THE COURT OF APPEAL
UNAPPROVED

Appeal Number: 2022/237
Neutral Citation Number [2023] IECA 52

The President
Edwards J.
Whelan J.

BETWEEN/

THE BOARD OF MANAGEMENT OF WILSONS HOSPITAL SCHOOL

RESPONDENT

- AND –

ENOCH BURKE

APPELLANT

JUDGMENT of Ms. Justice Máire Whelan delivered on the 7th day of March 2023 (Concurring with the judgments of The President of the Court and Mr. Justice Edwards)

Introduction

1. I have had the opportunity of reading and considering in draft form the judgments just delivered herein by the President and Mr. Justice Edwards and I entirely concur with their respective reasoning and conclusions. I make the following supplemental observations.

The statutory framework

2. The respondent is the Board of Management established pursuant to s.14 of the Education Act 1998 (as amended) ("the Act"). As such, pursuant to Part 4 of the said Act and s.14(2) the respondent Board is mandated to *"... fulfil in respect of the school the functions assigned to that school by this Act*…". This clearly encompasses s. 9 in Part 2 of the Act. Section 9(d) provides that:

"A recognised school shall provide education to students which is appropriate to their abilities and needs and, without prejudice to the generality of the foregoing, it shall use its available resources to…

…

(d) promote the moral, spiritual, social and personal development of students and provide health education for them, in consultation with their parents, having regard to the characteristic spirit of the school"

3. Section 15(1) of the Act identifies the functions and duties of a Board thus:

"*It shall be the duty of a board to manage the school on behalf of the patron and for the benefit of the students and their parents and to provide or cause to be provided an appropriate education for each student at the school for which that Board has responsibility*."

Thus, it is evident from the said sub-section that the duties of the school are child oriented. Section 61 of the Act provides:

"(1) Subject to subsection (2), the admission policy of a school shall include a statement (in this Part referred to as an 'admission statement') that the school shall not discriminate in its admission of a student to the school on—

(a) the gender ground of the student or the applicant in respect of the student concerned,

(b) the civil status ground of the student or the applicant in respect of the student concerned,

(c) the family status ground of the student or the applicant in respect of the student concerned,

(d) the sexual orientation ground of the student or the applicant in respect of the student concerned,

(e) the religion ground of the student or the applicant in respect of the student concerned…"

4. Section 15(2) further elaborates:

"(2) *A board shall perform the functions conferred on it and on a school by this Act and in carrying out its functions the board shall—*

(a)…

(b) uphold, and be accountable to the patron for so upholding, the characteristic spirit of the school as determined by the cultural, educational, moral, religious, social, linguistic and spiritual values and traditions which inform and are characteristic of the objectives and conduct of the school, and at all times act in accordance with any Act of the Oireachtas or instrument made thereunder, deed, charter, articles of management or other such instrument relating to the establishment or operation of the school,

(c) …

(d) … ensure that as regards that policy principles of inclusion, equality and *the right of parents to send their children to a school of the parents' choice are respected and such directions as may be made from time to time by the Minister, having regard to the characteristic spirit of the school and the constitutional rights of all persons concerned, are complied with,*

…

(e) have regard to the principles and requirements of a democratic society and have respect and promote respect for the diversity of values, beliefs, traditions, languages and ways of life in society."

The characteristic spirit of the school

5. The characteristic spirit of the respondent school, as referred to in s.15(2)(b) of the 1998 Act (as amended), is expressed as follows: Wilson's Hospital School is a Church of Ireland co-educational post primary school with a Church of Ireland and Anglican ethos under the patronage of the Archbishop and Bishops of the Church of Ireland. "Church of Ireland/Anglican" ethos in the context of a Church of Ireland post primary school means the ethos and characteristic spirit of the Anglican Christian tradition, which aims at promoting:

