to submit a further comprehensive report to the Board of Management in relation to the other serious issues which have arisen in Gaelscoil Moshíológ namely;

- *Incident involving the Principal and a 1st class pupil in January 2012*
- *Financial management of the school accounts - currently under audit*
- *Compliance with DES regulations with regard to time in school, school calendar and fulfilment of requisite days.*
- *Compliance with and operationalisation of Croke Park hours and related productivity*

- *Compliance with Education Act with respect to development of and operationalisation and implementation of school policies*

- *Significant exposure of the BOM to litigation by parents of a current pupil*

- *Significant exposure of BOM to 2 cases at the Equality Tribunal*

- *Breaches of Teaching Council Code of Professional Conduct"* [emphasis in original].

22. While the Principal was initially placed on administrative leave arising out of the single child incident, no inquiry into that incident was ever concluded. It is not clear if an inquiry ever commenced into these matters as suggested by the decision of the High Court, or never commenced, as suggested by the Principal by reference to the evidence. But any inquiry, if commenced, did not proceed very far and in any event, it is clear that no inquiry was concluded. Similarly, while the letter of 29 May, 2013 listed a number of other serious issues in relation to which it stated that it was the intention of the chairperson to submit a further comprehensive report to the Board of Management, that did not occur and the disciplinary hearing which proceeded and also subsequent hearings and reviews in respect of this matter were confined to the question of enrolment for the school year 2009/2010.

23. It should be said at this point that the letter was incorrect in suggesting that the names of pupils added to the roll in or around September 2009 were non-existent; they were real children who it was expected or perhaps hoped might attend the school in future years, but not that academic year. Nor is it the case

that the increased enrolment figure enhanced the Principal's salary. The Principal did not initially dispute the fact that an increase in capitation and teacher numbers would have an effect on the Principal's salary but it transpired during the course of the Labour Court hearing that the Principal's position on the relevant pay scale meant that in this case the increase on numbers did not have an effect on his own salary. However, the Principal does not appear to have seriously contested that the other matters set out in the letter were correct, namely that the roll had been deliberately misstated to include the names of students and suggested that they were actually attending the school even though they were not; capitation grants had been claimed in respect of at least eight of those pupils; and an additional teaching post was obtained than would otherwise have been the case. The essential response of the Principal was to seek to mitigate the seriousness of these matters by arguing that the question of deliberate inclusion of pupils who would not attend the school in that academic year in the roll was a grey area, that other schools adopted similar practices, and that in this case the Board of Management in place as of September, 2009 was aware of the practice adopted.

24. As set out in the letter of 29 May, 2013 the commencement of the disciplinary procedure meant a change in the status of the Principal from that of administrative leave to suspension on full pay.

25. The disciplinary procedure referred to is that set out in Circular 60/2009: '*Towards 2016 – Revised Procedures for Suspension and Dismissal of Principals*'. The terms of that circular are set out in detail at paragraphs 37-48 of the High Court judgment, and it is not proposed to set it out in full here. It is

enough for present purposes to observe that the essential elements of the procedure in relation to disciplinary issues were that they would be rational and fair; the basis for the disciplinary action clear; the range of penalties well defined; and an internal mechanism of appeal should be available. The circular contemplated the possibility of placing a principal on administrative leave with full pay pending an investigation where the circumstances warranted it, and also provided that there was a presumption of innocence and that no decision on disciplinary action would be made until there is a hearing; that the employee would be advised in writing of the precise matters concerned and given a copy of all relevant documentation; and the principal would be given an opportunity to respond fully to any allegations. It was further provided that any sanction imposed would be in proportion to the nature of the conduct or behaviour established, and was without prejudice to the principal's right to have recourse to any legal remedy.

26. The circular set out a number of escalating stages of investigation and provided for an informal stage (Stage 1) resulting in a verbal warning; Stage 2, which could involve a written warning; and Stage 3, a final written warning. Stage 4 was untitled, but provided that where the work or conduct issue was of a serious nature, a comprehensive report on the facts would be prepared and forwarded to the board of management. Following a hearing, the board of management could avail of a number of options, ranging from deferral of an increment, withdrawal of increment or increments, demotion, and up to and including dismissal. In the cases of gross misconduct, a Principal could be dismissed without recourse to the earlier stages 1-3. Examples of gross misconduct included "*fraud or deliberate falsification of documents*". Finally, the circular provided:-

"*If there is an allegation of serious misconduct, the Principal may be suspended on full pay pending an investigation and the conclusion of any appeal process… If the investigation upholds a case of serious misconduct the normal consequences will be dismissal.*"

27. On 24 March, 2014 the chairperson wrote to the INTO enclosing a report of an inspection carried out by the Department of Education and Skills at the school, relating to the validity of enrolment of pupils and the maintenance of official school records. This was a report prepared on 17 January, 2014 by Ms Mags Jordan, a divisional inspector in the Department of Education. It was addressed to the assistant chief inspector of the Department. This report stated, *inter alia*:-

"The return made by Gaelscoil Mhoshíológ to the Department's Statistics Section based on enrolment figures for 30 September 2009 claimed a valid enrolment of 199 pupils providing for a principal and 8 mainstream class teachers for 2010/11 (appointment/retention figure of 193 pupils). An examination of the roll books confirmed 208 pupils on roll. However, the examination of the roll books confirmed a minimum of 18 pupils on roll who could not be counted towards valid enrolment for staffing purposes… This reduced the valid enrolment of the school for staffing purposes to a maximum of 190 pupils, below the appointment figure for the 8th mainstream class teacher. Therefore the appointment of the 8th mainstream class teacher … was not warranted and was in contravention of the terms of Circular 0021/2010..."

The report concluded that:-

"*The appointment of the 8th mainstream class teacher … was not warranted based on valid enrolment and was in contravention of the terms of Circular 0021/2010 …*

2 [pupils] *in 2009/2010, were enrolled and attended school … prior to their 4th birthday in contravention of Circular 24/02 …*

In a significant number of instances retention practices were in contravention of Circular 32/03.

A*n inconsistency between the annual returns for Gaelscoil Mhoshíológ to the Department's Statistics Section and the school's roll books was noted on a number of occasions.*"

28. The following year on 29 May, 2015 the Department wrote to An Foras Pátrúnachta asking if the Board of Management accepted the findings of the inspector's report, and stating the departmental policy where it had determined the financial irregularities such as overstatement of pupil enrolments occurred. It was said:-

"*This policy includes requiring that an investigation into the matters is undertaken at school level, that arrangements are made for recoupment to the Exchequer of any overpayment arising and where necessary that any deliberate overstatement of school enrolment is referred to An Garda Síochána. However, it is important to note that the onus is placed first and foremost with the individual Boards of Management of particular schools to report any deliberate overstatement of enrolment to An Garda Síochána*".

The Disciplinary Hearing

29. A disciplinary hearing was conducted over three days over a protracted period. The hearing days were 5 November, 2014, 8 April, 2015 and 2 June, 2015. Mr Malcolm Byrne, a member of the Board of Management was appointed interim chairman of the disciplinary hearing. In addition to Mr Byrne, the disciplinary panel consisted of two parent representatives, a community representative and a Church of Ireland representative.

30. The thrust of evidence at the hearing was broadly similar to that at subsequent hearings. Two members of the Board of Management gave evidence on behalf of the Principal that they were aware of the issues in relation to numbers, and were prepared to countenance a bending of the rules on the basis of the best interests of the school. The first witness stated that this was the advice given by other gaelscoileanna and they were never told not to do so by An Foras Pátrúnachta but rather were told "*just don't discuss it*". A second witness was a member of the Board of Management between 2003 and 2007; she said that approaches would have been made to parents, including her, so that their other children, who were not attending the school, could be put on the enrolment as attending the school. She said:-

> "…*from the very word go when I joined the board it* [the practice of enrolling students who may not attend] *was a very acceptable practice you know and again I was actually involved subsequently with the founding of a second level school and the same practice was in place and it was very acceptable… we all were implicit in it rather than condoning it. We were a part of it. Like our own children were used. So*

it wasn't like it was just that the principal was doing it and we were saying go ahead and do it. We were a part of it."

31. The Principal also contended that there was a grey area in regard to enrolment because the National Education Welfare Board were saying that once children were on the roll they must stay on the roll.

32. It was also suggested that the Department issued a new circular in 2013 (Circular 28/2013) which was stated to have simplified arrangements for the maintenance of the register, roll book and daily attendance book, and it was only then that it was made clear that the practice was unacceptable. The case made against the Principal at all the hearings was that it was always clear policy that there should be no overstatement of pupil numbers and the 2013 Circular simply stated explicitly that this was a matter regarded as a criminal offence which would be reported to An Garda Síochána, something that had occurred before that time in a number of cases.

33. The Board of Management decided to dismiss the Principal. It communicated the decision in a two-page letter of 31 August, 2015. It stated:-

"*Having considered all of the evidence available to it (both oral and written), the Board has concluded that the allegations against you are supported by the evidence and have been substantiated. The Board finds as a matter of fact that you are responsible for making false enrolment returns to the Department of Education and Skills in the 2009/10 school year. The false returns made misrepresented the enrolment position in the school by at least 18 students. The consequences of this misrepresentation were serious in that it resulted in the continued*

employed in the school of a teacher during the 2009/10 school year and the appointment of a teacher in 2010/11 school year which were not warranted by the valid enrolment as of 30 September 2009. The Board finds that your actions in this regard amounted to serious misconduct."

34. The Board of Management's decision stated that it had given consideration to mitigating factors, being the enormous contribution the Principal had made to the school and that he was not motivated by personal gain. However, the Board of Management stated that it had "*reluctantly come to the conclusion that the seriousness of your misconduct in making false returns to the Department of Education and Skills in the 2009/10 year has so undermined the trust and confidence that the Board of Management has in you as Principal, as to make your position as Principal in Gaelscoil Mhoshíológ untenable.*" The Board of Management noted that, according to the agreed disciplinary procedures, the normal consequence of upholding a case of serious misconduct was dismissal. The Board decided that the making of false returns to the Department amounted to the deliberate falsification of documents as set out in Circular 60/2009 and as such amounted to such serious misconduct on his part as to justify dismissal, which would take effect from 30 November 2015.

The Disciplinary Appeal Panel

35. Section 24(11) of the Education Act, 1998, as substituted by s. 6 of the Education (Amendment) Act, 2012, provides that a board of management may suspend or dismiss the principal, teachers and staff in accordance with procedures agreed from time to time between the Minister, the patron, recognised school management organisations and any recognised trade union

and staff association. In accordance with this provision, an appeal panel consisting of Dr Carl Ó Dálaigh, an independent chairperson, Mr Seamus Caomhánach, nominee of An Foras Pátrúnachta, and Mr Michael McGarry, a nominee of INTO was convened. Dr Ó Dálaigh was an inspector in the Department of Education and Skills, as was Mr Caomhánach. The hearing was conducted on 9 November, 2015.

