THE HIGH COURT

[2023] IEHC 497

[Record No. 2022/178MCA]

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

BETWEEN

AN BORD BANISTIOCHDA GAELSCOIL MOSHIOLOG

APPELLANT

AND

THE LABOUR COURT

RESPONDENT

AODHAGÁN Ó SUIRD

NOTICE PARTY

JUDGMENT (No. 2) of Mr. Justice Cregan delivered on the 3rd day of August 2023.

Introduction

1. This is the second judgment which I have delivered in this case. In my first judgment I considered the substantive appeal brought by the Board of Management of the school against the decision of the Labour Court which held that Mr. Ó Suird had

been unfairly dismissed. In that judgment I dismissed that appeal and I indicated that I would hear the parties further on the exact terms of the order, the impact on the existing principal of the school, arrears of pay, the continuity of terms of employment and pension entitlements.

2. This judgment deals with three issues:

(a) the exact orders which should be made in this case – and in particular the issue of reengagement;

(b) the issue of costs;

(c) the application for a stay on parts of the order sought by the Board of Management in the event of an appeal to the Supreme Court.

The form of the final order

3. The starting point in considering this matter is to remember that this was an appeal brought by the Board of Management against the decision of the Labour Court. It is clear from the terms of my first judgment that this appeal was dismissed. In those circumstances, the order of the Labour Court stands except insofar as it made an error of law. It is important therefore to consider the decision of the Labour Court in this matter.

Statutory context

4. Before doing that, it is important to provide some context around this decision. It is clear that s. 7 of the 1977 Act, (as amended by s. 3 of the 1993 Amendment Act) sets out the primary remedies for unfair dismissal. As was stated in *Redmond on Dismissal Law*, (3rd Ed) at para. 24.05: -

> *"An employee unfairly dismissed under the Act is entitled to redress consisting of whichever of the following primary remedies the Workplace Relations Commission considers appropriate having regard to all the circumstances –*

(*a) Reinstatement by the employer of the employee in the position which he held immediately before his dismissal on the terms and conditions on which he was employed immediately before his dismissal together with a term that the reinstatement shall be deemed to have commenced on the date of the dismissal;*

Or

(b) Re – engagement by the employer of the employee either in the position which he held immediately before his dismissal or in a different position which would be reasonably suitable for him on such terms and conditions as are reasonable having regard to all the circumstances"(emphasis added).

5. I also note that the learned author states as follows at para. 24.12: -

"Re – engagement on the other hand may be in a different job provided it is comparable to the old one or is otherwise suitable. This remedy provides the WRC (or Labour Court) with considerable latitude. The stated terms of re – engagement, if sufficiently wide, could in effect, amount to reinstatement"(emphasis added).

6. It is important in that context to consider the "redress" directed by the Labour Court.

Redress ordered by the Labour Court

7. In the final paragraph of its decision the Labour Court stated as follows: –

"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 1st 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 services for all purposes".

8. It is clear therefore that the Labour Court determined that the appropriate redress in this case "is an award of re-engagement with effect from 1st September 2017".

Interpretation of Labour Court Decision

9. The statutory definition of re-engagement appears to have two limbs. The first limb is: –

(i) Re-engagement by the employer of the employee either in the position he held immediately before his dismissal,

or

(ii) In a different position which would be reasonably suitable for him on such terms and conditions as are reasonable having regard to all the circumstances.

10. In other words, the statutory definition of re-engagement has, as its first limb, the engagement of the employee in the position he held immediately before his dismissal which, in substance, amounts to re-instatement. The second limb allows for re-engagement of the employee in a different position which would be reasonably suitable for him on such terms and conditions as are reasonable having regard to all the circumstances.

11. Thus, whereas reinstatement means restoring the employee to exactly the same position he held beforehand, "re-engagement" – as defined – means either reinstatement or being put in a different position which would be reasonably suitable for him.

12. When one considers the statutory redress of re-engagement as ordered by the Labour Court, it is not clear from the Labour Court's decision which of the two limbs

it had in mind for Mr. O'Suird. In these circumstances it is a matter for this Court to interpret this redress as a matter of law and/or fact in this particular case.

13. There are three possible interpretations of the redress of re-engagement directed by the Labour Court.

14. The first of these is that Mr. Ó Suird is only restored to a position as a teacher in the school and Ms. Scott remains as the permanent school principal.

15. Mr. Lyons SC for Mr. Ó Suird submits that such an outcome would rob his client of all the moral and legal force of the Labour Court and High Court judgments and would result in a hallow victory for Mr. Ó Suird. I agree with that submission. Such an interpretation – and outcome – would be manifestly unjust.

16. The second interpretation is that Mr. Ó Suird should be offered a similar position. This raises the option of Mr. Ó Suird and Ms. Scott acting as joint principals of the school.

17. Whilst Mr. Ó Suird was open to such a possibility, and whilst such an outcome might have been an attractive one, counsel for the Minister for Education submitted that under the provisions of the Education Act 1998, there can only be one principal in each school. I agree with that submission. A 'two-principal solution' is therefore not possible.

18. That leaves the third and only possible option which is re-engagement of Mr. Ó Suird by his re-instatement as principal of the school. I am of the view that this is the correct resolution of this case. It is the correct interpretation of the Labour Court decision. Even if it were not, it would be the resolution which this Court would direct, in the exercise of its statutory power in an appeal of this nature.

19. Moreover, the position of the Minister was that the practical effect of the decision of the Labour Court to direct the reengagement of Mr. Ó Suird as principal

(which decision has been upheld by the High Court on appeal) was that the position of Ms. Scott as principal was displaced. I agree with that submission also.

The issue of "unpaid suspension"

20. The Labour Court in its decision recommended re-engagement with effect from 1st September 2017 with "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".

21. However, in my first judgment, I found at para. 398 as follows: –

"*398. I am of the view therefore that the continuation of Mr. O'Suird's administrative leave from 31st January 2013 until his suspension in May 2013 and his suspension from May 2013 onwards were not warranted by the circumstances, were wholly unreasonable, and reversed the presumption of innocence. As such, these actions were a clear breach of the rules of Circular 60/2009. As the procedure specifically stated that the Board of Management should comply with general principles of natural justice, I am of the view that they have failed in all respects to comply with the principles of natural justice. I have therefore concluded that the continued administrative leave of Mr. O'Suird from 31st January 2013 until May 2013 and his suspension from May 2013 until the conclusion of the disciplinary process were manifestly unreasonable, a breach of his natural and Constitutional rights and a breach of the requirements of Circular 60/2009".*

22. In paras. 433 to 436 of my judgment I stated that I was of the view that the Labour Court had erred in law in coming to a conclusion about the period of unpaid

suspension. I said at para. 435 of my judgment that the decision to suspend Mr. O'Suird in May 2013 was not only unreasonable but also unlawful.

23. At para. 436 of my judgment, I found that there was no reason in law why the Labour Court should have imposed a period of unpaid suspension.

24. In other words, my judgment in this case was that the Labour Court had made an error of law in imposing a period of unpaid suspension. This was a period from May 2013 until September 2017. It amounts to a penalty of almost two years' salary on Mr. O'Suird. In my view, this penalty was not, and could not be, justified as a matter of law. I found that the suspension of Mr. O'Suird for this time was unlawful. In those circumstances, I found the Labour Court made an error of law and that this period of his unpaid suspension should be set aside.

25. I should also add that in my view the decision of the Labour Court to impose a period of suspension was arbitrary. It is not clear to my mind, and no reasons were given, why the Labour Court chose a period of 22 months rather than, for example, six months. There was no discernible reason in principle behind such a finding.

26. In these circumstances, I am of the view that the Labour Court erred in law in imposing a period of unpaid suspension and I will set aside that part of its decision.

Should the matter be remitted back to the Labour Court?

27. It has been submitted by the Board of Management that it is not a matter for this Court to set aside this finding on suspension by the Labour Court and that, on the authority of *Nano Nagle*, I should instead remit the matter to the Labour Court with my observations on the legal issue on this aspect of their judgment and ask the Labour Court to reconsider this aspect of the matter.

28. Ms. Kimber SC for the board submitted that: –

(i) the matter should be remitted back to the Labour Court; and

(ii) that the board wishes to take an appeal to the Supreme Court.

29. In my view, this is a manifestly unsatisfactory position. This case cannot go on forever. Finality has to be brought to these proceedings. In my view, there is no good argument either on the facts or on the law as to why this Court should remit the matter to the Labour Court for the reasons set out below.

The position of the High Court on statutory appeals

30. Counsel for Mr. O'Suird submitted that the High Court could vary the Labour Court's decision on remedy given the nature of statutory appeals and s. 46 of the Workplace Relations Act 2015 specifically.