- *"The education of the whole person regarding their spiritual, physical, intellectual, social, emotional, aesthetic and moral development in harmony with the Christian faith as expressed in the Anglican tradition, which seeks to be characterised by inclusivity in approach, conveying certain values, being reflexive, affirming of the student, and caring. An Anglican ethos is focused on service to the local community as an outworking of the Gospel imperative to reach out to all people in a spirit of engagement and invitation to "come and see" (John 1:39). The ethos of a Church of Ireland school reflects the communal Scriptural values of the faith community, in a positive and encouraging student-centred understanding of living life in the Spirit of God* (Gal 5:25). (emphasis added)
- *An ethos based on the Anglican Christian tradition seeks to nurture and encourage the formation of the intellectual, academic, sporting, social and religious abilities of each child within the framework of the community of faith. A Church of Ireland ethos encourages intellectual diversity of thought and encourages the individual to seek to understand themselves, the world around them and the connection between the world and the Divine. This understanding of school ethos promotes pluralism in thought and living in the*

> *<u>context of a Christian school community.</u> Drawing on its Anglican tradition, the Church of Ireland school encourages parental involvement, highlighting the importance of the family in the social and emotional development of the child, and more broadly, the community of the school and church."* (emphasis added)

6. The core values of the school are said to include "faith, excellence, justice" - which latter value is defined as "*looking for fairness in our dealings with others, seeking to order our lives and the world around us in a context of equality for all people and to address unjust imbalances of power. To embrace compassion for our fellow human beings and to do all we can to make ourselves, our communities and our society conscious of the necessity for compassion, the cause of right and truth*." The core values further include "reflexivity", being "*<u>open to continually being self-reflective, combating our own biases, desires and motivations and engaging with pluralism of thought</u>*."(emphasis added), "Affirming"*: "Conscious of the importance of affirming to all students and staff that they are valued, supported and loved, that they are unique in themselves, are entitled to live their own lives and not to be judged by any external standards, other than how we all engage with those around them in the world."*

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

and "Community".

7. Students of all faiths and none are stated to be welcome at the school provided there is an acceptance of its ethos.

<u>In loco parentis</u>

8. Mr. Burke teaches German and History at the school. He holds, as he is entitled to, gender critical views based on his religion.

9. As more fully outlined in the judgments of the President and Edwards J., the initial precipitating event which led to the institution of the within proceedings occurred on 9th May 2022 when the school Principal communicated with staff, including the appellant, that a student at the school henceforth would be known by a new name and the nominated pronoun "they". The Board characterise the communication from the Principal as "a request", the appellant characterises it as "a demand". In an affidavit filed on or about 12th September 2022, the appellant deposed to having stated that the requirement sought by the school Principal vis a vis the student in question was *"incompatible with my Christian beliefs, the Christian ethos of the school and the welfare of children*."

10. On 10th May 2022, the appellant communicated with, *inter alia*, the school Principal stating:

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

11. The Principal responded approximately twelve minutes later stating: "*All due care has been taken. There is no "agreement" required from Chaplain. There is no suggestion of "force" by or for anyone involved. If you are not willing to include [ ] in your classroom going forward, please make an appointment to see me at our mutual convenience*." The appellant throughout has characterised the communications from the Principal as effectively coercive. As of the morning of 10th May 2022, a primary objection

appeared to be directed against the making of any communication to parents of class-mates regarding the proposal to inform the said students of the request concerning the treatment of the socially transitioning student which had been communicated to the school including by the affected student, parents/family in question. In his email of 10th May 2022 at 10.15 to the school Principal the appellant observed: "*it is wrong that this belief system will be forced upon students and I will be taking this further. It is an abuse of children and their constitutional rights*." A meeting took place on Wednesday 19th May 2022 between Mr. Burke, the Principal and the Deputy Principal of the school regarding the request by the student and the student's parents as to how they were to be addressed and the identifying pronouns to be used henceforward.