36. The Disciplinary Appeal Panel delivered its decision on 14 November, 2015. It considered that all relevant facts were considered by the Board of Management in a reasonable manner in that "[i]*t has been confirmed that the enrolment figures as sent to the DES by the Principal were incorrect .There is no evidence that these were signed off by the then acting Chairperson of the BOM in October/ November 2009*". The panel also considered that the teacher concerned could reasonably be expected to have understood that the behaviour alleged would attract disciplinary action. In this respect, the panel referred to Circular 60/2009 which listed falsification of records as an example of serious misconduct. Finally, it concluded that the sanction recommended was not disproportionate to the misconduct alleged.

The Workplace Relations Commission

37. The Principal then made a complaint to the WRC which was received on 8 February, 2016. As set out above, the Board of Management advertised for the post of principal of the school in 2016, and in July, 2016 an existing teacher at the school, Ms Scott, was appointed as principal.

38. The WRC hearing took place on 4 December, 2017, and the decision issued on 25 April, 2018. That decision summarised the applicant's case and that of the

Board of Management. The conclusion of the Adjudication Officer commenced from the premise that pursuant to s. 6(1) of the Unfair Dismissals Act, 1977 the dismissal of an employee shall be deemed to be an unfair dismissal unless, having regard to all the circumstances, there were substantial grounds justifying the dismissal. The evidence of two previous Board members during the disciplinary hearing and again at the hearing before the WRC, was recounted at page 16 of the decision. Their evidence, as summarised by the Adjudication Officer, was that "*following enquiries from other schools of this type, the returning of false enrolment numbers to the department, as in the circumstances of this case, was the done thing. With the benefit of hindsight, they both conceded it was the wrong thing to do, but at the time they, and the other board members, acting on the advice received from other schools didn't think they were doing anything wrong*". The Adjudication Officer stated that she was satisfied that the object of the exercise was not to defraud the Department of Education but to secure the future of the school, however she continued, "*nonetheless, the result of the exercise was to defraud the Department of Education. Both the school and the Principal were the beneficiaries of additional sums of the department's money, as a result of the misrepresentation*."

39. The Adjudication Officer concluded that "*it was ... clear, that the board at the time, were wholly complicit*". She also concluded that from the evidence of one of the other school principals, that an ambiguity was created by the Education Welfare Act, 2000 and there had been a seismic shift in practices adopted once the 2013 circular came into being. However, prior to 2013 the practice adopted by the Board of Management in 2009 "*was prevalent*". She concluded that while

his interpretation of the law at the time might have been wrong that did not *"change the fact that the practice adopted by the board in 2009 was widespread".* She considered that the Board of Management, having been complicit in the act, now, with new members, cannot now seek to justify its dismissal of the complainant since he was only one of the eight members involved in the misrepresentation/fraud. Accordingly, the Adjudication Officer found that the Board of Management had failed to justify the dismissal of the complainant and therefore, his claim should succeed. The conclusion in relation to remedy was the following:-

> "*When assessing the most appropriate remedy for the complainant, I am taking into account, the complainant's own contribution to the dismissal, the delay in bringing the matter to its conclusion, the effect of the lengthy suspension had on the complainant, the necessity for the suspension in the first place and his prospects of securing future employment. I find that the delay in bringing this matter to its conclusion, the length of time the complainant was unnecessarily out on suspension, together with his participation in the matter all render [h]is prospects of securing employment in the future very slim. In Those circumstances compensation is not an appropriate remedy as the act limits the level of compensation to 104 weeks. It is for that reason that I find that re-engagement [is] the most appropriate remedy.*
>
> *The complainant is to be re-engaged into the role of Principal effective from 01.01.2018 on the same terms and conditions prior to the dismissal. There is to be no break in his service or pension contributions.*"

The Labour Court

40. The matter was appealed to the Labour Court and heard over eleven separate days between November, 2018 and July, 2021. The decision of the Labour Court issued on 3 June, 2022. The Principal maintained that the Board of Management had full knowledge of the matters. The Labour Court recorded the Principal's evidence as follows:-

> "*The witness stated that he did not – and did not have to – tell the Board expressly that he was going to submit inaccurate returns that year to the Department as, per his own words, "I didn't need to. They knew what the practice was … that we were making up numbers.*"

41. The Court considered that its function was to determine whether or not the Board of Management had established that it had substantial grounds to dismiss the complainant; that it followed fair and reasonable procedures; and that the sanction of dismissal was proportionate having regard to all of the circumstances. In this regard, the burden of proof rested on the Board of Management. The Labour Court considered that it was the central plank of the Principal's case that the Board of Management in place in 2009 was informed of and approved of his conduct in relation to the enrolment figures. While he was dismissed by a subsequent and differently constituted board, the Board was a single legal entity and designated by statute as a body corporate with perpetual succession.

42. The Court expressed its concerns that the Principal's period of administrative leave was extended following the formal conclusion of the HSE investigation until May, 2013 to allow for an internal investigation, but there was no evidence

that that investigation ever commenced at all. It was recorded that Ms Ní Shúilleabháin raised the issue of the 2009 enrolment terms in January, 2013. The Court considered it had not been given an explanation as to why the Principal was not expressly informed of the details of the allegation against him until 29 May, 2013 at which stage he had been retained on administrative leave for a period of approximately sixteen months. Furthermore, it considered that Dr Ní Dhuinn was being economical with the truth when she stated in her letter of 29 May, 2013 that the enrolment issue had "*just recently come to my attention*".

43. While this did not substantiate the allegation that the chairperson was motivated by animus, the Court considered that the failure to carry out the internal investigation into the single child incident; the "*surreptitious*" investigation into a totally separate allegation over a period of five months without informing the Principal; and the raising in the letter of 29 May, 2013 of additional allegations suggested in the Court's view "…*a determined intention on the part of the Respondent to find a basis for removing the Complainant from his employment in circumstances where the HSE had concluded that his conduct on 11 January 2012 did not constitute physical abuse of a child*". Furthermore, the Court considered that the chairperson's letter of 29 May, 2013 did not provide an explanation as to why it was necessary to put the complainant on paid suspension and this decision raised further concerns in the Court's mind about the appropriateness of the Board's conduct in the disciplinary process having regard to the fact that the investigation into the enrolment issue had been ongoing for some four months at that stage.

44. The Court considered that the delay in the process was significant. First, there was a period of over four months after the issue had been raised in January, 2013, before the Principal was advised on 29 May, 2013 that the allegation would be the subject of a disciplinary process. Second, there was considerable delay until the disciplinary hearing concluded and the complainant was dismissed. In this regard it was accepted by the complainant that some of that delay was caused by his own non-availability at the time. Nevertheless, the Court noted that it was apt to reflect on the adage "*justice delayed is justice denied*". The Court concluded that what happened in respect of the delays at various points in time between January 2012 and November 2015 "…*could hardly have fallen further short of affording the Complainant this aspect of fair procedures*".

45. Under the heading "*The Complainant's Admission of Wrongdoing*" the Court stated that "[t]he *Complainant has never denied that he knowingly overstated the numbers validly enrolled in the school on 30 September 2009. However, he vigorously contests the manner in which the Respondent has sought to characterise and overstate his 'offence'*". It was said that no evidence had been put before the Court that the number of pupils enrolled in 2009 was overstated in the return to the Department by eighteen but the complainant admitted and accepted that he overstated the numbers by nine only. It was also to be recorded that he had not personally benefited in any way. The Court considered that it appeared from the evidence of Mr O'Reilly that the practice described was not unique to Gaelscoil Moshíológ and the Court concluded in this regard the "…*deliberately over-stated and suggestive formulation of this allegation against the Complainant further adds to the Court's concerns that the*

Respondent was overly zealous in its desire to establish a basis upon which to justify the Complainant's dismissal."

46. In relation to the Board of Management's knowledge of the 2009 enrolment returns, the Court, while accepting that the Board of Management was a body corporate with perpetual succession, did not accept that a subsequent board was automatically debarred from conducting a disciplinary investigation into allegations of wrongdoing that may have occurred with the knowledge of the previous board. However, it concluded that it was also equally the case that the subsequent Board of Management could not disregard the evidence in relation to the previous Board of Management's state of knowledge and its tacit or otherwise support of the alleged wrongdoing. The Court's conclusion in this regard was this:-

> *"In summary the Court finds that the evidence it heard establishes that such discussions did take place and that the Board and its individual members understood or ought to have understood what steps the Complainant took each year with regard to the enrolment returns and his reasons for so doing. It follows that the Court accepts that the Complainant was not acting without the support and encouragement of the Board. This calls into question the proportionality of the sanction imposed on the Complainant at the conclusion of the disciplinary process".*

47. The Court stated that its task was to determine whether or not the decision taken by the Disciplinary Appeal Panel on behalf of the respondent was within the range of responses open to a reasonable employer acting reasonably in all the

circumstances. It considered that it was beyond dispute that dismissal from an education post, particularly that of a principal, was the *"kiss of death"* to a person's career as an educational professional. In that sense, the Court considered that "…*the sanction of dismissal in a case such as the instant one is manifestly more far-reaching than it might be if applied to an employee in any number of other settings whose future employment prospects would not be curtailed in a similar fashion*". It followed, the Court considered, that the bar was set very high for the respondent in this case in terms of demonstrating that its decision to dismiss the complainant was a proportionate response to his admission of making an inflated return of the 2009 enrolment numbers to the Department. The Court's conclusion was as follows:-

> "*Having regard to the Respondent's acknowledgement that, when arriving at its decision to dismiss the Complainant, it erroneously believed that the Complainant had himself benefited from the inflated returns in 2009, the Court's findings in relation to the Board's ongoing and informed support for the Complainant's consistent practice when it came to making the annual return each year from the establishment of the School, the Complainant's full admission from the outset in relation to his actions in October 2009 and the very strong evidence of Mr O'Reilly about the prevalence of similar practices in the sector prior to 2013, the Court finds that the sanction of dismissal in this case was disproportionate and not within the band of reasonable responses open to a reasonable employer in the circumstances.*"

As a consequence, the Court determined that the appropriate redress was the award of reengagement in his role as principal with effect from 1 September 2017.

The High Court

48. On 13 July, 2022 the Board of Management appealed the decision of the Labour Court, pursuant to s. 46 of the 2015 Act contending that it was wrong in law and sought an order setting aside the decision, and remittal to the Labour Court.