31. Section 46 states the following:

> *"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."*

32. Paragraphs 11-47 and 11-48 of Hogan, Morgan and Daly's *Administrative Law in Ireland* (5th Ed., 2019) state:

> *"The nature and scope of the court's jurisdiction on an appeal is in all cases a matter of statutory construction. However, the interpretation of the relevant statutory provisions begins from a common starting point. It is presumed that the Oireachtas, having created a right of appeal, intended to vest the High Court with powers in addition to, and distinct from, the inherent powers of judicial review which it enjoys at common law. In general, "the appellant is entitled [to] raise both the question 'is it lawful or unlawful?' and the question 'is it right or wrong?' in seeking to set aside an appealed decision."*

31. *In a contrast between an appeal and judicial review, four general points are relevant. First, when the High Court exercises such an appellate jurisdiction it has, generally speaking, the power to uphold, reverse, alter or vary an administrative decision. By contrast, in judicial review proceedings these options are restricted. Traditionally, the court was faced with the stark question: to quash (save where the order is severable) or not to quash. Since 1986, however, there has been the possibility of both remittal and an award of damages.*

32. Clarke J. (as he then was) in *Fitzgibbon v. Law Society of Ireland* [2015] 1 I.R. 516, stated at 542 and 543:

"Where the legislature confirms a right to a statutory appeal, it must evidently be assumed that this was intended to have some meaning and some purpose. Where, for example, judicial review is independently available, it must be considered as conferring some additional benefit(s) on the appellant. Something separate from a mere "test" for legality, or the mere quashing or remitting of a decision based on standard judicial review grounds. The range of possibilities in this regard is extensive, varying from a full appeal, as from the Circuit Court to the High Court on circuit (s. 38 of the Courts of Justice Act 1936), to one strictly limited, say on a point of law, perhaps even further limited by the nature of the point and only then on due certification by the trial court… In between, one can find several other variable forms of "appeal". It therefore follows that the availability of such a right does not mean that all reviews, by way of appeal, are necessarily the same: quite obviously they are not. As Costello J. pointed out in Dunne v.

Minister for Fisheries [1954] 1 I.R. 230, "in every case the statute in question must be construed." (emphasis added)

33. He also stated at 560:

> *"Any public law decision having an effect on legal rights and obligations is, of course, amenable to judicial review. The purpose of judicial review is to determine the legality (whether procedural or substantive) of the decision challenged. While this judgment is not the place to engage in the difficult but important task of defining the precise boundaries of a judicial review (there is more than ample jurisprudence in this area), nonetheless it is, in my view, worthy of comment to note that, at the level of principle, there must be some difference between even the most restrictive form of appeal (being an appeal on a point of law only) and a judicial review.*
>
> *Given that judicial review lies in respect of all public law decisions affecting rights and obligations, it must be assumed that, by conferring a right of appeal, the Oireachtas intended that some greater degree of review is permitted than that which would have applied, in the context of judicial review, in any event."* (emphasis added).

34. In *Doyle v. PRTB* [2015] IEHC 724, Baker J. cited these comments of Clarke J. (as he then was) and stated as follows at paragraphs 19 and 20:

> *"I consider that these dicta point to the proposition that when the Oireachtas provides a statutory right of appeal on a point of law, it must have intended some greater degree of court involvement with the decision than the perhaps more constrained approach taken by a court on judicial review. The distinction does allow a court hearing an appeal on a point of law to set aside a decision within jurisdiction where perhaps the evidence*

> *was sufficient to support a finding but where the decision was vitiated by legal error. It may also not involve an element of curial deference in a suitable case.*
>
> *The appeal on a point of law, then, gives a wider scope to a court to reverse or vary a decision of the body at first instance, and while that is not to say that the court will set aside a finding of fact, more important for present purposes, it does suggest that a court hearing a statutory appeal may set aside a finding which arises from an incorrect interpretation of the law or of legal documents, including contractual documents which bear on the dispute, or a mixed question of law and fact."*

35. Mr Ó Suird submits that it is clear from these authorities that, although the ambit of each type of statutory appeal must be construed by reference to the relevant enactment, the starting point is that the High Court has a power to vary the decision of the administrative body.

36. I agree with all of these submissions. In particular, I am of the view that, as Clarke J. stated, "*It must be assumed that by conferring a right of appeal, the Oireachtas intended that some greater degree of review is permitted than that which would have been applied in the context of judicial review in any event".*

37. Likewise, I agree with the views expressed by Baker J. in *Doyle v. PRTB* that:

> *"The appeal on a point of law then gives a wider scope to a court to reverse or vary a decision of the body at first instance".*

38. I am therefore of the view that in circumstances where the Labour Court has made an error of law in relation to the issue of the imposition of unpaid suspension, the court is within its jurisdiction to set aside that finding as an error of law, and to

order that Mr. O' Suird be paid his salary and benefits in an unbroken manner from 30th November 2015.

39. I would also add that there is no practical point in remitting this matter to the Labour Court to consider this issue in the light of the ruling of the High Court on the law because the Labour Court would certainly apply the finding of this Court and make a similar decision itself.

40. Mr. Ó Suird also submitted that even if there were any legal bases for such a remittal (which, in my view, there is not), it would be oppressive and deeply unjust for Mr. Ó Suird and would involve further time being lost and costs incurred before a forum where Mr. Ó Suird has spent over six years. I agree with this submission also.

The decision in *Nano Nagle*

41. Counsel for the board submitted that the matter should be remitted to the Labour Court on the authority of *Nano Nagle*. I have carefully read and considered the decision in *Nano Nagle v. Daly* [2019] 3 IR 369. It was a decision of the Supreme Court in which the majority decision was given by McMenamin J. The key passage as it relates to this case is para. 112 of the decision in which McMenamin J. states as follows: –

> "*The question of remedy is constrained by the fact that the approach adopted in each earlier legal forum was erroneous. The court is faced with a series of invidious choices. But this does not mean that the situation is entirely beyond remedy. While the Labour Court determination did not comply with the statute, what occurred can, in fact and in law, be addressed. But to my mind, it can only be remedied by remitting the appeal to the legal forum charged under the statute with evaluating the evidence in accordance with law – and applying the law to the facts. There are some issues yet to be determined;*

which in my opinion can only be determined by the Labour Court itself. In this way, statutory compliance can be achieved. This Court should not act as a surrogate Labour Court which is charged with carrying out a statutory function. Regrettably therefore, it seems that the only appropriate order is to remit the matter to the Labour Court for further consideration in accordance with the totality of the evidence adduced, together with such further limited evidence that may be necessary, and the law as explained in this judgment. This Court should not in my view seek to pre-empt or short circuit that process. But the decision of the Labour Court must address the legal principles applicable in light of the full evidence. The Labour Court is under a statutory duty to carry out its functions in accordance with the law enacted by the Oireachtas. This duty can result in having to make difficult decisions as well as easy ones. It is to be hoped however that whatever ultimate conclusion is arrived at, based on an appreciation of the full factual background, and on a correct interpretation of the law, will bring an end to this overlong litigation"(emphasis added).

42. At para. 113, McMenamin J. stated as follows: –

"*What the Labour Court must address.*

113. The issues which the Labour Court must address are: -

(a) the process of consultation with the NCSE,

And

(b) the entirety of Mr. McGrath's evidence and its legal consequences".

43. However I am of the view that the decision in *Nano Nagle* should be distinguished on the facts of this case. There are a number of reasons for that. First, the employee in that case was a special needs assistant (SNA) in the school who

became paralysed from the waist down after an accident and was confined to a wheelchair. Following a course of rehabilitation, she sought to resume her employment. The school decided she was not in a position to return to work as an SNA. The facts therefore are very far removed from the facts of the present case where Mr. O'Suird was the subject of a disciplinary process for allegations of gross misconduct.

44. Secondly, the issues in that case involved the interpretation of a completely different statutory regime, i.e. the Employment Equality Act 1998 (as amended) as opposed to the Unfair Dismissals Legislation (as amended) in this case.

45. Thirdly, the teacher in *Nano Nagle* brought an application to the Equality Tribunal claiming that the school's actions were discriminatory. That tribunal held with the school. She appealed to the Labour Court who reversed the decision and held for the teacher. The school appealed to the High Court on points of law. The issue in that case was that the school submitted that the Labour Court had ignored significant evidence. The High Court upheld the decision of the Labour Court. The school appealed to the Court of Appeal, which reversed the decision of the High Court. The teacher then appealed to the Supreme Court who allowed her appeal and reversed the decision of the Court of Appeal. In substance, the Supreme Court held that the Labour Court had failed to address relevant evidence on the relevant issues and as such did not fulfil its statutory duty.