12. The Principal in her August 2022 report pursuant to Stage 4 of the Disciplinary Procedures as provided for in Department of Education Circular 49/2018, states concerning the said meeting: " *On 16th May 2022, I invited Mr. Burke to meet with me and Mr. John Galligan, Deputy Principal, to discuss the concerns that had been raised by him by email and at the staff meeting. A meeting took place on the 18th May 2022. At the meeting Mr. Burke asserted that I was preventing him from expressing his personal beliefs, going on to state that I was going out of my way to defy the ethos and teachings of the Church of Ireland. As teachers are required to take a roll in certain classes, in circumstances where Mr. Burke had indicated his unwillingness to address the student by their chosen name and pronoun, I asked Mr. Burke what he would do if he had to call to the roll if this particular child was in his class. Mr. Burke did not respond to my question."* It is noteworthy that Mr. Burke does not deny that he refused to respond to that critical question. He has continued to maintain that stance throughout this appeal. He has offered no credible justification for maintaining that stance nor identified any credible reason why he is unwilling to disclose his intentions on this central issue.

13. In my view, having due regard to the ethos of the school, its published mission statement encompassing core values including justice, reflexivity, the obligation of affirming, caring excellence and faith, as outlined above, the Principal and Deputy Principal had a clear obligation to pose the said question to the appellant and an immediate need in the proper discharge of their functions and duties in law to ascertain with clarity and candour from Mr. Burke how he proposed to conduct himself in the school setting vis a vis the student in question. His refusal to provide clarity as to how he proposed to address, treat and engage with the student in question presented a substantial issue of concern to the management of the school not alone in light of the school's statutory obligations but having regard to the fact that it stood in law in *loco parentis* to the student in question.

14. Mr. Burke does not deny that he did not provide the reassurance sought in the email of 27th May 2022 by the Principal where she stated: *"I expect that you will communicate with this student in accordance with the wishes of the student and the student's parents*". It was abundantly evident that he had no intention of complying with the said request.

15. Thus, the Principal and Board of Management at the school were confronted with a state of affairs from and after 27th May 2022 that Mr. Burke did not intend to communicate with this student in accordance with the wishes of the said student or the student's parents and the requests of the Principal.

"all teachers have interaction with all pupils"

16. At the hearing on 16th February 2023, in response to questions from the President of this Court, Mr. Burke made clear to the Court that whereas, at the time, the student in question was not one of his pupils in the sense of attending one of his classes, however, *"... all teachers have interaction with all pupils, it may be in the corridors, it may be covering a substitute class which all teachers are obliged to do under S&S as it's known... it may be*

extra work taken on to assist another teacher… it would be seen as a small school, it has approximately 400 students" (Transcript of hearing, p.19, lines 23 – 31). When (at p.28 of the Transcript) the Court enquired of Mr. Burke how he anticipated interfacing with the student he chose to answer another question in the first instance stating "*the request was unlawful*" (p.28, line 26 Transcript). When he was requested to indicate how he intended to address the student in question his answer was equally evasive *"… I certainly wouldn't have addressed them in an unlawful - - in a manner that did not act - - wasn't in accordance with the law…"* Having indicated how he intended not to address the student, quite alarmingly, he declined to give a candid or coherent answer to the question how he would actually address the student. He stated "*…Well, that … - that hasn't arisen in this case*…" He further, and quite extraordinarily, contended *"… At no stage had this anything to do with a child in the sense of immediate contact or being in the vicinity or an interaction such as the one postulated by the Court. That is absolutely not the case and this speaks to the absurdity and the legal absurdity of the whole thing.*" This is entirely inconsistent with the position he had outlined to the Court earlier and as recorded at p.19 of the Transcript where he asserted that "*all teachers have interaction with all pupils*".
It goes without saying that the school and also Mr. Burke were acting *in loco parentis* vis a vis each student, including the student in question.

Relevance of rights of affected student

17. It is self-evident that in light of the refusal on the part of Mr. Burke to disclose how he proposed to interface with the student concerned or what he proposed to do and in circumstances where he had communicated a clear intention not to comply with the requests of the Principal which she considered necessary concerning appropriate social interaction with the student in the school context, that the respondent Board and the

Principal would have concerns regarding the discharge of their obligations concerning the protection of the welfare of the student in the school setting.