49. As already set out above, in a judgment delivered on 14 July, 2023 the High Court reviewed the evidence extensively, and held that the Labour Court was entitled to come to the conclusion it did that the dismissal was unfair, but had erred in law in coming to the conclusion that the appropriate remedy was one of reengagement with effect from 1 September, 2017. The Court so concluded for three reasons set out at paragraph 435 of the judgment:-

"*(1) It is clear for the reasons set out in this judgment that the decision to keep Mr. Ó Suird on administrative leave from end January 2013 until May 2013 was not only unreasonable but also unlawful;*

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

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

50. In those circumstances the Court considered that the proper order was for immediate reinstatement. Subsequently, in the second judgment delivered on 3

August, 2023 that order was varied so that Mr Ó Súird was deemed to be reengaged as Principal and it was ordered that he be put back on the payroll with effect from 1 August, 2023; and all arrears of pay from the date of dismissal on 30 November, 2015 were to be paid by 15 September, 2023. A stay on the order was refused and costs were awarded on a legal practitioner and client basis.

51. The starting point in this appeal is that it is an appeal from the decision of the High Court which was in turn an appeal on a point of law from the decision of the Labour Court pursuant to s. 46 of the 2015 Act. It should be possible therefore, to identify with clarity and relative precision, the issues to be determined in this appeal. This case has taken a considerable length of time to reach this point, and generated more than the normal amount of contention, and a number of satellite issues were pursued vigorously by both parties before the WRC, the Labour Court and the High Court. It is, in my view, important to keep a clear focus on the issues which were to be determined at each stage by the respective decision-makers, including this Court on appeal.

52. The general issues in respect of which this Court granted leave to appeal to the Court are set out at paragraph 11 above. In the light of the written submissions and argument in this Court, the issues in controversy can be identified as follows:

i. The proper scope of an appeal on a point of law under s. 46 of the 2015 Act and its application to this case;

ii. The test for the determination of unfair dismissal on grounds of misconduct under s. 6 of the Unfair Dismissals Act, 1977, as amended, and its application in this case;

iii. The principles to be applied in ordering reengagement or reinstatement and their application in this case;

iv. The test for the determination of an application for a stay on an order pending an appeal; and

v. The circumstances in which it is appropriate to order costs on a legal practitioner and client basis, and their application in this case.

The proper scope of an appeal on a point of law under s. 46 of the 2015 Act and its application to this case

53. This issue is one to which, at first sight it might appear that there is an obvious and clearly understood answer. The scope of an appeal on a point of law is now well established. The question deserves further attention in this case however because it is central to the proper resolution of this difficult and contentious litigation.

54. There are, as Clarke J. observed in *Fitzgibbon v. Law Society* [2014] IESC 48, [2015] 1 I.R. 516 a somewhat bewildering array of formulations of appeals on the statute book, and it is not always clear why the Oireachtas chooses one rather than another, or what exactly is comprehended in some cases where an appeal is provided for. The jurisdiction to appeal to the High Court also sits sometimes uneasily alongside the extensive judicial review powers of the High Court in supervision of the exercise of jurisdiction by tribunals and other courts. But there is little difficulty in stating the nature of an appeal to the High Court on a point of law; it is that set out at paragraph 20 of the first judgment of the High Court and is not in serious controversy.

55. There have been numerous and authoritative statements of the jurisdiction of a court on an appeal on a point of law in recent times, commencing with the decision of this Court in *Henry Denny & Sons (Ireland) Limited v. Minister for Social Welfare* [1997] IESC 9, [1998] 1 I.R. 34. The authority cited in the High Court was *ESB v. Minister for Social, Community and Family Affairs* [2006] IEHC 59 (Unreported, High Court, Gilligan J., 21 February 2006) ("*ESB*"), and is instructive. Gilligan J. set out the legal principles applicable to an appeal, in that case from a social welfare determination and relied on an authority in respect of an appeal from the decision of the Information Commissioner in *Deely v. Information Commissioner* [2001] IEHC 91, [2001] 3 I.R. 439. At page 12 of *ESB*, Gilligan J. said:-

> *"In* Deely v. Information Commissioner *(Unreported, High Court, 11th May, 2001) McKechnie J. noted at p. 17 that the remit of the Court in an appeal on a point of law encompassed the following:*
>
> *(a) it cannot set aside findings of primary fact unless there is no evidence to support such findings,*
>
> *(b) it ought not set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision making body could draw,*
>
> *(c) it can however reverse such inferences, if the same were based on the interpretation of documents and should do so if incorrect, and finally,*

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

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

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

56. Gilligan J. continued:-

> *"I take the view that this Court has to be mindful that its own view of the particular decision arrived at is irrelevant. The Court is not retrying the issue but merely considering the primary findings of fact and as to whether there was a basis for such findings and as to whether it was open to the Appeals Officer, to arrive at the inferences drawn and adopting a reasonable and coherent view, to arrive at her ultimate decision".*

57. It is to be observed that the test is a very familiar one; it is the test applied on appeal from the High Court, formerly to the Supreme Court and now to the

Court of Appeal, set out most notably in *Hay v. O'Grady* [1992] 1 I.R. 210. As observed in the decisions, the test can also be understood negatively; whatever the precise limits of an appeal to the High Court on a point of law, it is not a rehearing. The appellate body does not hear evidence, and is not free to substitute its findings for that of the decision-maker. In the context of court litigation originating in the High Court, this means that there would be one hearing in which evidence is heard and facts found in the High Court, and a possibility of review on appeal by reference to the test in *Hay v. O'Grady*. In the present context, s. 46 of the 2015 Act provides for two full hearings, a hearing at first instance before an Adjudication Officer of the WRC, and an appeal to the Labour Court, which is a full rehearing, followed by an appeal on a point of law to the High Court.

58. It is true that the division of function is easily stated in principle, but can sometimes be difficult to apply in a particular case. It is almost a daily occurrence that appeals to the Court of Appeal will proceed on contested assertions as to whether there is a finding of fact; whether such a finding is a finding of primary fact or an inference; and if so, whether such inference is correct. This degree of contention is not an indication of a failure in the system. Judges – no more than any other individual – do not readily speak the language of findings of fact, still less findings of primary fact, or inferences, even within the formal structure of a decision. Even when they do employ that language, it is often applied to a reasoning process after the fact, rather than a description of the reasoning itself. In most cases, judges come to a conclusion on the balance of probabilities of what they consider occurred, and explain why that is so, and

it is for an appellate court to analyse that reasoning through the lens of the *Hay v. O'Grady* test.

59. It is also only correct to recognise that sometimes that decision can be marginal and can be affected by an appellate court's overall view of the case. It may at some level be easier to persuade an appellate court that there has been an incorrect or unsustainable inference where it appears that the outcome seems markedly unfair or incorrect. This should not be surprising. It is often the case that where a decision miscarries that there will also be an error in reasoning, and it is the proper exercise of the judicial function to recognise and appreciate those sometimes marginal cases and the fact that there is some limited scope for flexibility in the application of the test. It does mean however that an appellate court should be alert to avoid being drawn wholesale into the details of the dispute.

60. However, notwithstanding the potential difficulties with the application of the test and the inevitability and contestability of sometimes marginal cases, there is a clear distinction in principle which must be respected and honoured in practice. An appeal on a point of law is not a rehearing. An appellate court does not retry the issues and substitute its own view of the merits for that of the primary decision-maker, particularly since its understanding of the facts is gleaned through the imperfect prism of a transcript. Its view of the merits is not the issue and is not a legally relevant factor.

61. The maintenance of this distinction is important in practice. Here, for example, the State has provided for a first hearing before an independent adjudicator, with experience in the field of employment. It has also provided for a full appeal to

the Labour Court – a body composed of representatives of employers and employees and persons with legal qualification and experience. In theory this procedure is meant to be shorter, more informal and less costly than parallel proceedings in court. A decision-maker with expertise built up through a succession of cases can accumulate a valuable sense of the range of issues that arise and set a particular case in its context and may have a well-developed sense of the seriousness of any particular case. Furthermore, such decision-makers may have experience in applying appropriate remedies in particular situations.

62. The High Court (and, for that matter this Court) has limited exposure to the detail of routine employment disputes. A court's expertise is in law, the legal and factual reasoning process, the application of law to facts, and the analysis of those facts by reference to a legal test. If, therefore, all elements in the structure play their role correctly, a litigant should have a high degree of assurance that disputes relating to employment, and in particular, termination of employment, which may be of immense personal significance to them, will be dealt with expeditiously and expertly and with a guarantee that any decision is subject to review by the High Court for compliance with what the law requires. That was at least the promise of the mechanism created by the Unfair Dismissals Act, 1977, and all participants in the process should strive to make it a reality.

63. It is not, therefore, formalism to maintain the distinct role of the High Court on appeal on a point of law, and to insist that it limits itself to that role. Rather, this distinction is central to the proper functioning of the statutory scheme established in the field of employment disputes by the Unfair Dismissals Act, 1977. As was succinctly stated by McKechnie J. in *Nano Nagle v. Daly* [2019]

IESC 63, [2019] 3 I.R. 369, "[t]*his Court should not act as a surrogate Labour Court, which is charged with carrying out a statutory function*". The range of orders which a court may make on an appeal on a point of law follows from this essential distinction. It is incorrect, in my view, to approach the question of the jurisdiction of the High Court on an appeal on a point of law and particularly the orders it may make where it considers there has been an error of law, laterally, as it were, and by analogy with the now familiar jurisdiction in judicial review, and to conclude that if the Oireachtas provides for an appeal on a point of law, it must have intended something different, and indeed, something more than judicial review. This was suggested by Costello J. in *Dunne v Minister for Fisheries* [1984] I.R. 230 at pages 236-237, but with respect I do not think this approach is correct. An appeal on a point of law long predated the development and expansion of judicial review. Furthermore, it cannot be the case that if the field of judicial review expands that the scope of an appeal on a point of law must also expand to be always, as it were, judicial review plus. An appeal on a point of law is a separate procedure to judicial review. It is available as of right; the leave of the court is not required; and the remedy is not discretionary.

64. Where the High Court concludes that there is an error of law, the order it may make depends upon the error identified, in the same way as the order this Court or the Court of Appeal may make in an appeal. In some cases, if the court concludes that there has been an erroneous finding of primary fact which led to a conclusion in favour of a party, then the court may allow the appeal and set aside the order made and substitute the order which follows from that conclusion. Similarly, if there is an error of law and the correct understanding and application of the law would lead to the contrary conclusion, then the court

is entitled to allow the appeal and substitute that conclusion. There may, however, be circumstances where the error identified cannot lead to the substitution of a final order by the court, and may mean that the case has to be remitted to the primary decision-maker. None of this however, expands the court's jurisdiction to substitute an order it considers appropriate for that made by the primary decision-maker. The order which the court makes on an appeal on a point of law, is still constrained because it is an appeal on a point of law.