46. By contrast, in the present case there is no suggestion that the Labour Court ignored any evidence. Indeed, I found in my judgment that the Labour Court had considered all the relevant evidence and that there was ample evidence before it to justify its findings of fact, the inferences made, and its conclusions in relation to

unfair dismissal and redress. This crucial fact distinguishes the present case from the *Nano Nagle* case.

Re-engagement of Mr. Ó Suird

47. It is clear therefore that the re-engagement of Mr. Ó Suird as principal is the only lawful interpretation of the decision on redress addressed by the Labour Court. Moreover, that is also the redress which will be ordered by this Court. To my mind, that is the inevitable outcome of my judgment and, indeed, the decision of the Labour Court. Re-engagement on the facts of this case can only mean re-engagement as principal. Mr. Ó Suird will, therefore, be deemed to be re-engaged with effect from the date of his dismissal, 30th November 2015, and resume his duties as principal from 4 August 2022.

The position of Ms. Scott

48. The court has considerable sympathy for the position of Ms. Scott, the second principal appointed in July 2016. She should never have been appointed to that position on a permanent basis, whilst this litigation was on-going. She should only have been appointed as acting principal until then. However, it is important to emphasise that the blame for her current predicament is not the fault of Mr. Ó Suird but the Board of Management.

49. However, I would also add that Ms. Scott was a former teacher in the school and then acting principal before she was made principal. As such, therefore, she was aware at all times when she took the position, of the litigation brought by Mr. Ó Suird. She was also aware of the decision of the WRC made on 25 April 2018 that Mr. Ó Suird was to be re-engaged as principal with effect from 1 January 2018. She was also aware of the decision of the Labour Court of 3 June 2022 that Mr. Ó Suird was to be

re-engaged with effect from 1 September 2017. She knew therefore since at least April 2018 – over 5 years ago – that this moment might come.

The issue of costs

50. Mr Ó Suird is seeking his costs of the High Court proceedings against the Board of Management on a legal practitioner and client basis.

51. Order 105 of the Rules of the Superior Courts deals with appeals and references from the Labour Court. Order 105, r.7 provides: –

> *"No costs shall be allowed of any proceedings under this order unless the court shall by special order allow such costs".*

52. In *Power v HSE* [2021] IEHC 454, Simons J. considered the relationship between O.105, r.7 of the Rules of the Superior Courts and s.169 of the Legal Services Regulation Act 2015 which provides that:

> *"A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case and the conduct of the proceedings by the parties".*

53. Simons J. stated at para. 14 of his judgment:

> *"On the one view there is a potential conflict between the LSRA 2015 and Order 105. This is because the starting position of each is different. Under the LSRA 2015 the successful party is normally entitled to costs whereas under Order 105 the default position is that each side should bear its own costs. Of course the court has discretion to depart from the starting position in each instance".*

54. At para. 15 Simons J. stated:

"In circumstances where the primary legislation appears to prescribe an exhaustive set of criteria governing the costs of civil proceedings, it is at least arguable that those criteria prevail in the event of a conflict between the LSRA 2015 and the Rules of the Superior Courts. As against this, section 169(1) of the LSRA 2015 expressly envisages that a departure from the default position may be justified having regard to 'the particular nature and circumstances' of the case. The introduction of a specific rule for appeals in employment law disputes might be considered as complementing rather than cutting against the statutory criteria".

55. At para. 17 and 18 Simons J. described O.105, r.7 in the following terms:

"The rationale underlying Order 105, rule 7 is that parties to an employment law dispute should not normally be on hazard of having to pay the costs of the other side in the event of a statutory appeal to the High Court. The decisionmaker at first instance, i.e., the Labour Court, does not have jurisdiction to award costs against a party under the Workplace Relations Act 2015. It would be anomalous where the costs position to change dramatically in the event that either side invoked its statutory right of appeal to the High Court under s.46 of the Act…

It is readily apparent that the risk of having to pay the other side's costs of even a one-day appeal before the High Court would be prohibitive for most employees. An employee (and indeed many small employers) might well be deterred from either pursuing or defending a statutory appeal were the normal rule on costs to apply. The legal costs would be equivalent to the annual salary of many employees appearing before the Labour Court".

56. In this case, the Board of Management has, in my view properly, consented that this Court can *"by special order"* order the payment of Mr. Ó Suird's costs of the High Court by the Board of Management.

57. The only issue therefore which remains between the parties on the issue of costs is that Mr. Ó Suird is seeking his costs on a "legal practitioner and client" basis whereas the Board of Management submit that Mr. Ó Suird should only be entitled to his costs on the normal basis to be taxed in default of agreement.

58. The rules governing costs on a legal practitioner and client basis are set out in O.99, r.10(3) of the Rules of the Superior Courts which provides:

> *"The Court in awarding costs to which this rule applies may in any case in which it thinks fit to do so, order or direct that the costs shall be adjudicated on a legal practitioner and client basis."*

59. The decision of Barniville J. (as he then was) in *Trafalgar v. Mazepin* [2020] IEHC 13 provides the leading authority on the circumstances in which costs may be awarded on a legal-practitioner-and-client basis. Barniville J. summarised the position at paragraph 54, as follows:

> *"It seems to me that the following principles can be derived from O. 99 r. 10 and from the judgments of the Irish courts discussed above and should inform the exercise by a court of its discretion to make an order for costs on the solicitor and client basis: -*
>
> *(1) The normal position is that where costs are awarded against one party in favour of on other, those costs will be taxed or adjudicated on the party and party basis.*
>
> *(2) The court has a discretion to depart from the normal position in the particular circumstances of the case, where the court thinks fit to do so, and*

to direct that the costs be taxed or adjudicated on the solicitor and client basis.

(3) There has to be a good reason for the court to depart from the normal position and to make an order for costs on the solicitor and client basis (or on the even more severe basis, the solicitor and own client basis).

(4) The court may exercise its discretion to order costs on the solicitor and client basis where it wishes to mark its disapproval of or displeasure at the conduct of the party against which the order for costs is being made.

(5) The conduct in question can include: -

> *(a) A particularly serious breach of the party's discovery obligations;*
>
> *(b) An abuse of process by that party in commencing and maintaining proceedings for an improper purpose or for an ulterior motive, designed to seek a collateral and improper advantage;*
>
> *(c) The failure to exercise the requisite caution in commencing proceedings making claims of fraud or dishonesty or conspiracy without ensuring there exists clear evidence supporting a prima facie case in relation to such claims;*
>
> *(d) Any other conduct in relation to the commencement or conduct of the proceedings, or any aspect of the proceedings, which the court considers merits be marked by the court's displeasure or disapproval, such a particularly serious or blatant breach of a court order, the directions of the court or the Rules of the Superior Courts.*

(6) In considering whether the conduct of a party is such that the court should exercise its discretion to make an order for costs on the solicitor and client basis, the court should: -

(a) Clearly identify the particular conduct or behaviour of the party which is said to afford the basis for the court exercising its discretion to award costs on the solicitor and client basis;

(b) Carefully examine and consider the explanation (if any) offered by the party for the conduct or behaviour in question;

(c) Carefully consider and examine the consequences (if any) of the conduct or behaviour in question for the other party, whether in terms of delay or costs or any other form of prejudice to that party;"

60. In my view, this is an appropriate case in which to award Mr. Ó Suird's costs on a legal practitioner and client basis for the following reasons:

(1) First, I believe that it is appropriate to make such a costs order in this case to mark the court's disapproval of the conduct of the Board of Management in the conduct of these proceedings;

(2) The Labour Court and this Court found that the Board of Management unfairly dismissed Mr. Ó Suird and had an animus against Mr. Ó Suird;

(3) The Board of Management improperly and falsely levelled an allegation of fraud against Mr. Ó Suird in the Labour Court and the High Court;

(4) The Board of Management persisted in making allegations of fraud against Mr. Ó Suird in the High Court appeal despite the fact that the Board of Management actually knew that the disciplinary panel of the Board of Management had not made any findings of fraud against Mr. Ó Suird and neither had the Disciplinary Appeal Panel or indeed the Labour Court.

(5) The Board of Management deliberately concealed evidence from Mr. Ó Suird;

(6) Various aspects of the appellant's evidence before the Labour Court and the High Court were found to have been improper and/or untruthful; and

(7) The Board of Management deliberately sought to pre-empt the jurisdiction of the WRC, the Labour Court and the High Court by replacing Mr. Ó Suird despite the fact that he had issued unfair dismissal proceedings,

61. In relation to the question of fraud in particular, Barniville J. stated the following at paragraph 53 of *Trafalgar*:

> *"The court, in the exercise of its discretion, could award costs on that basis where the necessary caution which should be exercised before bringing proceedings alleging fraud, dishonesty or conspiracy are brought and also where such claims are made, without the exercise of the required caution, against a professional person in relation to the manner in which he or she has acted in a professional capacity. These observations pre-suppose a finding, on evidence, that the requisite caution was not exercised prior to the making of those claims and that some basis existed for the making of such findings."*

62. It is clear that the fraud allegations in these proceedings were manifestly unfounded. However, they went to the core of Mr. Ó Suird's professional reputation and his position as the founder and principal of the school. It was, as Mr. Ó Suird's lawyers submitted, *"deliberately deployed to maximise the chances that Mr Ó Suird would lose his job and never work in the school again". The objective of the*

allegation was to destroy Mr Ó Suird's career". As I found in my judgment at paras. 407-423 the allegations of fraud were a gross distortion of the truth and were manifestly unfounded.