18. This state of affairs arose not because of Mr Burke's religion but because his said conduct was potentially untenable insofar as the uncertainty created by his refusal to identify his proposed course of action presented the school with a risk of potential discrimination towards an individual student.

19. The school had a real and immediate need to know how Mr. Burke intended to engage with the student, to communicate with the student and to behave towards the affected student. Given the position of influence and status he enjoyed within the school as a teacher, his proposed conduct – by act or omission - could be expected to influence the behaviour of other children towards the student in question also. Mr Burke's stance that this information was of "*...no relevance...*" (p.30 line 4 of transcript) is simply untenable.

20. Contrary to Mr. Burke's contentions the safety, health and welfare of the individual student is of central importance in this case. In was incumbent upon the school to ensure that a parental request that respect be afforded by the school for the diversity arising should be accommodated in accordance with the school's own Admission Statement and characteristic spirit. As stated above, both the school and Mr. Burke stood *in loco parentis* to the student. It was incumbent upon the school to ensure that no conduct, by act or omission, as might cause harm or be potentially discriminatory or that could impact detrimentally upon the student in question or the student body would be engaged in. A balancing exercise was required to be carried out between the rights of Mr. Burke to hold the beliefs, which he undoubtedly sincerely does, on the one hand and their obligations towards the student to ensure that conduct - whether act or omission - as could potentially cause harm would not be engaged in towards the minor.

21. Mr. Burke has failed to identify any legitimate basis for his continuing refusal to disclose to the school how he intended to address the student. Merely identifying that he would not comply with the request of the school – as he clearly did - does not constitute an answer that might reasonably address the concerns of the school which were welfare-oriented as regards the student in question. Mr. Burke's refusal to engage with the school or put forward any proposal or to disclose his hand as to what course he intended to adopt represented a significant and material concern for the school including the Board of Management since having confirmed that he would not comply with the request of the school the ensuing uncertainty reasonably gave rise to serious concerns as to how he might actually behave or act in the school in future and the potential impact or risks his behaviour – by act or omission - might have, not alone for the student directly and immediately affected, but for the entire student body, the staff and the school.

Religious Service in Chapel

22. A particular feature of Mr. Burke's approach is the degree of verbal aggression and disrespect exhibited in his engagement particularly towards the school Principal. Such conduct is alluded to as having taken place in the confines of a staff meeting in May 2022. More importantly on Mr. Burke's own version of events he interrupted a formal church service on the 21st June 2022 at the school at which the officiant was Bishop Glenfield. His demeanour and unorthodox behaviour were very much evident in the course of the presentation of his appeal before this court. He granted himself free rein to speak disparagingly about and deploy language calculated to traduce and demean those with whose conduct or decisions he did not agree. The conduct of Mr. Burke at the religious service in the chapel was wholly disrespectful towards the school Principal and entirely inappropriate. By the standards of civilised behaviour his conduct was simply outrageous.

23. Mr. Burke in his "Defence and Counterclaim" (para. 9) delivered the 13th January 2023 characterises the events thus:

> *"At the close of the service, Bishop Glenfield spoke to Principal McShane stating 'We pray God would bless you as go to Bandon now' At this point the Defendant stood up and begged the Principal publicly to withdraw her demand, noting that her demand was contrary to Scripture and his Christian beliefs, the vision of the school's founder being commemorated (Andrew Wilson) and the teaching of all Christian churches. The contribution was measured, respectful and reasonable, in light of the stated purpose of the service being to commemorate and reflect on 260 years of Andrew Wilson's legacy. Following his contribution, which was less than two minutes, the defendant resumed his seat and Bishop Glenfield pronounced the benediction. Following the service, after a dinner held in a nearby hall, the Defendant spoke briefly to the Principal, asking her to withdraw her demand."* (para.9)

24. In an affidavit filed on the 12th September 2022 Mr. Burke deposes that he is quoting from "*the exact transcript of my contribution…".* Quite how the said *"exact transcript"* came into existence is unclear and in particular as to whether he recorded same or attended the ceremony with a prepared manuscript from which he then read. Mr. Burke characterises his imposition and interruption of the religious service being carried out by the Bishop as being a *"contribution".*

25. By any objective measure his conduct was highly confrontational and calculated to cause maximum embarrassment and stress to the school Principal and to undermine her publicly and openly in front of key stakeholders, parents, some students, clergy, members of the church hierarchy, and other persons connected with the school as well as teachers.