65. It is perhaps implicit in the formulation of the issue upon which leave was granted in this case, that the panel of this Court did not consider that any question of law arose as to the test to be applied, so much as with the application of it in this case. There has been much, perhaps too much, heat generated in this case and I do not wish to add to the epithets employed already. I am also conscious to avoid being unduly critical with the benefit of hindsight when issues are more clearly laid out for forensic scrutiny in an appellate court which has the luxury of reviewing what has been done, rather than adjudicating in real time. Nevertheless, I must observe that the determinations by the WRC and the Labour Court did not facilitate the performance of its function by the High Court on an appeal on a point of law.

66. It is not entirely clear, without some detective work, what were the factual matters in issue which could be considered relevant to the decisions to be made, and what conclusions were drawn in relation to them. For example, some matters of importance were not addressed at least explicitly. A central question, arguably the central question, was whether the decision of the Board of Management to dismiss the Principal was within the range of decisions which a

reasonable employer/board of management could come to. In that regard an important consideration was that the dismissal decision had been the subject of appeal to an independent Disciplinary Appeal Panel comprising of two former inspectors from the Department of Education, one of whom was the nominee of An Foras Pátrúnachta and one union nominee from the INTO, and that panel had upheld the decision. In order to conclude that the employer's decision was outside the range of reasonable decisions which an employer could take, it would be necessary to explain why that decision could, or should, be discounted. It is perhaps possible to infer what the reasoning of both the WRC and the Labour Court in this respect was, but it is certainly not clearly or adequately expressed. It may also be that the lack of explicit reference was due to a reluctance to criticise the panel – and for reasons which I will address later, the decision of the WRC and Labour Court that the dismissal was unfair is one which should not be set aside – but the lack of reference to the Disciplinary Appeal Panel and analysis in the determination was not helpful in coming to this conclusion.

67. In *Zalewski v An Adjudication Officer* [2021] IESC 24, [2022] 1 I.R. 421, this Court held that the adjudication by both the WRC and the Labour Court was the administration of justice within the meaning of Article 34 of the Constitution and the exercise of limited functions and powers of a judicial nature under Article 37. The very fact that these bodies are discharging the judicial power of the State – albeit that these functions are limited in accordance with Article 37 – carries with it the obligation to adjudicate on what are important issues for all the participants involved, in a manner which adequately performs that function. The position of being the primary fact finder carries with it the duty of

identifying the issues in controversy considered to be relevant to the decision; the evidence adduced; the findings of the tribunal; and the reasoning leading to its conclusion. While it is clear that considerable attention was given to this case by the Labour Court, and its conclusion was considered and measured, it is desirable that greater clarity be provided, at both the stage of the Adjudication Officer's determination and the decision of the Labour Court.

68. It must also be said that the time taken at each stage of this process is an unsatisfactory feature of this difficult case. The Principal was put on administrative leave in January 2012, but was not formally dismissed until November, 2015. The Labour Court was entitled to consider that this delay was in itself a factor contributing to its conclusion that the dismissal could not be found to be fair. Although a complaint to the WRC was initiated in February, 2016, it was only in April, 2018 that the Adjudication Officer issued her decision, and when that was appealed it was not until June, 2022 that the Labour Court determined the appeal. Even allowing for the intervention of the Covid-19 pandemic, and the multiple issues raised by the parties in this case, the lapse of time involved here is disturbing and unacceptable, particularly in circumstances where the Adjudication Officer, the Labour Court and the High Court had to consider the question of reengagement or reinstatement as a real possibility. In the event, the High Court made an order which required the Principal to return to his school, and that school to accept him as principal, where he had not fulfilled that role for eleven and a half years. If the WRC and Labour Court are to fulfil the promise of the 1977 Act of providing relatively informal, speedy and experienced determination of dismissals, then they must adopt procedures that promote the speedy resolution of unfair dismissal claims.

69. It is also often the case that parties on an appeal to the High Court on a point of law need little encouragement to engage upon a rerun of the merits in the hope that this may influence the judge in their favour. Indeed, in some cases, perhaps this one, it might require considerable discipline to ensure that the parties address only those issues and arguments which are properly within the scope of an appeal on a point of law. Here, for example, the parties exchanged lengthy affidavits in the High Court, and the judge was provided with and read the transcripts of the hearing before the Labour Court (less two days) and the Board of Management disciplinary hearing. The judgment of the High Court is lengthy and detailed. Nevertheless, it seems clear to me that the proceedings in the High Court slipped their moorings and travelled well beyond the limits of an appeal on a point of law.

70. The essential issue before the WRC and the Labour Court (which is the body alleged to have erred in law) was this: was the sanction of dismissal unreasonable, in the sense of being outside the reasonable range of responses of a reasonable employer in circumstances of serious wrongdoing on the part of the Principal?

71. Before addressing that issue, it is necessary to say something about the underlying conduct which gave rise to the disciplinary hearing and the dismissal which was found not to be justified by the Labour Court. One of the many sideshows in this case was whether it was improper on the part of the Board of Management and, indeed, their solicitor, to refer to this as a "*fraud*" rather than, it seems, a "*falsification of records*". The fact is that the records were falsified, and in consequence the Department of Education sanctioned payment in respect

of capitation and an additional teacher, to which the school was not entitled. There was also evidence that the dismissal of principals, and even criminal prosecutions, had occurred prior to 2013, in at least some circumstances of falsification of enrolment records. Of far greater importance then than any question of nomenclature – and I myself am not sure why the description of "*fraud*" for deliberate false statements made in order to procure the payment of monies to which a body was not entitled is considered to be wrong, let alone so wrong as to attract the level of criticism levelled at it in the course of these proceedings– was the fact that this was, on any view, a serious matter. It could certainly be considered serious misconduct and conduct which could justify dismissal. Indeed, in this regard there was evidence from an official in the Department of Education that prior to 2013 seven cases of falsification of enrolment had been referred to An Garda Síochána, three of which had resulted in prosecutions and convictions. The official further gave evidence that ordinarily the principal concerned would simply resign before disciplinary proceedings were commenced. In addition, the witness said that there was no significant change in Departmental attitude to the practice in 2013. The Circular issued in that year had merely made explicit that the policy of the Department was to pursue criminal prosecutions in such cases. It is one of the many unsatisfactory features of this case that this evidence was not assessed at all in the decisions of the WRC or the Labour Court. The system established under this and similar legislation divides the function of fact finding from appellate review, and places significant responsibility on the primary fact finder to identify the relevant facts particularly perhaps those which might tend against the decision to which they have come, and explain their assessment of those

facts – in this case, why in the light of such evidence a reasonable decision maker could not conclude that dismissal was an appropriate response to admitted and serious wrongdoing. The difficulty was compounded, rather than resolved, by the fact that the evidence was referred to in the High Court (which did not have a fact finding function) but then wholly discounted on the inadequate basis that the official giving evidence by reference to the Departmental files had not himself been employed in the Department until 2018.

72. The central factual issue in the case at all stages was whether the dismissal was justified, or, more correctly, whether the Board of Management could have reasonably considered that dismissal was justified, in the circumstances of this case. That required at least in my view, an assessment of the precise nature of the wrongdoing; whether the Principal benefited in any way personally; whether the Board of Management had been aware and at least some members complicit in the practice; if so, what the respective responsibilities between Principal and Board of Management were in that regard; and whether the practice of deliberately overstating the enrolment figures of the school could be said to be something which was prevalent in the sector, or at least to have occurred in other schools. Finally, there was a question as to the weight to be given to the Principal's hitherto unblemished record, and the fact that he had been the driving force in establishing the school.

73. The Labour Court, upholding the decision of the WRC in this respect, held that on the evidence the Board of Management was, or that some members of it were, aware at least to some extent, of the practice, and may have cooperated in it, that there was also evidence that the practice occurred elsewhere, and concluded

therefore, that it was arguable that the dismissal was disproportionate or perhaps even more precisely, that the school had not discharged the burden of showing that the dismissal was fair. It should be noted that the very concept of disproportionality implied that there was some wrongdoing, but that the sanction of dismissal was excessive.

74. In so much as this finding was seriously in issue in the appeal to the High Court, then, by reference to the standard set out in *ESB* and notwithstanding the evidence of serious wrongdoing, the High Court could plausibly conclude that the decision of the Labour Court should not be set aside. There was plainly evidence that supported the conclusion that the Labour Court appeared to have come to, and it could not be said that the finding of disproportionality, having regard to all the evidence, was an error of law. There was also, it should be said, plainly evidence upon which a sterner view could have been taken and the fact that the Board of Management and the Disciplinary Appeal Panel did take that view provided grounds for arguing the conclusion was one within the range of reasonable responses, but the Labour Court, as a finder of fact with experience and expertise was entitled to uphold the WRC decision and gave plausible reasons for so doing. Therefore, this aspect of the decision – that the dismissal was unfair – was one which notwithstanding the seriousness of the underlying conduct and the unsatisfactory nature of aspects of the assessment, the Labour Court was entitled to come to and involved no error of law.

75. However, the judgment of the High Court went much further than this. There was a series of issues which were at best peripheral to the central issue, upon which conclusions were expressed and adjudications, sometimes severe, were

made. It is important for any person adjudicating and whose decisions are published, to recognise that without anonymisation of parties, findings made on the balance of probabilities, and sometimes limited evidence, may often be treated as definitive judgments on individuals and will have a considerable half-life and the damage done to reputations can be spread very far, and persist for some time. That in itself is another reason to ensure that only determinations that are strictly necessary and required by the issue before the deciding body are reached. Unfortunately, the findings of the High Court went much further.

76. These peripheral issues loomed large – unnecessarily so – in this case. It would, I think, be unnecessary and compound the error to go through them to show the extent to which they were, in fact, the product of the High Court's own assessment of the evidence – albeit derived from the transcripts and affidavits – in this case. It is, I think, possible to show relatively shortly that what occurred in the High Court mutated into a form of rehearing on the merits, albeit without the oral evidence which was available to both the WRC and the Labour Court, and on the basis of transcripts which were incomplete.

77. One instructive issue is that of the independent Disciplinary Appeal Panel and the Departmental Report referred to in these proceedings as the 'Mags Jordan report', to which reference has already been made at paragraph 27 above. Once the falsification of records came to light, it was reported to the Department of Education and an inspector, Mags Jordan, was appointed to investigate and produce a report. That report was produced not as something procured at the behest of the school for the purposes of the inquiry, or for the present proceedings; rather it was the performance of a Departmental inspector of her

function to investigate and report to the Department having overall responsibility for the education system. While it appears the Principal took issue with some of the report's findings of fact – principally the total number of pupils who could be said to have been enrolled and included in the register and returned to the Department who did not in fact attend the school – he did not challenge the gravamen of the report's conclusions. These were to the effect that he was responsible for the inclusion in the register and the reporting to the Department of children who did not attend the school, and this had the effect of, and was done with the purposes of, increasing capitation to the school and securing the provision of another teacher to which the school was not entitled. The details of the Mags Jordan report were not therefore, and ought not to have been, a matter of significant controversy in the case; the Principal admitted that at least nine pupils had been included in the register who did not attend the school, and this was a sufficient number to make a difference in terms of both capitation and teacher provision. This was the central issue of the report, and it was not disputed.