63. I am satisfied that the explanations, if any, offered by the Board of Management for its conduct have been without substance.

64. I am also satisfied that the consequences of the conduct of the Board of Management for Mr. Ó Suird both in terms of delay, costs and prejudice to Mr. Ó Suird have been quite simply incalculable. The school's conduct of this appeal continue to inflict enormous damage on Mr. Ó Suird in respect of his profession, his finances, his health and wellbeing, his reputation and his family life.

65. Mr. Ó Suird submitted that *"the false and baseless allegation of fraud presents as compelling an argument for the awarding of costs on a legal practitioner and client basis as one is likely to find in civil litigation",* I agree with that submission.

66. In the circumstances, I am satisfied that all of the criteria required for an order of costs on a legal practitioner and client basis are satisfied in this case and I will therefore so order.

The application for a stay by the Board of Management

67. The Board of Management has made an application for a stay on part of my judgment. Counsel for the Board submitted that the Board of Management is not seeking a stay on (i) the restoration of Mr. Ó Suird to the payroll; (ii) the payment of arrears of salary to Mr. Ó Suird; or (iii) the restoration of pension entitlements with immediate effect to Mr. Ó Suird. She submitted that the Board was only seeking a stay in respect of that part of the order which would result in Mr. Ó Suird being re-engaged by the Board of Management with immediate effect.

68. The substance of the Board of Management's application is, in effect, to secure an injunction restraining Mr. Ó Suird from resuming his position as principal in circumstances where the WRC, the Labour Court and the High Court have all found that he was unfairly dismissed in November 2015. It is an attempt by the Board to continue to exclude Mr. Ó Suird from the school in circumstances where he has been unlawfully and/or unreasonably and/or unfairly excluded from the school for over eleven and a half years.

Legal principles governing an application for a stay

69. Order 58, r.10(1) provides:

> *"An application for leave or an appeal to the Supreme Court does not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the Court of Appeal or (as the case may be) the High Court orders."*

70. It is clear therefore that insofar as the Board of Management wish to apply to the Supreme Court for leave to appeal or make an appeal to the Supreme Court, such an appeal of itself does not operate as a stay on a decision or order of the High Court.

71. The principles to be applied in deciding whether the High Court should grant a stay were summarised by Clarke J. (as he then was) in *Danske Bank v McFadden* [2010] IEHC 119 at paras. 2.1 to 2.15.

> *"2.1 It is clear from both Redmond v. Ireland & Anor [1992] 2 I.R. 362 and Irish Press Plc v. Ingersoll Irish Publications Limited [1995] 1 I.L.R.M. 117 that, in general terms, two broad issues will ordinarily arise for consideration in relation to whether a stay should be placed on an order of this Court pending appeal to the Supreme Court.*

2.2 The first issue is that, in order that a stay might be considered, any such appeal must be bona fide. For example, McCarthy J. in Redmond noted that a heavy responsibility lay on the legal advisers of those seeking a stay to assist the court on the reality of an appeal and also noted that appeals have been known in the past to have been brought for tactical rather than bona fide reasons.

2.3 However, this issue does not arise in the current application. Counsel for NIB quite properly accepted that any appeal which might be brought in the circumstances of this case would be bona fide (while, of course, asserting that it would ultimately fail). Indeed, counsel himself drew attention to the fact that, on the issue of construction on which Mr. McFadden ultimately failed (despite succeeding on other issues), I had used the phrase "on balance" as a means of describing my view on relevant question. I am, therefore, satisfied that counsel was quite correct in characterising this as a case where, in the event of an appeal, any such appeal would be a genuine appeal with genuine issues to be determined by the Supreme Court. Indeed it is entirely possible that NIB might itself wish to cross appeal on the issues on which it was unsuccessful.

2.4 Where the appeal is genuine, it seems clear from Ingersoll that the court should conduct a process analogous to the balance of convenience test which the court is required to apply in determining whether to grant an interlocutory injunction. It is obvious that a successful party in this Court may lose out to a greater or lesser extent and with a greater or lesser degree of permanency as a result of having a stay placed on any order obtained. Likewise, it is equally clear that an unsuccessful party who fails

to obtain a stay, but who ultimately succeeds on appeal, may suffer, again to a greater or lesser extent and again with greater or lesser degree of permanency, as a result of the fact that a court order has been effective against them in the intervening period. In the words of McCarthy J. in Redmond the court is, in those circumstances, required to "maintain a balance so that justice will not be denied to either party". (emphasis supplied)".

72. In *Lobar Limited v. Gladney* [2018] IECA 129 Irvine J. (as she then was) in giving the judgment of the Court of Appeal, on an application to extend a stay granted in the High Court stated at paras. 15 and 16 of the judgment:

"15. The aforementioned authorities make clear that the court is bound to engage in what is often described as a two-stage test. First, the applicant must demonstrate that they have an arguable ground of appeal and is one which is bona fide rather than tactical.

16. If the court is not satisfied that the appellant has demonstrated an arguable ground of appeal, that is the end of the stay application. Assuming, however, the appellant demonstrates a bona fide and arguable ground of appeal, then the court must consider where the balance of justice is to be found. As is stated in many of the more recent authorities, a stay brings with it potential detriment to both sides. Thus, it is necessary for the court to consider where the greatest risk of injustice may arise. It must consider the likely effect that granting a stay would have on the respondent should the appeal fail, and must also consider the effect that refusing a stay may have on the appellant should it succeed on its appeal. In this context, the court may impose a stay in terms which can

ameliorate the potential detriment of granting or refusing a stay." (emphasis added).

The statutory scheme – no statutory right of appeal

73. Before I consider the principles which are set out above in the context of this case, it is also important to consider another point made by Mr. Ó Suird through his counsel, which is that the Board of Management does not have an automatic right of appeal or a statutory right of appeal. It must petition the Supreme Court for leave to appeal and such an appeal is not automatic.

74. Counsel for Mr. Ó Suird submits that this Court should not grant a stay in the event of an appeal for the simple reason that there is no appeal from a decision of the High Court in this statutory scheme. The statute provides that the appeal is from the Labour Court to the High Court on a point of law and that the decision of the High Court in relation to thereto *"shall be final and conclusive".*

75. Counsel for Mr. Ó Suird also submits that the Board of Management has no automatic right of appeal to the Supreme Court and has no statutory right of appeal to the Supreme Court. It can therefore only petition the Supreme Court and request the Supreme Court for leave to appeal. It appears from the authorities that it is a matter for the Supreme Court as to whether to grant such leave to appeal and it will only do so where points of general public importance arise in the case.

76. However, in my view, this should not, as a matter of principle, prevent the High Court from deciding to grant a stay if one is sought - provided the other criteria are fulfilled. Such a stay would be granted, if one were granted, on terms which could include a term that the stay would lapse in the event that the Supreme Court declined to hear such an appeal. I am satisfied therefore that the fact that the Board of

Management has no statutory right of appeal is not of itself a ground on which to refuse a stay.

Is the appeal being brought in a *bona fide* manner?

77. The first test which the court must consider is whether the appeal is being brought in a *bona fide* manner. In this regard I note the statement by McCarthy J. in *Redmond* that *"a heavy responsibility lay on the legal advisers of those seeking a stay to assist the court on the reality of an appeal".*

78. In those circumstances, counsel for the Board of Management indicated that it would provide an outline of the grounds of appeal which it intended to raise in any putative notice of appeal to the Supreme Court. These grounds were contained in a document entitled "Submission grounds for application for leave to appeal" dated 30 July 2023. In it, the Board of Management raised nine issues which it says raise issues of general public importance.

79. However, before going on to deal with those proposed grounds of appeal, I would like first to consider the question of whether this appeal is being brought in a *bona fide* manner.

80. Counsel for the Board of Management submitted that the appeal was being brought in a *bona fide* manner.

81. Counsel for Mr. Ó Suird however submitted that it was clear that this appeal was not being brought in a *bona fide* manner.