26. The focus of Mr. Burke's preoccupation appears to have been ostensibly directed towards *"the spiritual development of children".* That is, of course, one of the important factors specified in s. 9(d) of the Act. However, other consideration such as the moral, social and personal development of the student are equally relevant and encompass the need for mutual respect to be engendered as between teachers and students and between students *inter se*. Respect for equality, diversity, human dignity, inclusivity, tolerance and the safety, health mental and moral welfare of the particular student are not to be debased or reduced to nothing in the balancing exercise necessarily arising pursuant to the Act and were not addressed or engaged with at all by Mr Burke who, in effect, contends that they "*were not relevant*"… Neither does the Act permit a teacher to construe or impose obligations concerning *"the spiritual development of children"* in such a way as to discriminate against a student or to unilaterally impose values not shared by and contrary to the wishes of a student and their parents.

27. By any measure the disruption of the Chapel Service in June 2022 at which the Bishop was officiating was wholly unorthodox and Mr. Burke's lack of insight into the inappropriateness of his behaviour speaks to either his inability or unwillingness to engage in dialogue or discussion as one might conventionally expect to find in a school setting where through the mechanism of dialogue a means would be arrived at which would be mutually respectful of the teacher's concerns on the one hand and the spiritual and moral values of a student and their family on the other.

28. The appellant appears to lack all insight into the extent to which his conduct was inappropriate, undermining, intimidating, contumelious towards and demeaning of the school Principal. Even on his own version of events, his behaviour was confrontational and wholly out of place having regard to the nature of the event as a ceremony of religious worship, the wide variety of attendees and the solemnity of the occasion. His approach in

all matters appears to be directed towards getting his own way at all costs whilst being incapable and/or unwilling to engage in respectful dialogue in an effort to achieve a mutually acceptable compromise which might adequately address his concerns. One is driven to the conclusion that he quite enjoys conflict and confrontation and the passing notoriety his wilful and contumacious contempt of court has bought him.

29. From the school's perspective there was from that date a self-evident need to establish a minimum threshold to protect and vindicate the human dignity of an individual student given their specific personal circumstances and the wishes and views of parents so as to ensure that the student would not be vulnerable to discrimination in terms of the respect to be afforded them and would not suffer less favourable treatment than other students and would not be at risk of exposure to potentially harmful or discriminatory treatment. The school could not reasonably countenance the risk that a student would be exposed to harm in respect of their social and personal development contrary to s.9(d) of the Act. Mr. Burke's sustained and wilful refusal and neglect over time to disclose to the school how he proposed to communicate with the particular student from day to day in the daily interface that was integral to school life posed such a risk. It also potentially breached Mr Burke's own legal obligations towards the minor in question towards whom he stood *in loco parentis,* as already stated.

The Law

30. As McMahon and Binchy observe in *Law of Torts,* (4th Ed., Bloomsbury Professional, 2013) at para. 16.16:

> "*Clearly teachers and those involved in the management of schools have a duty of care in relation to pupils to attend the school. The element of proximity of relationship and foreseeability of potential injury could scarcely be more pronounced."*

31. The sustained failure of Mr. Burke to ever put forward any positive proposal as to how he actually intended to engage with with the student in question by of late August 2022 can only have left the school in a profound level of uncertainty and grave concern with regard to the nature and extent of any risks inherent in his stance vis a vis the student body, the management of the school and the welfare of students including, in particular, the individual child concerned. It was exclusively in the hands of Mr. Burke to address the reasonable concerns of the school and abate its concerns about the potential risk of harm and the legitimate concerns his refusal to answer gave rise to or that intimidatory conduct might be experienced by a student. He wilfully refused to resolve the matter or provide the reasonably requested information to the school.