78. The High Court, however, was not only critical of the report, but the fact of the report in turn became a justification for disregarding the decision of the Disciplinary Appeal Panel and treating it as wrong. It was said (at paragraph 354 of the first judgment) that since two members of the Disciplinary Appeal Panel were former inspectors in the Department of Education and Skills and that the "*main evidence*" before the panel was the report of Ms Mags Jordan, a former colleague in the limited sense of also being an inspector, neither the chair nor the other member of the panel were "*…sufficiently impartial or independent of the Department of Education in this matter and should not have been*

members of the Disciplinary Appeals Panel…". It was said (at paragraph 166) that Ms Mags Jordan's report needed to be treated with "*some circumspection*" and the Labour Court did so correctly. In fact, the Labour Court did not refer to the report at all in the body of its decision, and in respect of the Disciplinary Appeal Panel it simply recorded the evidence of the chairperson as outlining the composition of the expert panel and that "[t]*he witness also gave evidence in relation to the conduct of the appeal and the grounds of defence advanced by the Complainant at that stage*". It is apparent therefore, that the conclusions of the High Court did not arise from, and were not based upon, the findings of the Labour Court. Rather, as is apparent from the first judgment at paragraphs 355-362, it was a product of the court's own analysis of the evidence from the transcripts.

79. This conclusion was surprising and was arrived at without notice to the Department or the individual members of the Disciplinary Appeal Panel. It was raised as a ground of possible appeal on behalf of the Board. The High Court considered it was necessary to make an assessment of the reality of the appeal for the purposes of the application for a limited stay on the order of the High Court and accepted the submission on behalf of the Principal that these issues were inconsequential to the Court's reasoning and did not properly concern the litigation between the Principal and the Board. This if correct, only illustrates the fact that the decision of the High Court had, regrettably, strayed well beyond the limits of an appeal on a point of law.

80. This can also be seen in the treatment of the appropriate remedy. A key feature upon which the High Court differed from the Labour Court and the WRC

respectively, was in relation to the appropriate remedy and, in particular the date of deemed reengagement of the Principal. The Principal was initially put on administrative leave, and then suspended on full pay. When the Board of Management's decision to dismiss him was upheld by the Disciplinary Appeal Panel's recommendation, he was dismissed as of 30 November, 2015. The WRC ordered that he should be reengaged in the role of principal effective from 1 January, 2018 on the same terms and conditions he enjoyed prior to his dismissal. The Labour Court varied that somewhat by fixing the date of reengagement four months earlier, on 1 September 2017. The net effect of these orders was that the Principal would receive back pay from the date of the deemed reengagement but that this would not extend back to the date of actual dismissal and, as the Labour Court put it, the period between the two dates, i.e. twenty-one months, was "…*to be regarded as a period of unpaid suspension*…". The High Court however, considered that that was an error of law, and concluded per the second judgment that reengagement as principal was to be deemed to take effect from 30 November, 2015 being the date of actual dismissal. There would thus be no period of suspension without pay. These differences between the WRC, the Labour Court and the High Court as to dates of deemed reengagement might appear at first sight to be merely differences of degree and detail, but in fact, they are revealing of the fundamental difference of approach taken by the High Court.

81. Section 7 of the Unfair Dismissals Act, 1977 distinguishes between reinstatement under s. 7(1)(a) and reengagement under s. 7(1)(b). Reengagement can be in the position held immediately before dismissal, or another position. Reinstatement is, by definition, reinstatement in the same

position held before dismissal, and is made "…*together with a term that the re-instatement shall be deemed to have commenced on the day of the dismissal…*". It follows that where reengagement is ordered that employment recommences, but that the reengaged employee is not entitled to recover pay for the period between dismissal and reengagement or, deemed reengagement as occurred in this case. There is a significant difference in principle between reengagement and reinstatement. Both are strong remedies, but reengagement is more flexible and may be appropriate where, for example, an employee can be restored to employment but in a different department of a large enterprise where he or she may not be required to work in close proximity to former colleagues. Reinstatement is a significantly more burdensome and intrusive remedy and will often involve a significant element of public vindication appropriate where an employer's conduct is regarded as particularly outrageous and where there is little or no contribution by the employee to the dismissal. The distinction was blurred somewhat in this case, since the WRC, the Labour Court and the High Court (ultimately) ordered reengagement in the position of principal, and also fixed the point of such reengagement at a point in the past so as to give rise to an obligation to pay arrears. When in the case of the High Court, that point was fixed as the date of actual dismissal the distinction between such reengagement as principal and reinstatement becomes very fine. Nevertheless, the distinction between the remedies is important and the choice of reengagement by both the WRC and the Labour Court was significant.

82. The remedy awarded by the Adjudication Officer and slightly adjusted by the Labour Court, clearly shows that both the Adjudication Officer and the Labour Court chose reengagement as the remedy and further chose to fix the point of

reengagement at a period substantially after the period of actual dismissal to reflect the fact that the Principal had been guilty of wrongdoing which merited sanction, but not dismissal. In effect, both bodies adopted the approach of a former principal, and member of the INTO Executive, called to give evidence on behalf of the Principal who said, "[b]*y all means sanction him, don't sack him…*" (Labour Court determination at page 44). This was consistent with the position taken on behalf of the Principal in the written submissions in this Court which was that the Principal "…*has always accepted that his role in the overstatement of enrolment figures was wrong*".

83. It is apparent that the decisions of both the Labour Court and the WRC considered that this wrongdoing merited a significant sanction, between 21 months unpaid leave (per the Labour Court) and 25 months (per the Adjudication Officer). Indeed, the Adjudication Officer in the WRC said at page 16 of her determination:-

> "*I am satisfied that the objective of the exercise was not to defraud the department, but to secure the future of the school. Nonetheless, the result of the exercise was to defraud the Department of Education. Both the school and the Principal were the beneficiaries of additional sums of the department's money, as a result of the misrepresentation*".

(It should be said, that subsequent to this determination it was established that the Principal did not himself benefit from an increased increment because he was already on the highest salary scale). At page 18 of her decision the Adjudication Officer continued, "[w]*hen assessing the most appropriate*

remedy for the complainant, I am taking into account, the complainants [sic] *own contribution to the dismissal…*".

84. For its part, the Labour Court's determination was equally clear. It started from the proposition that, as the respondent emphasised, the "…*normal consequence of serious misconduct such as falsification of documents will be dismissal*". It appears to have considered that demotion would have been an appropriate sanction. It observed that dismissal of a principal teacher in such circumstances could be manifestly more far-reaching than a dismissal of an employee in other circumstances and therefore, a high bar was set in terms of demonstrating that the dismissal was a proportionate response to the Principal's "…*admission of making an inflated return of the 2009 enrolment numbers to the Department*". The Labour Court considered however that the sanction of dismissal was disproportionate and not within the band of reasonable responses open to a reasonable employer in the circumstances (at page 68). Accordingly, it ordered reengagement with effect from 1 September, 2017, and said expressly that the period from the date of actual dismissal to that date should be "…*regarded as a period of unpaid suspension…*".

85. The remedy of reinstatement under s. 7(1)(a) can normally be said to be only applicable in a case where the WRC or Labour Court considers that the employee's dismissal has been totally unfair and unjust, such as to require the employer to take the person back in the same job, without any break in service or loss of pay, and notwithstanding the inevitable breakdown in the relationship between them. It is a very strong remedy, and is only applicable in clear cut cases, where it is the appropriate response to perhaps high-handed and

unjustifiable conduct on the part of an employer, and where any other remedy is not sufficient vindication of the employee. While I return to this question in more detail later, the remedy of reinstatement is exceptional in nature, involving as it does the imposition of a contractual relationship which is not only personal, but involves a high level of mutual trust and confidence, on an unwilling party. That remedy can only be properly granted where the court or tribunal has carefully assessed the interests of both parties to the arrangement, and where, having done so, it provides clear and coherent reasons for the appropriateness of the remedy in the particular case. It is wrong to view reinstatement simply as punishment for wrongdoing on the part of the employer. It is clear that the High Court judge saw in the remedy of reengagement as and from the date of dismissal as effective reinstatement, and that unlike the Adjudication Officer and the Labour Court, did not see the case as one of admitted serious wrongdoing that merited severe sanction falling short of dismissal, but rather as one in which it was doubtful that any wrongdoing had occurred at all. Thus, at paragraph 220 it was said that:-

> "*It is clear therefore from this - and other evidence – that the 12-18 pupils who were described as "non-existent" were nothing of the sort. They were real pupils whose parents had properly sought to have them enrolled in the school and whom Mr. O'Suird <u>had properly</u> enrolled in the school*" [emphasis added].

At paragraph 222, it was said:-

> "*Ms. Ni Dhuinn also accepted in her cross examination that the enrolment forms were "all in disarray". In these circumstances, <u>it is</u>*

more likely than not, given that these were actual names of actual students (and not "non-existent" pupils as Ms. Ni Dhuinn asserted) that parents of these pupils had actually enrolled their children at the school but, for whatever reason, these children did not appear at the school at the start of the new school year" [emphasis added].

86. In the second judgment at paragraph 117 it was said that the Principal did not admit wrongdoing: "[h]*e admitted that he submitted returns which could be regarded on one view of the law as incorrect in circumstances where the Board of Management had approved it and where the law was a grey area"*. On this reading the Principal makes the transition from serious wrongdoer but whose dismissal was disproportionate in the Labour Court, to innocent victim in the High Court. This is consistent then with the redress ordered by the High Court of reengagement from the date of dismissal which was effective reinstatement. However, it is a conclusion which also shows that it does not come from the findings made by the Labour Court – and is in fact, inconsistent with them – but comes from the High Court judge's own view of the evidence as gleaned from the transcripts.

87. It is unnecessary to itemise every occasion in which the High Court justified its conclusions by reference to evidence which was not addressed or resulted in any finding by the Labour Court. The only legal issues before the High Court on the appeal on a point of law in this regard, was whether the finding of the Labour Court upholding the Adjudication Officer, that the dismissal was unfair because it was disproportionate to the wrongdoing, was one for which there was evidence. It is plain that there was evidence supporting this conclusion. It may

have been necessary to consider the transcript of evidence to come to this conclusion, albeit that this ought not to have been an onerous task as the reasons for the Labour Court decision as to the unfairness of the dismissal and the evidence it was based on was apparent on the face of the decision. But it appears that in doing so, the High Court went much further and substituted not only its own remedy, but its own reading of the evidence. This was significantly outside the jurisdiction of the High Court in hearing an appeal on a point of law. It also gives rise to concerns as to the rights of fair procedure of those whose conduct was criticised by the trial judge based on what he deduced from the transcripts available to him.