82. Having considered these submissions, I have come to the conclusion that the Board of Management is not bringing this appeal in a *bona fide* manner but is rather doing so for tactical and/or other reasons. I say this for the following reasons:

(i) First, the history of these proceedings shows that the Board of Management has not conducted these proceedings in a *bona fide* manner from the start;

(ii) secondly, throughout the internal disciplinary process, the Board of Management concealed important evidence from Mr. Ó Suird;

(iii) thirdly, the Board of Management made allegations of fraud against Mr. Ó Suird which were manifestly unfounded and, in one case, demonstrably false;

(iv) fourthly, the Board of Management refused to engage in any way with the evidence presented by Mr. Ó Suird;

(v) the WRC also criticised the conduct of the Board of Management in its decision and stated (at p.16 of its decision) that it could not ignore the equitable maxim "he who comes to equity must come with clean hands", with the clear implication that the Board was not coming to the WRC hearing "with clean hands" for the reasons set out therein;

(vi) the Labour Court, in substance, found that Ms. Ni Dhuinn and the board were motivated by some kind of animus against Mr. Ó Suird and concluded that there was "a determined intention on the part of the [Board] to find a basis for removing [Mr. Ó Suird] from his employment…";

(vii) this Court found that there was ample evidence before the Labour Court to justify its finding that Ms. Ní Dhuinn and the Board were motivated by an animus against Mr. Ó Suird;

(viii) the Labour Court found that the allegations of fraud were "deliberately over-stated";

(ix) the actions of the Board of Management in appointing a full-time principal rather than an acting principal in July 2016 in circumstances where they actually knew that Mr. Ó Suird had instituted proceedings against the Board of Management and had made a complaint to the Workplace Relations Commission show an intention on the part of the Board of Management to pre-empt the jurisdiction of the Workplace Relations Commission, the Labour Court and the High Court. It is quite clear that the Board of Management should have allowed the due process of law to have run its course. Their decision to pre-empt the jurisdiction of the High Court can only be regarded as an act of bad faith which has tainted these proceedings from the very start;

(x) the conduct of the Board of Management's appeal in the High Court was unacceptable. Counsel for the Board of Management – on instructions from the Board of Management – opened the case by stating to the court that this was a case in which Mr. Ó Suird had engaged in a fraudulent misrepresentation to the Department of Education. In addition, Mr. Riordan of Mason Hayes & Curran, the solicitor for the Board of Management, swore an affidavit in similar terms. In my view, these instructions should never have been given. As I found in my judgment, neither the disciplinary panel of the Board of Management or the Disciplinary Appeal Panel made any findings of fraud against Mr. Ó Suird. In those circumstances it was not open to the Board of Management to make allegations of fraud against Mr. Ó Suird. I dealt with these allegations of fraud in my first judgment. I found that the allegations were a gross distortion of the truth and in

certain cases demonstrably false. The manner in which the Board of Management conducted the hearing before the High Court does not give me any faith that they would seek to prosecute the appeal to the Supreme Court in good faith.

83. I am fortified in this view by the astonishing way in which some of these grounds of appeal are framed. Despite the fact that in my judgment I found that the allegations of fraud were manifestly unfounded, and in one case demonstrably false, and despite the fact that counsel for the Board of Management has stated in open court, on instructions, that the Board does not intend to appeal against the findings by the High Court in relation to the fraud allegations, the proposed grounds of appeal suggested by the Board of Management are, as counsel for Mr. Ó Suird characterised it, *"shot through"* with continuing innuendos of deception and/or dishonesty.

84. There are no less than five occasions in which such issues appear in the proposed grounds of appeal. These are as follows:

(1) At para. 12 the proposed ground of appeal states *"can the dishonesty of a principal in law be condoned by a Board of Management?"*(emphasis added).

(2) At para. 13, it refers to *"the statutory obligation to make enrolment returns to the Department honestly, on time and accurately in circumstances of acknowledgement of wrong returns by a school principal"* (emphasis added).

(3) At para. 14 it states: the issue arises as to whether *"a voluntary board can condone or exonerate an executive chair in respect of any external wrongdoing or deception if same be found?"* (emphasis added).

(4) At para. 23 of the draft notice of appeal, it states that *"The Court held that the allegations of fraud by the Board of Management were 'manifestly unfounded and demonstrably false' in circumstances where the term 'fraud' was itself used by the adjudicator for the Workplace Relations Commission in its decision (para. 293(4),407).*

(5) At para. 24 of the draft notice of appeal, it states *"The imposition of a high threshold for the making of allegations of fraud per se by non-legally qualified persons – whether such allegations are ultimately made out or not – is one of general public importance and should be clarified for the purposes of a Board of Management and employers in their enforcement of honesty"* (emphasis added).

85. These five instances of innuendos of dishonesty or deception or fraud in the context of the actions of Mr. Ó Suird are most improper. Counsel for the Board of Management has indicated to the court – on instructions – that the Board of Management does not intend to appeal the findings of the High Court in relation to what I stated on the issue of fraud. They must therefore be taken to have accepted this element of the judgment. Despite this however, there are no less than five instances where the issues of dishonesty or deception or fraud appear to be creeping into the draft grounds of appeal by the back door. These are indicative of the fact, in my view, that the Board of Management is stating that, although it does not intend to appeal the findings in relation to fraud, it is nevertheless seeking to "colour" the grounds of appeal by inserting these matters yet again.

86. In my view, in seeking to ventilate these points, for a fourth time, in circumstances where neither the disciplinary panel of the Board of Management or the

Disciplinary Appeals Panel made any finding of fraud against Mr. Ó Suird, the Board is continuing to act in bad faith in the prosecution of this putative appeal.

87. I should add that in the light of the reference by the Board of Management to the finding of the WRC set out above, I have reviewed that finding for the purposes of this judgment. It is to be found in the section 'Findings and Conclusions of the WRC' at p.16.

88. However, in the light of the findings of the Labour Court and this Court, I am satisfied that this finding cannot be maintained.

89. For the avoidance of all doubt, I want to clarify that such a finding by the WRC was wrong in fact and law and should not be allowed to stand.

90. Unfortunately, as both the Labour Court and the High Court came to the conclusion that Ms Ní Dhuinn and the Board of Management had an animus against Mr. Ó Suird, I have concluded that the desire to pursue this appeal to the Supreme Court is motivated by the same animus. For that reason also, I do not believe that the appeal is being prosecuted in a *bona fide* manner, but rather is being sought for tactical reasons or because, as Mr. Lyons SC suggested, the board is "in denial" that it has lost the case.

The reality of the appeal

91. I now turn to consider the "reality" of the appeal.

92. As Charleton J. stated in *James Elliot Construction Limited v Irish Asphalt* [2011] IEHC 338 at p.5 of the judgment:

> *"It has been argued for the defendant that this Court made serious errors in its judgment on liability. A gigantic notice of appeal has been drafted. The focus in oral argument was principally on seven issues. I will concisely*

consider each in turn; concisely because I do not intend to operate as an appeal court against myself nor should I so approach the matter".

93. I agree with this statement of principle by Mr. Justice Charleton. In a similar fashion, I do not intend to operate as an appeal court against myself and I do not intend to approach the matter in that way. However, under the first limb of the test for a stay, I must consider the "reality" of the appeal and this is best considered by an assessment of the proposed grounds of appeal.

94. Moreover, the proposed issues set out in the grounds of appeal have been the subject of a sustained and rigorous attack in supplemental submissions (running to over twenty pages) by Mr. Ó Suird and his legal team and it is right and proper that I would consider this matter and comment as I deem appropriate.

95. There are nine issues raised in the proposed notice of appeal.

Issue One - the composition of the Disciplinary Appeals Panel

96. The first of these matters relates to the composition of the Disciplinary Appeals Panel at paras. 1 to 4 of the proposed appeal. It was submitted by the Board of Management that the matters raised therein are matters of general public importance. The substance of the issue is at para. 3 which states *"The within DAP has been found by the court to be not sufficiently impartial as two members of the three-part panel had long careers in the Department of Education"*. It was also stated *"Consequently the court ruling of lack of sufficient impartiality due to careers in the Department of Education finding has wide implications for the entire appeal process established by the statutory procedures".*

97. However, in my view, this ground of appeal is completely overstated. Mr. Ó Suird in his legal submissions states *"these are issues which are ultimately quite inconsequential in the judgment's reasoning and which in any event don't properly*

concern the litigation between Mr Ó Suird and the Board". I agree with that submission.