32. Mr Burke in his submissions purports to rely upon the decision of *Meriwether v Hartop* 992 F.3d 492 (6th Cir. 2021). However**,** in *Meriwether,* there were crucial distinguishing factors. Firstly, the student in that case was an adult. Here the student is a minor. In *Meriwether* the lecturer engaged actively with management and proposed to always address each student by their chosen surname or forename. Here Mr Burke makes no such accommodation and offers no proposal.

33. It would be very evident to any right-minded or reasonable person that the continuing conduct of Mr Burke attending at the school grounds daily is not alone a wilful contempt of court but visits anguish and ongoing stress and anxiety upon the minor concerned and those who care about their welfare.

Religion

34. The courts will pay every respect to the individual's right to hold and subscribe to religious principles. The Constitution demands no less. There is however a significant distinction to be drawn between the Constitution's protection of individual freedom of

conscience and the free profession and practice of religion which, as Article 44.2.1 expressly states, are *"…subject to public order and morality, guaranteed to every citizen".*

35. *Kelly on The Irish Constitution* (5th ed., Bloomsbury Professional, 2018) at para. 7.9.45 observes:

> *"Unlike the European Convention on Human Rights, art 9, which guarantees freedom of thought, conscience and religion without qualification and permits restrictions only with regard to expression of belief, Article 44.2.1 qualifies freedom of conscience and the free profession and practice of religion by reference to public order and morality."*

36. Walsh J. in *Quinn's Supermarket Ltd. v. Attorney General* [1972] IR 1 observed at pp. 24/25: *"The primary purpose of the guarantee against discrimination is to ensure the freedom of practice of religion."* Subject to public order and morality the Constitution protects the right to profess and practice a religious belief. It is an entirely different proposition to suggest, as Mr Burke appears to, that the law automatically protects the substance or content of any particular belief system, particularly where such involves exercise in a school setting and is calculated to deny, diminish or even destroy the personal and fundamental rights of another, in particular a child, or where such conduct is discriminatory towards another person or is incompatible with the child's human dignity.

37. Mr. Burke has identified no authority for a proposition which appears to underpin his arguments that he is a person who is exempt from all consequences not alone in the expression his beliefs but in the imposition of the impact those beliefs, by act or omission, on a child by conducting himself in a school setting in accordance with his stated beliefs notwithstanding that to do so risks having a harmful impact on the individual student and the entire student body. His unorthodox and gratuitous behaviour in asserting his rights

undermine the authority of the school and its Principal and the norms conventionally operating in a school setting.

The European Convention on Human Rights

38. The European Convention on Human Rights Act 2003 provides:

> "2**.** (1) *In interpreting and applying any statutory provision or rule of law, a court shall, in so far as possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions*."

Thus in interpreting the obligations of the Board pursuant to the Education Act of 1998 (as amended) regard must be had to the terms of the Convention.

39. Article 9(1) of the Convention protects the right of freedom of thought, conscience and religion including freedom to manifest religion or belief. Article 9(2) provides certain limitations which in substance acknowledge that the manifestation of faith/religion or beliefs may impact upon others which warrant the delimitation of the protections afforded by Article 9(1). Article 10(1) of the Convention protects the right to freedom of expression. Same is qualified by virtue of Article 10(2) which states that the exercise of the freedoms can be curtailed if prescribed by law and if necessary in a democratic society for the protection of the reputation or rights of others.

40. It will be recalled that pursuant to Article 17 of the Convention it is provided that:

> *"Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."*

In substance Article 17 precludes the use of the Convention to destroy the rights of others.

41. Mr. Burke is entitled to hold gender critical beliefs which he says are an intrinsic part of his religion. However, in a school setting where individuals and children of differing faiths and none coming from families where parents subscribe to various faiths, religions or none a balancing exercise is called for. Articles 9 and 10 of the Convention do not create absolute rights as is self-evident. An individual teacher is not entitled to engage in conduct in a school setting in the professed exercise of his religion which involves violating a child's dignity or generating, creating or promoting an environment in the school vis a vis the particular student that is degrading, intimidatory discriminatory or otherwise capable of creating or promoting a hostile atmosphere towards the studentin question. Such would violate s. 9(d) of the 1998 Act and is otherwise contrary to law.