88. In fairness to those individuals whose conduct and motivation were the subject of such stringent criticism in the course of that analysis, it should be clearly stated that any such findings were not within the proper exercise of the High Court's jurisdiction and had, and have, no status in law. It follows that there was no basis in this case upon which the High Court could properly have substituted its own remedy of effective reinstatement/reengagement as and from the date of dismissal for that of the Labour Court and that part of the High Court decision cannot stand and must be set aside. It will be necessary to consider that issue further in relation to the broader question of the circumstances in which it is appropriate to order reengagement or reinstatement. Before doing so it is necessary to address a discrete issue of law raised by the Board for the first time on this appeal.

The test for the determination of unfair dismissal on grounds of misconduct under s. 6 of the Unfair Dismissals Act, 1977, as amended, and its application in this case

89. The Board sought to argue on this appeal that the High Court and, indeed, the Labour Court and WRC, had been mistaken in their approach to the applicable test in this case, in considering that the legal issue was whether the dismissal was within the range of responses open to a reasonable employer in the circumstances. The appellant supported this argument by a detailed textual analysis of s. 6 of the 1977 Act as amended, and by comparing it to UK legislation which is more explicit in this regard. On this reading it was said that s. 6(4) merely meant that if it could be shown that the dismissal resulted from the conduct of the employee then such a dismissal would be deemed to be fair under s. 6(4)(b) irrespective of the reasonableness of the employer's view. Similarly, it was said that once it was shown that the dismissal resulted from a question of capability or competence (s. 6(4)(a)) then it was irrelevant if the employer's view in this regard was objectively unreasonable. While s. 6(7) did provide that in determining if a dismissal was an unfair dismissal, regard might be had to the reasonableness and otherwise of the conduct of the employer in relation to the dismissal, this, it was said, related only to the procedure followed in relation to the dismissal, and not to the content of the dismissal decision itself.

90. On behalf of the Principal, it was objected, with some merit in my view, that this was a fundamental change of position on the part of the appellant Board, and this argument, which went to the root of the legal test, had not been raised at any earlier stage in the process. Furthermore, the Principal argued that it might just as plausibly be argued from the language of the section that the Act did not require or permit an assessment of the reasonable response of the employer. Instead, it was arguable that it was a matter for the WRC or the Labour Court

on appeal to form their own view as to the correctness of the employer's decision.

91. It is not necessary in my view to decide if this is an appropriate case to permit novel argument to be made at this late stage of the case. I would incline to the view that it is too fundamental a *volte-face* to be permitted even on terms as to costs. However, I am satisfied that it is not necessary to decide the case on this point as I do not consider that the point raised has force.

92. There is no doubt that s. 6 of the 1977 Act is not elegantly or clearly drafted. The reference to dismissal being "*deemed*" unfair or fair, as the case may be, is unhappy. Normally a deeming provision is one which treats the legal position as one which would be other than that which would apply if the deeming position was not applicable. Moreover, the categories of dismissals, to be deemed unfair or fair as the case may be, are not exhaustive and in a given case there will often be considerable dispute as to the reason for a dismissal. The fundamental issue is whether the dismissal is unfair. The onus is on the employer, and the reasonableness of the employer's approach is a key issue.

93. The 1977 Act can be understood when viewed against the background of the applicable law prior to 1977. At that time, the rights of employees other than that small cohort who could claim to be office holders, were determined by contract, with only limited statutory intervention. The lawfulness of a dismissal was therefore determined by reference to the terms of the contract, which in most cases provided for a short notice period, so that an employee could be dismissed for any reason at all simply by giving the requisite notice, or indeed, pay in lieu.

94. The 1977 Act effected a significant change and provided for an adjudication of the fairness of dismissal. It would, I consider be inherently unlikely that the Oireachtas would have created the complex statutory machinery providing for the adjudication on fairness of dismissals if the test was simply that the employer had made the decision, however unreasonably, on grounds such as conduct. It is also equally unlikely that the Oireachtas would have sought to effect such a significant change in the relationship between employer and employee, as to make the Employment Appeals Tribunal and its successors, the sole arbiters of the dismissal decision. The specific grounds deemed to be unfair dismissals, and those grounds deemed fair, are best understood as providing examples. The essential structure of the section follows from the presumption of an unfair dismissal under s. 6(1), that "…*unless, having regard to all the circumstances, there were substantial grounds justifying the dismissal*". When this provision is read with s. 6(7) permitting the decision-maker to have regard to the reasonableness or otherwise of the conduct of the employer in relation to dismissal, it becomes clearer that the Act seeks to provide protection to employees by imposing upon employers the onus of establishing that a dismissal was fair.

95. Thus, in *JVC Europe Limited v. Panisi* [2011] IEHC 279 (Unreported, High Court, 27 July, 2011), Charleton J. considered that:-

> "*The issue for the tribunal deciding the matter will be whether the circumstances proven to found the dismissal were such that a reasonable employer would have concluded that there was misconduct and that such misconduct constituted substantial grounds to justify the dismissal*".

96. In *The Governor and Company of the Bank of Ireland v. Reilly* [2015] IEHC 241, [2015] 26 E.L.R. 229 ("*Reilly*"), Noonan J. said:-

> "*That is however not to say that the court or other relevant body may substitute its own judgment as to whether the dismissal was reasonable for that of the employer. The question rather is whether the decision to dismiss is within the range of reasonable responses of a reasonable employer to the conduct concerned…*".

97. This has been the almost invariable approach of the Employment Appeals Tribunal, and subsequently the WRC and Labour Court and the High Court on appeal. The 1977 Act has been amended on a number of occasions, and the Oireachtas has not seen fit to alter the provisions of the Act. The appellant has not pointed to any case or commentary suggesting that the interpretation now advanced was even plausible. I would, accordingly, dismiss this ground of appeal.

The principles to be applied in ordering reengagement or reinstatement and their application in this case

98. The circumstances of this case are extreme and, it should be said, very unsatisfactory. The Principal was put on administrative leave in January, 2012, suspended on full pay in May, 2013, and dismissed with effect from 30 November, 2015. After consultation with, and advice from, the Department of Education, a new principal, one of the existing teachers in the school, was appointed principal in July, 2016. In April, 2018, the WRC decided that the Principal should be reengaged, but that decision could not take effect pending appeal. The decision was upheld by the Labour Court, in its decision of June,

2022 subject to the slight variation already discussed. The High Court ultimately ordered reengagement; restoration to the payroll from 1 August, 2023; that all arrears of pay from 30 November, 2015 to 1 August, 2023 be paid within six weeks, *viz* by 15 September, 2023; and refused a stay on the order.

99. The effect of this is that the Principal has resumed the role of principal as of 1 August, 2023. The position after the High Court decision therefore was that a teacher who had not been in the classroom for eleven years and a principal who had not been in the school for the same period was being restored to the position of principal of a school, where there was a principal who had been in place for seven years. The Principal would also be resuming a position in a school where there had been a bitter dispute between him and the Board of Management consisting in part of parents and teachers at the school, and where two teachers at least gave evidence against him.

100. The Board of Management of a school cannot be treated as the equivalent of a board or indeed the management of a commercial enterprise. It is composed of volunteers, representatives of parents, teachers and the local community. It does not have flexibility in relation to the terms of employment which it may offer teachers, and cannot, for example, negotiate a settlement of a dispute in a way which would be open to a commercial body. The employment relationship, and indeed the work carried out in a school, are, to a large extent, controlled by the Department of Education which funds the school and pays the teachers. The position of a principal within such a regime is particularly important. In effect, the principal runs the school. It seems clear that before an order is made requiring the effective reinstatement of a person as principal in circumstances

such as these, that careful consideration must be given to all factors involved. It has been said authoritatively, that "[r]*einstatement has frequently been described as being suitable only in exceptional circumstances*" and is granted "*…as a general rule, where the employee is found not to have contributed to the dismissal in any significant way and/or where the interests of justice so require*" (see Desmond Ryan, *Redmond on Dismissal Law* (3rd edn, Bloomsbury 2017) at paragraphs 24.18 and 24.07). These considerations might apply with even greater force in the particular context of a small local school.

101. Unfortunately, very little consideration if any, appears to have been given to these matters in the determinations of the WRC, Labour Court or High Court. The reasoning of the Adjudication Officer was brief:-

> *"When assessing the most appropriate remedy for the complainant, I am taking into account, the complainant's own contribution to the dismissal, the delay in bringing the matter to its conclusion, the effect…the lengthy suspension had on the complainant, the necessity for the suspension in the first place and his prospects for securing future employment. I find that the delay in bringing this matter to its conclusion, the length of time the complainant was unnecessarily out on suspension, together with his conduct in the matter all render [his] prospects of securing employment in the future very slim. In* [t]*hose circumstances, compensation is not an appropriate remedy as the act limits the level of compensation to 104 weeks. It is for that reason that I find … reengagement the most appropriate remedy".*

102. The inadequacy of financial compensation under the 1977 Act may be a factor in finding that reengagement or reinstatement is the more appropriate remedy (see *Reilly*). But it is only one such factor, and one of limited significance, and if there are reasons making reengagement or reinstatement an inappropriate remedy, then they must also be taken into account. It is troubling if reengagement was seen as appropriate as a method of providing greater compensation than was available under s. 7 of the 1977 Act. Here, delay was undoubtedly a significant feature, which meant that compensation, even of the full amount payable under the Act, together with the vindication of a determination of unfair dismissal, might not be a sufficient remedy. But that delay itself (which could not be laid solely at the door of the Board of Management), was also a strong reason against ordering reengagement. The determination by the Adjudication Officer is focussed solely on the interests of the Principal, and makes no assessment of the practicability of the Principal resuming a role as principal at that stage, six years after his placement on administrative leave and later suspension, two and a half years after dismissal, and two years after a new principal had been appointed. It does not reflect the exceptional nature of the remedy. The fraught relationships within the staffroom, and with parents and the then members of the Board of Management, also required assessment. No assessment was made, nor was any consideration given to any changes in the curriculum or of teaching practice or the responsibilities of a principal and no assessment was made of the Principal's capacity to take up the role or whether he had become deskilled by being out of the school environment.