98. I would also add a number of further observations. First, the remarks in relation to this (at para. 354 of my judgment) were that both Mr. O'Dalaigh and Mr. Caomhanach were not sufficiently impartial or independent of the Department of Education in this matter and should not have been members of the disciplinary appeals panel were related to the specific issue in relation to Mr. Ó Suird's case namely (i) that the proposed misconduct in this case was misconduct against the Department of Education and (ii) the prime evidence in this case was supplied by a Department of Education officer Ms Mags Jordan. There is nothing, in principle, which would prevent persons with lengthy service in the Department of Education from sitting on disciplinary appeal panels in respect of other complaints of misconduct against teachers or principals or in relation to investigations of matters of gross misconduct. However, in this case, the gross misconduct alleged was in relation to returns of the Department of Education. However, my comments in this regard must be regarded as obiter in the overall context of my judgment.

99. Secondly it is clear from my judgment that the Labour Court was not impressed by the evidence given by Mr. O'Dalaigh – as it declined to accept it – and it was not impressed with the decision of the Disciplinary Appeal Panel. I found in my judgment that there were reasonable grounds for the Labour Court to find as it did. That is the kernel of the issue. The Labour Court made no findings that two of the members were not sufficiently impartial, but I expressed that view. However, nothing in my judgment turns on that view. To that extent, it is merely *obiter*. I do not believe therefore that the issues raised by the notice of appeal in respect of the Disciplinary Appeal Panel are substantive or go to the root of my judgment.

100. I am of the view that there is no reality to this ground of appeal.

The second issue - the status of expert panels

101. The second proposed ground of appeal is the status of expert panels and in this case the Disciplinary Appeals Panel. The essence of this argument is that *"the ruling of the court has not accorded the ruling of the DAP with the same weight or due deference which other decisions of the High Court have accorded such panels"*. *The court has also made rulings arising from its criticisms of the manner in which the DAP set out its findings, how it engaged with the evidence on appeal and the detail of reasoning in its report".*

102. Again I am of the opinion that there is no reality to this ground of appeal.

103. First, in my judgment I referred to the dicta of O'Malley J. in *Kelly v Board of Management of St Joseph National School, Valleymount, Co Wicklow* [2013] IEHC 392, and the views of O'Malley J. stated therein, namely that the role of the disciplinary appeal panel deserves *"more respect that it was given"*. At para. 167 she said *"it is therefore a body of the sort to which the courts generally display a high level of deference on issues within its areas of expertise. These recommendations should accordingly carry very substantial weight with boards of management. While a board is not bound to carry out its recommendation, it should in my view depart from it only for very good reasons"*.

104. However, as I stated at para. 364 of my first decision, that decision must be seen in the facts of that particular case. In other words, this Court did not resile from the principle that a court generally should display a high level of deference to such panels on issues within its expertise but rather distinguished it in the facts of this case. In addition, I was critical of the fact that the evidence given by one member of the Disciplinary Appeal Panel was simply wrong. I concluded that at para. 364 that:

"In those circumstances it is clear that the disciplinary appeal panel failed to have regard to all of the evidence before the original disciplinary appeal panel of the Board of Management. Moreover, the disciplinary appeal panel took into account a matter which was demonstrably false i.e., that Mr Ó Suird had personally benefitted from the increase in teachers when this was not true".

105. It is also important to bear in mind that the Disciplinary Appeal Panel in this case was given information (*i.e.*, that Mr. Ó Suird had personally benefitted from the increase in teachers by an increase in his salary) by Ms. Ní Dhuinn, which was demonstrably false and which she did not correct at the time of the appeal.

106. Moreover, that issue whilst set out in my judgment, was not central to the issues which I had to consider. The Labour Court heard evidence from one member of the Disciplinary Appeal Panel. It set out its summary of that evidence in one paragraph. Clearly it was not impressed by that evidence as it refused to uphold the decision of the Disciplinary Appeal Panel. In my judgment I found that although this had not been elaborated on by the Labour Court in its decision, there was ample evidence before the Labour Court to allow it to reach its decision not to uphold the Disciplinary Appeal Panel findings.

107. Fundamentally therefore my findings in relation to this Disciplinary Appeal Panel in this case are fact specific, and in my view, do not raise issues of substance. I am of the view that there is no reality to this ground of appeal.

The third issue - the weight to be attributed to evidence provided by government department officials

108. The third issue which the Board of Management says amounts to a point of law of general public importance is what it calls *"the weight to be attributed to*

evidence provided by government department officials" as set out at paras. 9 and 10 of its proposed grounds of appeal.

109. It was submitted by Mr. Ó Suird that the weight to be afforded to particular evidence is a matter for the tribunal of fact and scarcely discloses any issue of law whatsoever much less a point of general importance for the Supreme Court. I agree with that submission.

110. Moreover, insofar as the Board of Management is referring to the evidence of Ms. Mags Jordan, it is important to recall that she did not actually give evidence before the disciplinary panel of the Board of Management or the Disciplinary Appeal Panel or the WRC or the Labour Court or the High Court.

111. Moreover, insofar as the evidence refers to Mr. McEvoy, the weight to be afforded to his evidence was not because he was a government official but rather because the Labour Court gave more weight to the evidence of Mr. Ó Suird's expert (Mr. Brian O'Reilly) and Mr. Ó Suird himself, rather than an official who had carried out a review of the files. This is classically an exercise by the Labour Court in evaluating the evidence given by two conflicting parties and deciding to prefer one witness's evidence over another.

112. I concluded in my judgment that there was sufficient evidence before the Labour Court to allow it to prefer the evidence of Mr. Ó Suird's expert than the evidence of Mr. Enda McEvoy from the department. Again, it is difficult to see how there is any reality to this ground of appeal.

Issue four – the role of Boards of Management when there is admitted wrongdoing

113. This matter is set out at paras. 11 to 14 of the proposed notice of appeal. Paragraph 12 refers to the issue of *"dishonesty"* of a principal; para. 13 refers to the

issue of a statutory obligation to make enrolment returns to the department *"honestly"*; para. 14 refers to whether a voluntary board can condone or exonerate an executive chair in respect of any external wrongdoing or *"deception of same be found"*.

114. I have set out my views in relation to these matters above. In summary this is an attempt by the Board of Management to reintroduce the allegations of fraud, dishonesty and/or deception by the back door despite the fact that these claims were comprehensively discredited by the Labour Court which finding was upheld by me in my judgment.

115. In substance, the Board of Management seeks to argue that the school has been placed in the invidious position of being unable to enforce compliance with the Education Act 1998 and in particular the statutory obligation to make enrolments to the department honestly, on time and accurately, in circumstances of acknowledgement of incorrect returns by a school principal.

116. In my view, this statement is, in substance, incorrect. First, it should be remembered that the issue in this case relates to one set of historic returns in 2009 *i.e.*, returns made now over fourteen years ago. Secondly, the evidence was at the time between 2009 and 2013 this was a grey area; thirdly, the evidence of Mr. Ó Suird's expert witness which the Labour Court accepted, was that the position has now been completely resolved and clarified by the department in its 2013 circular. Fourthly, the Board of Management can, and any Board of Management can, put in place procedures in the school, in liaison with the school principal, to review the returns made by the school to the department each year with a view to ensuring that they are accurate and correct. That is a day-to-day management issue for this Board and every Board of Management.

117. Sixthly, Mr. Ó Suird did not admit "wrongdoing". He 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.

Issue five - the validity of enrolment

118. The fifth issue on which the Board of Management seeks to appeal is on what they call the "validity of the enrolment". This is set out at paras. 15 to 19 of the proposed grounds of appeal, and, the essence of the issue is, they say, that the ruling on the validity of pupil enrolment for capitation and teacher funding is a matter of general and profound public importance for the allocation of public monies.

119. However, counsel for Mr. Ó Suird states quite correctly, in their legal submissions, that the High Court did not make any determination on the legal interpretation of the framework for enrolling children in schools. To suggest that I did is simply incorrect. What I did in my judgment was to set out a context of the assessment of evidence in this case and various matters in relation to enrolment. I set this out from paras. 154 and following of my judgment. It covers the Mags Jordan memo, the enrolment of pupils in the school (para. 216 to 222), what happened to pupils after enrolment in this school (paras. 223 to 248) and related matters.

120. At para. 248 of my judgment I state as follows:

> *"The question therefore is not whether Mr. Ó Suird was right or wrong but rather whether his actions in completing the said enrolment figures and making such returns to the Department of Education were 'reasonable' in the circumstances and whether his detailed explanation and defence of his actions amounted to a reasonable defence of his actions such that he merited at worst, as he says, 'a rap on the knuckles' but certainly not suspension for three and a*

half years and then dismissal in November 2015. All of this evidence was before the Labour Court when it made its decision".

121. It is clear therefore that this Court did not engage in a detailed legal analysis of the confused regulatory regime for enrolment. I simply set out the evidence of Mr. Ó Suird on this issue, the evidence of other parties and the evidence of Mr. Ó Suird's own expert. The Labour Court had sufficient evidence to find that Mr. Ó Suird's actions in this regard were reasonable and did not justify his dismissal. I found that there was sufficient evidence before the Labour Court to justify that finding and that any inferences which the Labour Court made in respect of these matters were justifiable.