42. Edwards J. in his judgment outlines in great detail the history of the European Convention on Human Rights relevant to this case including *Goodwin v. United Kingdom* [2002] 35 EHRR 447 and comprehensively deals with the jurisprudence in this jurisdiction including, *Foy v an tArd-Chlaraitheoir & the Attorney General & Ors (Nos.1 & 2)* [2007] IEHC 470, [2012] 2 IR 1.

43. It is noteworthy that subsequently in *Eweida & Ors v United Kingdom* [2013] IRLR 231 (ECHR) the European Court of Human Rights essentially held that religious freedom pursuant to Article 9 of the Convention encompasses freedom to manifest one's religious beliefs in public. However, the Court reasoned that since manifestation of religious beliefs might impact upon others, Article 9(2) allowed these to be curtailed or limited by national law, to the extent that the limitation is necessary in a democratic society. The court acknowledged that Member States enjoy a margin of appreciation when deciding whether interference with such a right is necessary having carried out any valuation as to whether restrictions that obtained in the workplaces in the cases before it were proportionate. In assessing proportionality consideration was to be given to striking a fair balance *"...*

between the competing interests of the individual and the community as a whole" see at para.84 of judgment. It will be for the trial judge to consider all of these matters in the light of the evidence which the parties adduce at the plenary hearing of this case.

44. We live in a free and democratic society. In the administration of justice courts must maintain an essentially neutral view of religious beliefs nor is a court entitled to maintain a stance with regard to the core tenets or doctrinal values inherent in any particular religion. In general each religion is entitled to equal respect. The courts have no function in adjudicating as to whether a particular tenet is or is not encompassed in any particular faith. The United Kingdom Supreme Court in *R (E) v. Governing Body of JFS & Anor. United Synagogue & Ors. Intervening)* [2009] UKSC 15 and [2010] 1 All ER 319 stated at para. 157: *"It has long been understood that it is not the business of the courts to intervene in matters of religion."*

45. In *R (Johns & Anor.) v. Derby County Council* [2011] EWHC 375 Munby J. observed:

> *"…it is important to realise that reliance upon religious belief, however conscientious the belief and however ancient and respectable the religion, can never of itself immunise the believer from the reach of the secular law. Any invocation of religious belief does not necessarily provide a defence to what is otherwise a valid claim".*

46. In *McFarlane v. Relate Avon Limited* [2010] EWCA 880 Laws LJ observed:

> *"In cases of indirect discrimination… the law forbids discriminatory conduct not by reference to the actor's motives but by reference to the outcome of his or her acts or omissions. Acts or omissions may obviously have discriminatory effects and outcomes, as between one group or class of persons and another, whether their motivation is for good or ill; and in various contexts the law allows indirect*

discrimination where, in a carefully controlled legislative setting, it can be shown to have justifiable effects."

47. Elsewhere in *McFarlane* Lord Laws at paras. 21-22 of his judgment observed:

"21. The common law and ECHR Article 9 offer vigorous protection of the Christian's right and every other person's right to hold and express his or her beliefs, and so they should. By contrast, they do not, and should not, offer any protection whatever to the substance or content of those beliefs on the grounds only that they are based on religious precepts. These are twin conditions of a free society. The first of these conditions is largely uncontentious. I should say a little more, however, about the second. The general law may of course protect a particular social or moral position which is espoused by Christianity, not because of its religious imprimatur, but on the footing that in reason its merits commend themselves. So it is with core provisions of the criminal law, the prohibition of violence and dishonesty. The Judea-Christian tradition, stretching over many centuries, has no doubt exerted a profound influence upon the judgment of law-makers as to the objective merits of this or that social policy…. But the conferment of any legal protection or preference upon a particular substantive moral position on the ground only that it is espoused by the adherents of a particular faith, however long its tradition, however rich its culture, is deeply unprincipled; it imposes compulsory law not to advance the general good on objective grounds, but to give effect to the force of subjective opinion. This must be so, since, in the eye of everyone save the believer, religious faith is necessarily subjective, being incommunicable by any kind of proof or evidence. It may, of course, be true, but the ascertainment of such a truth lies beyond the means by which laws are made in a reasonable society. Therefore it lies only in

the heart of the believer who is alone bound by it; no one else is or can be so bound, unless by his own free choice he accepts its claims.

