Neutral Citation No: [2020] NIQB 8

Ref: **KEE11162**

Judgment: approved by the Court for handing down

*(subject to editorial corrections)**

Delivered: **24/1/20**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

____

IN THE MATTER OF AN APPLICATION BY JR95 (A MINOR)

AND IN THE MATTER OF A DECISION BY A SUB-COMMITTEE OF A BOARD OF GOVERNORS

____

KEEGAN J

[1] The applicant challenges a decision of a Sub-Committee of a Board of Governors ("the Sub-Committee") of a small primary school of 11 November 2019. The decision dismissed a complaint by the applicant's mother in relation to the conduct of a school principal. Anonymity has been granted as the applicant is a young child. Nothing should be published which would identify the applicant or the school.

[2] I granted leave on 23 December 2019 on grounds of (i) apparent bias (ii) inadequate investigation and (iii) procedural unfairness. In granting leave I stressed that further evidence would assist me on the procedural issues and I repeated my request that the parties attempt all means to resolve this case as I was deeply concerned that this young child remained out of school. Unfortunately a resolution could not be found and so I heard the case on 17 January 2020. Mr McQuitty BL appeared for the applicant and Mr Anthony BL appeared for the respondent. I am grateful to counsel for their written and oral submissions.

[3] The applicant's mother, as next friend, has filed an affidavit in support of her case dated 7 November 2019. An affidavit has also been filed by the solicitor, Ms McKeegan, dated 14 November 2019 which deals with procedural matters. I have considered this evidence.

[4] The applicant's mother's affidavit refers to the index event which occurred on 24 January 2019 in the school canteen. There was an interaction between the applicant and the school principal that day at lunchtime. Ultimately the applicant's mother made a complaint about how the principal had acted when assisting the

child to eat her dinner. The mother complained on 4 February 2019. The matter was referred to police. No prosecution was communicated on 3 June 2019 and the school principal took sick leave from 11 March 2019.

[5] After the no prosecution decision the investigation began in earnest. This led to the decision of the Sub-Committee that the complaint was not upheld due to differing accounts but it was hoped measures would be put in place to allow the applicant to return to school. The principal had a return to work meeting on 2 October 2019 which resulted in a phased return. In her affidavit the applicant's mother states that the incident continues to have a detrimental effect on her child, who has not attended school since the principal returned. She states that she has lost confidence in the school due to failures in the handling of the complaint. The affidavit refers to a lack of response from the school to pre-action correspondence but Ms McKeegan's affidavit confirms that this averment was not correct.

[6] In her affidavit at paragraph 5 Ms McKeegan also states that:

> "Following the exchanges with the solicitor for the proposed respondents, noted, our client received (on or about 13 November) a copy letter from XX dated 11 November 2019 along with a report of a sub-committee of the Board of Governors also dated 11 November. It can be noted that the complaint by the applicant's mother was not upheld and further that the applicant may appeal further to the Board of Governors' Appeal Committee. We will take the applicant's mother's instructions on this further material development and the documents now provided, following the issue of these proceedings."

[7] In advancing the applicant's argument, Mr McQuitty made the following points:

(i) Mr McQuitty argued that this was a case of apparent bias on the part of the priest who chaired the sub-committee. He based this on what he described as a "dual pastoral role" and his contact with the principal. Mr McQuitty stressed that the priest was well meaning but that an informed observer would recognise this as bias.

(ii) Mr McQuitty argued that a number of documents (adumbrated at paragraph 10 of his written submission) were not provided to the applicant and so the process was flawed.

(iii) Further, Mr McQuitty contended that the investigation was flawed as all relevant witnesses were not interviewed, particularly the other children in the dining room.

(iv) Finally, he argued that the appeal was not an effective alternative remedy as it could not cure the public law wrongs apparent in this case.

(v) Mr McQuitty also suggested that the setting up of an appeal board was in itself unlawful if apparent bias could be established.

[8] The evidence on behalf of the respondent is comprised in an affidavit of 9 January 2020. I allowed a supplementary affidavit to be filed on the effectiveness of the appeal and this is dated 20 January 2020. In the grounding affidavit of 9 January 2020 the priest explains the process of investigation. He confirms that prior to the formal complaint being lodged, he spoke to the applicant's mother (24 and 25 January 2019) and the principal (on 30 January 2019). He also sought advice from Catholic Council for Maintained Schools "CCMS" and the Education Authority's Child Protection Service. Ultimately this all led to the referral to police on 12 February 2019 following the formal complaint. The priest explains that the investigation recommenced upon communication of the no prosecution decision on 3 June 2019. Thereafter the process is explained. The priest explains how he informed the applicant's mother of the principal's intention to return to the school and the remedial steps and strategies that would be taken to limit contact between the applicant and the principal. Paragraph 16 of the affidavit refers to one strategy that the applicant could take a friend with her should she need to leave the classroom for any reason. This joint meeting of 8 October 2019 concluded with both parties being happy with the arrangements.

[9] The complaint meetings happened subsequently and resulted in the decision of 11 November 2019 which is under challenge. The priest answers the complaints made against him. At paragraph 23 of his affidavit he makes the point that he operates within a small school setting (26 pupils, 3 teachers) and the success of the school depends upon the Board of Governors working closely with the principal whilst being cognisant of its duties under the relevant legislation. The priest also points out that he acted in the same way towards the applicant's mother. He states that he did not interview children as this was a sensitive issue and a small school. He did have the benefit of a report from the dinner assistant. He states that it was within the remit of the Sub-Committee not to have to circulate all documents.