103. These difficulties cannot be ignored. As *Redmond on Dismissal Law* (*op. cit.*) notes at paragraph 24.26:-

> *"The fact that either of the primary remedies will generally be awarded only where it is practicable represents a serious qualification to the view that unfair dismissals legislation protects a worker's* proprietas *in employment, thus negating a supposed new balance in the employment relationship. The vast majority of complainants before the Workplace Relations Commission who are declared to have been unfairly dismissed do not receive their jobs back".*

The same author notes at paragraph 24.24:-

> *"In all cases, regard will be had to the industrial relations realities of the situation. It is improbable that either of the primary remedies will be awarded where shop floor feeling will be against it or if strikes or industrial action would follow. The size of the business will have an important influence on industrial relations aspects. Where the enterprise is small, the Workplace Relations Commission will probably conclude that compensation is the more appropriate remedy. On the other hand, if a complainant had worked for a large company in a relatively impersonal employer/employee relationship, particularly in a less senior position, either of the primary remedies might be appropriate. In contrast, the primary remedies are unlikely to be appropriate for a senior employee*".

104. All these considerations tended against the remedies of reengagement into the existing role, or, as the High Court found, effective reinstatement. That is not to say that either remedy could not or should not be awarded in an appropriate

case, but it does require that the decision is adequately reasoned and takes account of all the relevant factors and explains the conclusion to which the Adjudication Officer has come.

105. The decision of the Labour Court in this regard is even less satisfactory. It said simply that:-

> "*Having found that the Complainant was unfairly dismissed for the reasons outlined above, the Court determines that the appropriate redress in this case is an award of re-engagement with effect from 1 September 2017, the period from his date of dismissal to that date to be regarded as a period of unpaid suspension thus preserving the Complainant's continuity of service for all purposes*".

106. The decision of the Labour Court is lengthy, comprehensive and nuanced. It explains why it found that, notwithstanding the Principal's admitted wrongdoing, his dismissal was unfair. It is also to be inferred that the Labour Court considered that his conduct required some sanction falling short of dismissal, and imposed what amounted to a significant period of unpaid suspension. In coming to conclusions as to the conduct of the Board of Management, and in particular expressing its doubts about the motivation of the Board; criticising its delay; the manner in which it dealt with the Principal; and expressing the conclusion that the Board of Management "…*was overly zealous in its desire to establish a basis upon which to justify the Complainant's dismissal*", the Labour Court was judicious, balanced but appropriately firm. Its conclusion – that the sanction of dismissal was disproportionate – is one it was entitled to come to, and the division of function between primary fact finder and

appellate court means that the decision must be accorded respect. However, the Labour Court had also an obligation to explain why it considered that an exceptional remedy was the only appropriate redress in this case. At the risk of stating the obvious, the grant of an exceptional remedy requires a clear and balanced explanation detailing precisely why a relief which is out of the ordinary is being granted in a particular case. This would be so in any case, but was particularly required here because of two factors referred to in this Court's determination set out at paragraph 11 above: the employer's asserted lack of trust in an employee whom they have unfairly dismissed and the appointment of a new principal in the school on a permanent basis.

107. The fact that the new principal appointed in 2016 would be "*displaced*" as the High Court judge put it (second judgment, paragraph 19) is a relevant, and in my view, very significant factor, in considering the appropriateness of the remedy of reengagement as principal, and in this case amounting to effective reinstatement. This was the case in 2018, when the Adjudication Officer made her decision, and all the more so in 2022 when the Labour Court made its decision, and in 2023 when the High Court had to consider whether the Labour Court had erred in law in so deciding. In this regard it is instructive to consider the decision of this Court in *State (Cussen) v Brennan* [1981] I.R. 181, where it was held that a decision was *ultra vires*, but the Court refused to grant an order of *certiorari* because of the unfairness to a third party who had indicated an intention to take up the post in question. The impact of a decision – particularly where a remedy is discretionary – is a relevant and sometimes central consideration.

108. I should state clearly that I do not agree that the issue can be addressed, or perhaps more accurately, avoided, by seeking to characterise the decision to appoint the principal as pre-empting the legal process or setting at nought remedies that might be ordered (second judgment, paragraph 143), still less "…*an interference with the administration of justice*" (second judgment, paragraph 145).

109. Here the decision to appoint the new principal was taken after the Principal had been dismissed following a hearing before the Board of Management which had been upheld by the independent Disciplinary Appeal Panel and after the lapse of a further period of almost a year. The decision to employ a principal was made after consultation with, and advice from, the Department of Education. Neither the Adjudication Officer nor the Labour Court made any finding of bad faith or ulterior motive in making the appointment in 2016. Indeed, neither body made any finding about the validity of the appointment of the principal. (It is indeed a valid criticism of both decisions that they did not consider the impact of their decision on the position of the new principal *at all*). However, in circumstances where it has been held that both of those bodies could order reengagement of a dismissed person notwithstanding the appointment of someone to the position (and both did in fact do so) it is difficult to see how it could be said that the decision was a pre-emption of the jurisdiction of the WRC, the Labour Court or the High Court, or should be the subject of such trenchant criticism.

110. Litigation is not a laboratory experiment. It cannot be rerun as if at the flick of a switch. Life must go on. In this case this was a working school, and the pupils,

parents and teachers could all reasonably expect to have a principal in place. As set out in the extract from *Redmond on Dismissal Law* (*op. cit.*) at paragraph 103 above, it is extremely rare, even in those cases in which a claim for unfair dismissal succeeds, for an order for reinstatement to be made. It is not reasonable to expect that businesses would remain in limbo pending the outcome of protracted legal proceedings. That is so in general, but must apply with particular force in a case such as this, in which there has been such a lapse of time between dismissal and adjudication, and in the context of a small national school.

111. The Department of Education, the second named Respondent hereto has made submissions on this appeal limited to this issue, and scrupulously avoided any comments on the merits of the claim for unfair dismissal. It points out that the position of principal of a school is referred to in the singular in s. 23 of the Education Act, 1998, which lists the special functions of a principal as, *inter alia*, being responsible for the day-to-day management of the school, including guidance and direction of teachers and other staff of the school and the implementation of the admission policy of the school, to be accountable to the board of the school for that management. The principal's functions also include providing leadership to the teachers and other staff and students of the school; responsibility together with the board of management, parents, students and teachers for the creation in the school of an environment which is supportive of learning among students and which promotes the professional development of teachers; and the setting of objectives for the school, to monitor achievement of those objectives and to encourage the involvement of parents and students in the school in the education of students and the achievement of the objectives of the

school. This extensive catalogue of duties gives some sense of the importance of a principal to a school and explains why it is both necessary to have a principal in place, and impossible to see how two persons could simultaneously occupy the position. As the Department of Education further submitted "…*it is not desirable for a school to operate in an uncertain manner with a 'temporary' appointment at a senior level for a prolonged period. It is also unfair on the individual who may step into such a role*". This is no more than common sense. It is further submitted by the Department that "…*the Court's decision appears to effectively restrict permanent appointments, in similar circumstances until all proceedings are concluded. It is not clear in reality how a school could continue to function properly in such an uncertain environment when the appointment of a Principal is delayed for a prolonged period*". I agree.

112. The Department of Education also submits that it is possible to order reengagement to a teaching post with retention of a principal's pay rather than reinstatement, if it was deemed that it was warranted on the facts and a court wanted to recognise the unfairness to the occupant, and any legal uncertainties. It is a further unsatisfactory feature of this case that no consideration was given to this possibility, (at least in the determinations and judgment), and no explanation given why, if considered, it was not adopted.

113. It is necessary to consider whether any order of reinstatement or reengagement is practicable in the circumstances. If it is not practicable it should not be ordered. This assessment may include a consideration of whether that reengagement will displace an innocent person who has been engaged to fulfil that role. The Board of Management submitted that regard should be had to the

example of law in the UK where practicability is an express statutory consideration when a tribunal is considering ordering reengagement or reinstatement. In Upex and Hardy, *The Law of Termination of Employment* (8th edn, LexisNexis Butterworths 2012) at page 265, it is stated that "*the tribunal should not take into account the engagement of a permanent replacement, unless the employer shows* either *that it was not practicable to arrange for the dismissed employee's work to be done without engaging a permanent replacement,* or *that the replacement was engaged after a reasonable period had passed without the employer having heard from the dismissed employee that he or she wished to be re-engaged and that when the replacement was engaged it was no longer reasonable for the employer to arrange for the dismissed employee's work to be done except by a permanent replacement.*" These considerations if applied here in the light of the submissions of the Department would mean that it was entirely appropriate to consider the engagement of a permanent replacement principal and if so that this in itself was a substantial factor suggesting that it was impracticable to order reinstatement or reengagement in the position of principal.

114. This is so not merely because of a consideration of the practical running of the school, albeit that that in itself was important. Although the High Court judge appeared to consider that there was a question mark as to the validity of the appointment of the principal in 2016, it was not explained why the appointment was other than entirely lawful. It follows that if her position was "*displaced*", as the High Court judge put it, by the order of reengagement made by the Labour Court and upheld (and varied) by the High Court, that the new principal would be dismissed, and unfairly so, and she would become entitled to her own

remedies under the Act, including perhaps, substantial compensation. This together with the requirement to pay damages amounting to arrears of salary from the date of dismissal would impose a further financial burden on the school, which would be necessary to weigh in considering the appropriateness and proportionality of the remedy.

115. We have been informed that since the decision in the High Court, the principal appointed in 2016 has chosen to leave the school by agreement. If so, and if it was done to avoid further contention, that decision reflects credit on the principal appointed in 2016. If on the other hand it evidenced an unwillingness to continue to work in the school after the Principal's reinstatement then that was something that reflected upon the practicability of the remedy. Either way it could not have been known at the time that the order of the Labour Court was made, or upheld by the High Court, that the new principal would take this course, and there was in my view, an obligation to consider whether in all the circumstances it was truly necessary or appropriate to order reengagement as effectively reinstatement, and if so, whether it was practicable to do so. The outcome is that the school is at the loss of the principal appointed in 2016, as principal or teacher, and that possibility (or indeed the possibility that the 2016 principal would insist on remaining in their role) was something that also required to be considered and assessed before reengagement was ordered.

116. This raises the question of trust and confidence referred to in this Court's determination. The Board of Management submitted that it did not have trust and confidence in the Principal. The Principal's response was that there had been resignations from the Board of Management and that it was quite possible

that a newly constituted board would be in favour of the Principal. This may be the case, but if so, it only illustrates the more substantial issue that it is conceivable there will be factions within the parent body, the wider community and the teachers in the school in favour of or opposed to the Principal's return. A school particularly a small national school struggling to establish itself requires cooperation and enthusiasm from teachers, parents and the local community and the question of practicability of an order of reinstatement required some assessment of how it was anticipated the school would work. Again, this was something to be considered before ordering what was in effect reinstatement. The approach of the Labour Court in this regard and in relation to the position of the existing principal was in my view inadequate and wrong in law.