122. Again, I would reiterate that the issue of enrolment is now of historic interest only. It relates only to the enrolment of one set of figures for 2009. It is also the case that clarification has been provided in the departmental circular of 2013 and therefore it is difficult to see on what basis the issues set out in the draft grounds of appeal have any reality.

The sixth issue – the definition of fraud in civil proceedings

123. This issue is set out at paras. 20 to 25 of the draft notice of appeal.

124. It appears that the essence of this issue is that the Board of Management are complaining about criticisms made in the High Court judgment on the issue of fraud. I addressed this issue at para. 407 and 423 of my judgment.

125. However, firstly, it is of some significance that counsel for the Board of Management has stated in open court that the Board of Management does not intend to appeal against, or challenge in any way, the findings of the High Court as set out in my judgment in relation to the issue of fraud.

126. Secondly, in those circumstances, the appeal to the Supreme Court on this issue can only be regarded as an attempt to obtain a consultative opinion from the Supreme Court on this point.

127. Thirdly, there has been no real difficulty – apart from in the minds of Ms Ní Dhuinn and the Board of Management, and indeed in the affidavit of its solicitor, as to what constitutes the appropriate law on fraud. The issue in this case has not been the law on fraud; rather it has been the fact that Ms Ni Dhuinn made allegations of fraud against Mr. Ó Suird, which were not sustainable. The disciplinary panel of the Board of Management did not make any findings of fraud against Mr. Ó Suird; the Disciplinary Appeal Panel made no findings of fraud against Mr. Ó Suird. The Labour Court made no finding of fraud against Mr. Ó Suird and concluded that those allegations were "deliberately overstated". I concluded that there was sufficient evidence before the Labour Court to justify that conclusion. I also criticised the Board of Management in round terms for making such unfounded allegations before the High Court in circumstances where no such findings had been made by the Board of Management or the Disciplinary Appeal Panel.

128. The issue therefore is not the law on fraud; it is that on the facts of this case the allegations made by Ms. Ní Dhuinn did not rise to the level of fraud or fraudulent misrepresentation.

129. It is difficult therefore to see on what basis the Board of Management can now seek to appeal to the Supreme Court on what it says is a point of law of public importance where its own Board of Management did not make any findings of fraud against Mr. Ó Suird and the Disciplinary Appeal Panel did not make any findings of fraud against Mr. Ó Suird, and where it stated it does not intend to appeal the findings of this Court on fraud.

130. I am of the view that there is no reality to this proposed ground of appeal.

The seventh issue - the role of boards of management when child protection issues arise

131. The seventh issue in relation to this matter is set out at paras. 26 to 28 and it is stated to be the scope of the duty of boards of management to report child protection issues and the extent to which a Board of Management should consider child protection procedures when it refers the matter to other bodies.

132. First, it is important to say that this case is not about child protection issues. The parents of the child said it was a minor issue; the HSE said there was no case to answer; Ms. Ní Dhuinn in the Labour Court, years later, belatedly accepted that the "Slate was clear" as far as Mr. Ó Suird was concerned on this matter.

133. Secondly, Mr. Ó Suird said in his submissions that this *"is a wholly tangential issue to these proceedings and insofar as it might be said that the court commented on it at all those comments were obviously obiter".* I agree with that submission.

134. Thirdly, the criticisms which I expressed in my judgment about Ms. Ní Dhuinn were in fact that she failed to prepare a report on these child protection issues for the Board of Management at any stage from January 2012 when the issue first arose, between January 2012 and January 2013, or at any point thereafter. Therefore, it ill behoves Ms. Ní Dhuinn and the Board of Management now to be seeking to apply to the Supreme Court on a point of law of general public importance about child protection issues when the criticism that was made of Ms Ni Dhuinn and the Board of Management was that they had failed to prepare a comprehensive report on these child protection issues in the context of a disciplinary procedure being taken against Mr. Ó Suird.

135. Fourthly, in addition, it is clear from my judgment that the Board of Management concealed important evidence from Mr. Ó Suird which was exculpatory of him in this issue and which he could have used in his defence before the Board of Management, the Disciplinary Appeal Panel and the WRC.

136. Fifthly, I made some general remarks that, in the circumstances where the parent of child A said it was only a minor issue and they did not believe an investigation to the HSE was warranted, the Board could have taken that view. These remarks were clearly obiter. The Board of Management was within its rights to refer the matter to the HSE and to maintain Mr. Ó Suird on administrative leave pending that investigation. In my judgment, I indicated that it was not unreasonable that Mr. Ó Suird be put on administrative leave from January 2012 until January 2013 although there is some strength in the argument that that period of administrative leave was unfair and excessive. However, I held that being kept on administrative leave after January 2013 (when he was kept on administrative leave not on child protection issues but on pupil enrolment issues) was unreasonable and unlawful.

137. The issues in this case therefore are not related to child protection; they are related to the manner in which the Board of Management conducted this disciplinary process. Moreover, Mr. Ó Suird was not dismissed for child protection issues; he was dismissed for inflated returns of enrolment figures to the Department of Education. These are matters which have nothing to do with child protection.

138. In my view, there is no reality to this ground of appeal.

The eighth issue – re-engagement and/or reinstatement when the position is lawfully filled by another employee

139. This matter is set out at paras. 28 and 29 of the proposed notice of appeal.

140. The essence of this point as submitted on behalf of the Board of Management is that there is no provision in the Unfair Dismissals Act 1977 (as amended) which provides for the circumstances in which an employer has "lawfully" appointed another qualified employee to that position.

141. However, as Mr. Ó Suird submits, this point was never agitated either in the Labour Court or in the High Court. Of the twenty-three grounds of appeal raised before the High Court, none of them made any reference to the fact that the Board of Management had appointed Ms. Scott to the position. No reference of any kind was made to Ms. Scott in the Board's written submissions to the High Court. In the lengthy history of this case the Board apparently has never once advanced any argument as to what it now says is a point of law of general public importance.

142. I agree with those submissions. Given that this issue was not an issue in the case, it is difficult to see how it can arise now as a matter of general public importance.

143. Moreover, it is clear that the decision to appoint a new principal, was an attempt to pre-empt the jurisdiction of the WRC, the Labour Court and the High Court and to set at nought certain remedies these bodies might order including reinstatement.

144. Although the point was not argued before me, it is nevertheless the case that there is a question mark about the so-called "lawful appointment" of Ms. Scott by the Board of Management.

145. At the very least it was wrong and ill-advised. It was also an interference with the administration of justice.

146. I do not believe therefore that there is any reality to this ground of appeal.

The nineth issue – awarding re-engagement and/or reinstatement when trust and confidence has broken down

147. This is set out at para. 30 to 32 of the draft notice of appeal. It states:

"The Board of Management say trust and confidence has broken down between it and Mr Ó Suird and in those circumstances he cannot be reengaged as principal of the school".

148. There are a number of points I would make in relation to this matter.

149. First, the reason that the necessary trust and confidence, has – apparently – broken down between the Board of Management and Mr. Ó Suird is precisely because of the manifestly unfounded and false allegations made by Ms. Ní Dhuinn and, in part, upheld by the Board of Management against Mr. Ó Suird. Those allegations have been found to be without substance and the sanction of dismissal was found to be unfair by the WRC, Labour Court and the High Court.

150. Therefore, the reason that the Board of Management, now say that they have no trust and confidence in him, is because they made false allegations against him. They are therefore entirely responsible for the breakdown in trust and confidence between the parties.

151. The fundamental equitable and legal principle, however, is that an employer, such as the Board of Management in this case, cannot make false and reckless allegations against an employee, suspend him unlawfully, dismiss him unlawfully, continue to make unfounded allegations about him and then say that he cannot be restored to his position because all necessary trust and confidence has broken between employer and employee. Ms. Ní Dhuinn and the Board of Management are entirely responsible for the breakdown in this trust and confidence. They cannot now rely on

this point as a last desperate roll of the dice to try to prevent Mr. Ó Suird from returning to the school, a position to which he is lawfully entitled to return.

152. Moreover, there is no identification of any ground of appeal on this matter which raises a point of law of general public importance. The legal principles relating to mutual trust between employer and employee have never been the source of any serious controversy between the Board and Mr. Ó Suird in these proceedings. The Labour Court and the High Court dismissed the Board's argument by applying the agreed legal principles to the facts of the case as found.

153. I would also add that members of the Board of Management are volunteers and are voted in and out on a regular basis. It is possible therefore that a new Board of Management will have trust and confidence in Mr. Ó Suird.