[10] In the concluding paragraphs of his affidavit the priest expresses the sentiment that his first concern has been to facilitate the applicant's successful education and as part of that her return to school. He states that reassurance measures remain in place. He also refers to mediation as an alternative route to assist relationship building. Finally he refers to the availability of an appeal to the Board of Governors' Appeals Committee.

[11] In the second affidavit of 20 January 2020 the priest explains that he has sought advice from CCMS about the appeal structure. He then sets out the various steps at paragraph 4(i)-(vii) as follows:

"4. The Court will recall from my first affidavit that I have liaised closely with CCMS at all stages in this matter, and I can confirm that I have taken further advice about the nature of the appeal that is available. From that conversation with CCMS, the key points about the appeal are as follows:

i. The appeal process is commenced at the initiative of the complainant parent. This will usually be by way of letter specifying why an appeal is sought. Where the grounds of appeal are unclear, the Appeal Panel will seek to clarify these at this stage.

ii. The process of conducting an appeal is not prescribed, and the Appeal Panel has a broad discretion about the steps that are required to resolve a complaint. The process can be as deep and as wide as the Appeal Panel deems appropriate; however, it must allow the Appeal Panel to form a view whether a proper investigation was carried out and a reasonable determination reached.

iii. The Appeal Panel should begin by ensuring that it has all relevant documents from the initial investigation of the complaint. These should be considered in their entirety.

iv. The Appeal Panel should then invite the complainant parent to a meeting to discuss their appeal. This should be used to ensure that the Appeal Panel has a clear understanding of the grounds of the appeal and whether, for instance, the parent is challenging the manner in which the decision was taken and/or the actual decision itself.

v. Depending on the specific ground of complaint, the Appeal Panel may decide that is has enough information to determine the appeal. However, where it considers that there is a need for more information, it may do any or all of the following:

    a. Meet with the members of the Sub-committee to seek clarity on the process of

investigation, and how their decision was reached;

b. Meet with witnesses to seek clarity on evidence provided to the investigation;

c. Seek any additional evidence/documents that it feels should have been provided during the initial investigation; and

d. Interview any additional witnesses that may provide greater clarity.

vi. On having completed the above steps, the Appeal Panel must reach its decision. If it considers that the original determination should not stand, it should allow the appeal and take whatever steps are necessary in the light of the complaint at hand. In doing so, it should be guided by any applicable policies or circulars.

vii. A decision letter should be sent to the parent, advising him or her of the Appeal Panel's decision."

[12] In replying to this case, Mr Anthony made the following submissions:

(i) Firstly he said there was clearly an alternative appeal remedy (a point not argued in defence of leave which focussed on the Public Services Ombudsman).

(ii) Mr Anthony also made the point that procedural fairness is context specific. This is a very small school where over proceduralisation would cause very real problems day to day.

(iii) In any event he said that an informed observer would not consider there was bias.

(iv) There was no obligation to provide all documents which he said would be akin to defence rights.

(v) The police did not interview all of the other children and there must be a discretion afforded to public authorities to conduct their own procedures.

(vi) Overall, Mr Anthony argued that the case was overegged and should not succeed. Efforts, he said, would continue to reassure the child and her mother with a view to a return to school.

[13] Having considered the written evidence, written arguments and oral submissions I have decided that this case should be dismissed for the following reasons:

(i) Mr McQuitty rightly conceded that the apparent bias point was finely balanced. The test is contained in *Porter v Magill* [2001] UKHL 67 and is well-known. Would a fair-minded and informed observer, having considered the relevant facts, conclude that the tribunal was biased? I think not. The notes taken by the priest whereby he said he "sympathised" with the principal and he was "her chair of the Board of Governors" are authentic statements of his position. The priest also engaged with the mother and sympathised with her. He was placed in a very difficult position. The small community, small school context means in my view that the fair-minded and informed observer, in possession of all the facts would not find bias in these particular circumstances.

(ii) Clearly there is also an effective alternative remedy here. The effectiveness of that is confirmed in the affidavit of 20 January 2020 which has been very helpful albeit it was only provided late in the day and when prompted by the court. Nonetheless, now that the appeal route has been fully explained, this remedy militates against judicial review.

(iii) There is no question as to the lawfulness of the appeal body. It is in accordance with good practice and is not infected with bias as suggested in the argument made by Mr McQuitty.

(iv) I agree in general terms with the respondent's submissions that fairness in any process is context specific. In the light of my finding that an appeal should be pursued it is not necessary or prudent to make any further determination on the specific complaints raised. These issues should be left open for adjudication on appeal in the first instance and can be looked at in another case if they arise.

(v) However, I do make one observation which may be of assistance and in an effort to avoid further litigation. The point is this. There is no strict obligation to provide disclosure of documents as in a court setting. However, in order to satisfy the requirements of procedural fairness an affected person should be able to comment on all relevant information which the adjudicating tribunal has and may rely on subject to any issues of confidentiality or sensitivity which may arise. The mechanism for doing this depends on the circumstances with a degree of flexibility being afforded to the decision making body. See Fordham, Judicial Review Handbook, paragraphs 60.7.5-60.7.12.

[14] I repeat the fact that this is a court of supervisory jurisdiction, not merit review. This is a most unfortunate situation. The case is crying out for speedy resolution. I enjoin the parties to look again at investigating all possible avenues to get this young child back to school. It seems to me that both sides are committed to doing what is best for this child. It is a pity that judicial review was necessary as this is a sensitive issue which would undoubtedly be best worked out in private between the parties. I am going to dismiss the case on the basis of the above.