117. In the ordinary course the correct conclusion as a matter of law on this aspect of the case should be a decision that the Labour Court in failing to give consideration to whether reengagement or reinstatement was practicable in the circumstances of the case, was wrong in law, and the High Court judgment upholding that decision was also wrong and should be set aside. It also follows that this is a matter which could not be set right on appeal by either the High Court or this Court, since it involves an evaluation of evidence which by definition did not take place. This would normally require that the question of remedy would be remitted to the Labour Court for reconsideration in the light of this judgment.

118. However, these proceedings have been in being for an inordinate and unconscionable amount of time and the fact that there was no stay in the High

Court judgment coupled with the decision of the new principal to leave the school means that the situation has now changed yet again, and that any new Labour Court consideration of remedy would in practice involve an inquiry into how the school had been run in the last year, with the risk of reopening old wounds, or perhaps opening fresh ones. I have reluctantly come to the conclusion therefore that, while identifying the error of law in the approach of the Labour Court to the question of reengagement and reinstatement, the Court should not interfere with the High Court order in this regard, and that the Labour Court order of reengagement should remain in place.

119. However, it is clear that the variation of that order by the High Court judge was wrong, and in excess of the jurisdiction of that court. The order of the High Court in that regard must be set aside, and the order of the Labour Court restored with the effect that the Principal's reengagement should be deemed to take effect from 1 September, 2017. Unfortunately, the High Court order did not order any stay on its order pending appeal, and ordered instead that the arrears of pay consequent on the High Court's determination and variation of the Labour Court order, should be paid to the Principal by 15 September, 2023. It follows that there is an amount overpaid by the school to the Principal, which is now repayable and can if necessary be recoverable as an ordinary debt.

The test for the determination of an application for a stay on an order pending an appeal

120. The High Court was also wrong in my view to refuse any form of stay on its order pending the application for leave to appeal to this Court. The school had only sought a stay on the order of reengagement and had been willing to pay the

principal his continuing salary, the arrears, and any pension entitlements. If this was not acceptable it might have been possible to craft any stay so as to provide some measure of protection for both parties. However, the High Court refused a stay, holding *inter alia* that the Board of Management was not bringing the appeal in a *bona fide* manner, was rather doing so for tactical and other reasons, and that there was little reality to be found in the grounds of appeal. It is not necessary to revisit these grounds of appeal in any detail. It is perhaps sufficient to say, as is apparent from the Determination of this Court granting leave to appeal and the discussion in this judgment, that however this appeal was to be ultimately resolved, it clearly raised issues of real substance. A stay should have been ordered for the limited period necessary to allow an application for leave to be considered, or at the very least some limited stay on the terms of the order should have been put in place.

121. This Court can and does decide applications for leave to appeal promptly, once the papers are complete. In this case, and notwithstanding the intervention of the legal vacation, the Determination of this Court issued well within three months of the application for leave being brought, and only 26 days after the respondent's notice had been filed. If a partial stay had been granted by the High Court, and leave had been refused, then the stay would have lapsed on 31 October, 2023. If leave was granted, then it was a matter for this Court to determine if the stay should be granted pending the hearing and determination of the appeal. If even these periods were considered excessive, it would have been open to the High Court to require the parties to undertake to expedite the delivery of any application for leave and the delivery of a respondent's notice.

The circumstances in which it is appropriate to order costs on a legal practitioner and client basis, and their application in this case

122. Order 105 rule 7 of the Rules of the Superior Courts governs appeals on a point of law from the Labour Court and states that "[n]*o costs shall be allowed… unless the Court shall by special order allow such costs*". The Board of Management was prepared to consent to an order that the High Court should, by special order, order the payment of the Principal's costs in the High Court. However, the High Court went further, and ordered that such costs should be paid on a legal practitioner and client basis pursuant to Order 99, rule 10(3).

123. The High Court judge referred to the decision of Barniville J. (as he then was) in *Trafalgar Developments Limited v. Mazepin* [2020] IEHC 13 (Unreported, High Court, 17 January 2020), setting out the principles on which an order under Order 99, rule 10(3) could be made. Barniville J. explained that the court could exercise its discretion to order costs on a solicitor and client basis where it wished to mark its disapproval or displeasure of the conduct of the party. At subparagraph 5 of the principles set out, Barniville J. explained that the conduct could include a particularly serious breach of the party's discovery obligations; abuse of process; failure to exercise caution in commencing certain proceedings including making claims of fraud; or any other conduct in relation to the commencement or conduct of the proceedings or any aspect of the proceedings which the court considered should be marked by the court's displeasure or disapproval such as a particularly serious or blatant breach of a court order, a direction of the court, or the rules of court.

124. It is apparent therefore, that in most cases if not in all, the conduct meriting the award of costs on a legal practitioner and client basis will be related to, and arise out of, the course of the litigation being conducted under the rules, which in this case was the appeal to the High Court on a point of law. In its judgment the High Court judge identified a number of matters, most of which related to either the substance of the dispute, or the disciplinary proceedings before the WRC and the Labour Court. Those reasons were intertwined with the reasoning underlying the High Court judgment, which I have already held, were not within the jurisdiction of the High Court on an appeal on a point of law, and which as such cannot justify costs on a legal practitioner and client basis.

125. It may be that the order of the High Court was influenced by the fact that the proceedings in the Labour Court had been at hearing for eleven days, that both parties had been represented by full legal teams, but that no costs are recoverable in that jurisdiction. It may be that the terms of Order 105, rule 7 are influenced by a view that proceedings before the WRC, the Labour Court and therefore on appeal on a point of law, should not be costly and in particular, that an employee should not run the risk of an adverse award of costs, by pursuing a remedy through the Labour Court mechanism and on appeal in the High Court. However, in cases such as this, where an employee has been found to be unfairly dismissed, the presumptive rule may operate unfairly. As discussed above proceedings before the WRC and the Labour Court under the Unfair Dismissals Act, 1977 are the administration of justice and if parties, and in particular, individuals, feel that they can only protect their position and vindicate their rights by being represented by qualified lawyers, then there is a real risk of substantial injustice if they must bear the cost of that, without the prospect of

recovery of such costs even in clear cut cases. This is a matter which deserves consideration. In this case however, it is sufficient to say that there was, in my view, nothing in the conduct of the High Court proceedings which would justify an award of costs on a legal practitioner and client basis. Accordingly, I would set aside that portion of the High Court order.

The Order of the Court

126. The order of the Court should be to allow the Board of Management's appeal to the extent of varying the order of the High Court by deleting the order of costs on a legal practitioner and client basis and substituting an order of costs in favour of the Principal to be adjudicated in default of agreement and by deleting that portion of the High Court order which varied the order of the Labour Court by deeming reengagement to date from the date of effective dismissal of 30 November, 2015. The effect of this is that the order of the High Court should be varied to simply dismiss the appeal from the order of the Labour Court and by special order, direct that the Principal should recover his costs of the High Court proceedings from the Board of Management to be adjudicated in default of agreement.

127. This brings me to a final issue. During the course of this appeal the Principal sought to argue that there were resignations from the Board of Management, and the school was being administered by An Foras Pátrúnachta and that therefore there was no board which could give instructions to maintain this appeal. This argument if correct might have meant that there was no body against whom any order could be enforced. In the end the Principal did not press

this argument on the appeal. Accordingly, the order of the Court will be as set out in the preceding paragraph but with liberty to the parties to apply.

Conclusion

128. In light of the length of this judgment and the number of issues which have been debated in these contentious proceedings, it may be useful to summarise my conclusions as follows:-

(i) Where a dismissal is challenged by an employee, the test of whether the dismissal under s. 6 of the Unfair Dismissals Act, 1977, as amended, is whether the decision is within the range of responses open to a reasonable employer, the onus in this respect being on the employer;

(ii) The Labour Court found that notwithstanding the misconduct of the Principal in the falsification of documents relating to enrolment in the school, the sanction of dismissal in this case had not been shown to be proportionate in all the circumstances of the case;

(iii) When a decision of the Labour Court on a question of unfair dismissal is appealed to the High Court on a point of law pursuant to s. 46 of the Workplace Relations Act, 2015, such an appeal is not a rehearing on the merits. The test to be applied is that which applies in an appeal from the High Court to the Court of Appeal, namely whether there was evidence supporting conclusions of facts arrived at by the Labour Court; whether any inferences drawn from such facts were justified; and whether the decision exhibits any error of law;

(iv) The decision of the Labour Court that the dismissal of the Principal was unfair, in that it had not been established that the dismissal was a proportionate response to the wrongdoing established, is one to which, on the evidence, the Labour Court was entitled to come;

(v) However, the decision of the Labour Court that the Principal should be reengaged in his position as principal with effect from 1 September, 2017 was erroneous in law. No proper consideration was given to the exceptional nature of the remedy, the practicability of such reengagement, or the impact upon the school or on the principal who had been appointed. Any decision on the exceptional remedy of reinstatement or, as here, reengagement in the original position, requires that it be reasoned and justified by reference to the circumstances of the case;

(vi) In the normal course, the appropriate order would be to set aside the decision of the Labour Court in this regard and remit the matter to the Labour Court to consider the appropriate remedy in all the circumstances of the case in the light of this judgment. However, given the inordinate amount of time which has already elapsed in this case, and the fact that the consequence of the High Court order and the refusal of a stay in that court is that the Principal has now been in the position for almost one year and the existing principal has left the school, it would not be appropriate in the particular circumstances of this case to set aside the order of the Labour Court directing reengagement in the position of principal;

(vii) The decision of the High Court that the Labour Court erred in ordering such reengagement from 1 September, 2017, and substituting an order of reengagement in the position of principal with effect from 30 November, 2015 being the date of dismissal, was itself erroneous, and in excess of the proper jurisdiction of the High Court in an appeal on a point of law under s. 46 of the Workplace Relations Act, 2015, and must be set aside;

(viii) The arrears of salary which were ordered by the High Court to be paid to the Principal by the Board of Management in respect of the period between 30 November, 2015 (being the date of dismissal) and 1 September, 2017 (being the date of reengagement under the order of the Labour Court), must now be repaid by the Principal to the Board of Management;

(ix) The order of the High Court refusing a stay on its order pending an application for leave to appeal to this Court, was in error;

(x) The order of the High Court awarding costs of the High Court appeal on a legal practitioner and client basis was wrong and should be set aside;

(xi) The appeal of the Board of Management must, accordingly, be allowed to the extent that the order of the High Court should be set aside and the order substituted simply dismissing the Board of Management's appeal on a point of law against the decision of the Labour Court, to order reengagement of the Principal with effect from 1 September, 2017, and making a special order awarding the Principal his costs of the appeal on a party and party basis to be adjudicated in default of agreement; and

(xii) The parties will be given an opportunity to make submissions in relation to the costs of this appeal and there will be liberty to apply.