Assessment of the "reality" of the grounds of appeal

154. I am of the view, therefore, that not only is the appeal being brought in bad faith, but also there is little in reality, as a matter of law, to be found in these proposed grounds of appeal.

155. The central issue in this case was whether Mr. Ó Suird's dismissal was "unfair". The WRC held that it was; the Labour Court also held that it was; this Court held that there was ample evidence before the Labour Court to justify that finding.

156. The Board of Management has not indicated a single argument of substance on this issue in the proposed grounds of appeal to the Supreme Court.

157. The Board of Management has also stated in open court that it does not intend to contest and/or appeal any of the issues in relation to the issues of fraud, as set out in my judgment. The effect of this concession, which was, in my view, properly made, means that the decision to dismiss Mr. Ó Suird must now be regarded as even more disproportionate and unfair.

158. This means that the Board, whilst accepting that the issues of fraud will not be the subject of an appeal, appear to be arguing that the decision to dismiss was "fair" – even though all of the main allegations were dismissed. It is difficult to understand the logic of that position.

159. Moreover, the Board has not identified any error of law in my judgment as far as I can see. The principles applicable to appeals of this nature were set out in my judgment (para. 19-25). There is no suggestion in the draft grounds of appeal that

(i) there was no proper basis in the evidence before the Labour Court for its findings of fact;

(ii) the inferences drawn by the Labour Court were not reasonable;

(iii) this Court made any error of law in its interpretations and/or appeal of those principles of law.

160. Moreover, there is no point of statutory interpretation which has been identified as being of general public importance.

The balance of justice

161. The second issue I must consider is whether the balance of justice is in favour of granting the stay sought by the Board of Management in preventing Mr. Ó Suird returning to work after a period of eleven and a half years.

162. Counsel for Mr. Ó Suird submitted that, given that he has been the victim of a terrible injustice, – indeed a "savage injustice" as he characterises it – the balance of justice is overwhelmingly in favour of refusing the stay sought.

163. I agree with this submission, Mr. Ó Suird has been wrongfully deprived of his position as principal for a period of eleven and half years by reason of the unfounded charges levelled against him by Ms. Ní Dhuinn and the grossly unfair punishment of

dismissal levelled against him by the Board of Management. He should never have been dismissed.

164. When one balances the scales of justice in this case, it is overwhelmingly in favour of refusing the stay sought.

165. Moreover, there were no reasons put forward by the Board of Management to justify a stay. The closest they came was saying that they needed more time to deal with this *"pressure cooker situation"* in which the High Court might order re-engagement of Mr. Ó Suird as principal in circumstances where there was an existing principal and in circumstances where the new school term was due to commence on or about 28 August 2023.

166. However, the Board of Management is responsible for this "pressure cooker situation" as they call it. They have known since April 2018 – over 5 years ago – that the WRC ordered re-engagement; they have known since June 2022 – over one year ago – that the Labour Court ordered re-engagement; they have known of the High Court decision for over two weeks. They have had years to make plans for such an eventuality. I presume they have done so. If they have not, that is their fault. It is, however, not a pressure cooker situation for Mr. Ó Suird. Mr. Ó Suird is raring to go.

167. Moreover, Mr. Ó Suird has submitted that this is the perfect time to be re-engaged. All parties have the whole month of August to prepare the handover. There is no time to be lost. There is substance in that point also. Mr. Ó Suird is entitled to be in post before the start of the new academic year. There is no better time to organise the handover.

168. By contrast, the refusal of a stay will result in no injustice on the Board. It will have to engage Mr. Ó Suird for the duration of the appeal if one is taken. But it has already agreed to put him on the payroll. The effect of that, therefore, is that the Board

of Management wishes to argue that Mr. Ó Suird should be restored to the payroll, but that he does no work in return for this salary. This, of course, would be a waste of taxpayers' money. Mr. Ó Suird also earnestly desires to return to the job he loves in the school he founded.

169. For all of these reasons I will refuse the application for a stay.

The pre-emption of jurisdiction

170. The decision to pre-empt the jurisdiction of the WRC, the Labour Court and the High Court was profoundly wrong. It was an indefensible attempt to deny to Mr. Ó Suird the key remedies of reinstatement and/or reengagement. It was an attempt to destroy his career irrevocably and to show him there was no way back. It was an attempt to tie the hands of the Labour Court and, on appeal, the High Court. As such it can only be regarded as an unprincipled interference with the administration of justice and the rule of law.

171. Senior counsel for the Board of Management submitted that the Board of Management did not intend to pre-empt the jurisdiction of the WRC, the Labour Court or this Court and that as at June/July 2016, when it appointed a new principal, Mr. Ó Suird had only submitted a written complaint to the WRC. In my view, that defence is without substance.

172. Moreover, the Board of Management was legally advised at all stages through this process by Mason Hayes & Curran. It was therefore, or ought to have been, advised, that once Mr. Ó Suird initiated a complaint to the WRC, he had the benefit of a statutory presumption that his dismissal was unfair and that the due process of law must be allowed to take its course.

173. Sooner or later the consequences of disastrous and ill-advised decisions catch up with people. So it is here. The decision to appoint a full-time principal in the full knowledge that this litigation had commenced should never had been made.

Conclusion

174. It is important to re-state the essentials of this case , less they get lost in the welter of details.

175. This is not a case about child protection; it is a case about enrolment figures submitted to the Department of Education in 2009 – 14 years ago.

176. Ms. Ní Dhuinn alleged that these were fraudulent returns without any basis for doing so. Mr. Ó Suird said that what he did, he did with the board's consent and approval. That was true. Mr. Ó Suird also says the legislative framework governing such enrolment figures was a grey area. That was also true.

177. However, this case is about more than that. The evidence in this case establishes that the Board concealed evidence from Mr. Ó Suird; that it deliberately exaggerated the charges against him; that the allegations of fraud were manifestly unfounded and, in one particular case, demonstrably false; that his evidence – and that of all his witnesses – was completely ignored; that allegations of fraud were endlessly recycled in the WRC, the Labour Court and this Court in an unprincipled attempt to blacken his name even though there was no finding of fraud made by the Disciplinary Panel of the Board of Management or the Disciplinary Appeals Panel.

178. It is clear that the Labour Court – and this Court – concluded that the Board of Management had an animus against Mr. Ó Suird. That in itself should give the Board pause for thought.

179. The Board of Management has had three bites at the cherry *i.e.*, at the WRC, the Labour Court and the High Court. It has failed in all three, resulting in significant

legal costs for the school and Mr. Ó Suird. It now wishes to have a fourth bite at the cherry. I have no doubt at all that the Board of Management's case can now be properly characterised as a "vendetta" against Mr. Ó Suird.

180. All of these actions have resulted in the complete destruction of Mr. Ó Suird's career over the last 11 years. At a time when he was at the height of his professional career he was brought down by a whole series of unlawful decisions by the Board of Management – compounded by its attempt to prevent the legal process from administering a full measure of justice.

181. It is well past time, in my view, for this vendetta to come to an end. The Board of Management has lost all three battles. It is time for the Board to accept that it unfairly dismissed Mr. Ó Suird and to seek to make amends.

182. I would add one final comment. The education of children is almost a sacred duty. This Board of Management has responsibility for the education of young children. As such, it has a responsibility to inculcate values such as justice, fairness and respect for the rule of law. In its actions towards Mr. Ó Suird, the Board has sought to destroy Mr. Ó Suird's reputation, his constitutional right to vindicate his good name and his right to a proper hearing in accordance with the law. It is time for the Board of Management to reflect on the fact that three separate independent tribunals have found that their actions were unfair and unlawful. It should not need a fourth bite at the cherry; it should not need to waste further taxpayer's funds on legal battles. It needs to make its peace with Mr. Ó Suird, who has indicated he is open to that, and work with him for the better welfare of the school and its pupils. Every odyssey comes to an end. Mr. Ó Suird is entitled to resume his professional life and career from tomorrow.

Final Orders

183. I will therefore order:

i) that the Appellant's appeal is dismissed;

ii) that Mr. Ó Suird will be put back on the payroll with effect from 1st August 2023;

iii) that Mr. Ó Suird is deemed to be re-engaged as principal with effect from 30th November 2015 (being the date of his dismissal) and will be restored to his duties with effect from 4 August 2023;

iv) that all arrears of pay from 30th November 2015 to 1 August 2023 are to be paid by 15th September 2023;

v) that all previous entitlements are to be restored to Mr. Ó Suird from 30th November 2015 to the date of the order;

vi) that the Appellant is to pay Mr. Ó Suird's legal costs on a legal practitioner and client basis to be taxed in default of agreement;

vii) that the application for a stay is refused;

viii) that the application to remit the matter to the Labour Court is refused; and

ix) that there will be liberty to apply.