22. The promulgation of law for the protection of a position held purely on religious grounds cannot therefore be justified; it is irrational, as preferring the subjective over the objective, but it is also divisive, capricious and arbitrary. We do not live in a society where all the people share uniform religious beliefs. The precepts of any one religion, any belief system, cannot, by force of their religious origins, sound any louder in the general law than the precepts of any other."

48. It is noteworthy that in *R.(Williamson & Ors.) v. Secretary of State for Education and Employment* [2005] 2 WLR 590 the English Court of Appeal drew a sharp distinction between the right to express religious beliefs and the right to manifest those beliefs noting that the freedom to hold a belief is an absolute right whereas the right to manifest a belief is a qualified right. The analysis took place in the context of the Article 9(2) of the European Convention on Human Rights. Lord Nicholls observed at para. 23 observed that everyone was:

"... entitled to hold whatever beliefs he wishes. But when questions of 'manifestation' arise, as they usually do in this type of case, a belief must satisfy some modest, objective minimum requirements. These threshold requirements are implicit in Article 9 of the European Convention and comparable guarantees in other human rights instruments. The belief must be consistent with basic standards of human dignity or integrity. Manifestation of a religious belief, for instance, which involved subjecting others to torture or inhuman punishment would not qualify for protection."

49. The case concerned teachers and parents who sent their children to private schools established to provide a Christian education based on biblical observance which included,

for religious reasons, corporal punishment. In that case Lord Nicholls noted that a ban on corporal punishment had been prescribed by primary legislation in clear terms and that such a ban was in pursuance of a legitimate aim:

> *"… children are vulnerable, and the aim of the legislation is to protect them and promote their wellbeing. Corporal punishment involves deliberately inflicting physical violence. The legislation is intended to protect children against the distress, pain and other harmful effects this infliction of physical violence may cause. That corporal punishment may have these harmful effects is self-evident*."

50. Elsewhere in the said judgment, at para. 58, citing the Australian High Court decision of *The Church of the New Faith v. Commissioner of Pay-Roll Tax (Victoria)* (1983) 154 CLR 120 at 136 (Mason ACJ and Brennan J.) that *"Religious conviction is not a solvent of legal obligation"*, the court observed:

> "*In my opinion the filters are to be found (first) in the concept of manifestation of religion or belief and (second) in Article 9(2), which qualifies an individual's freedom to manifest his religion or beliefs (in the four ways mentioned in Article 9(1), worship, teaching, practice and observance by 'such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety for the protection of public order, health or morals or for the protection of the rights and freedoms of others.'"*

51. I am satisfied that Mr. Burke is mistaken insofar as he contends that the interests of the child in question are not relevant or are not engaged in these proceedings. As recently as 2015 the people of this State in a referendum added Article 42A to the Constitution. It is worth recalling that Article 42A.1 provides *"The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights."*

The interim injunction

52. I am in entire agreement with the analysis and conclusions of the learned President and Mr Justice Edwards regarding the judgments and orders under consideration in this appeal. I merely make a few selective further observations. By formal notice in writing dated the 24th August 2022 Mr. Burke was notified that the respondent Board had:

> *"…decided that with immediate effect you should be placed on administrative leave with pay pending the outcome of the current disciplinary process. I would like to assure you that this decision is a temporary decision, and does not comprise a disciplinary sanction of any kind*."

53. The issues to be determined at the plenary hearing include whether the Board is entitled to a declaration that Mr. Burke is on paid administrative leave pending the outcome of a disciplinary process and whether the Board is entitled to a declaration that its decision to put Mr. Burke on such paid administrative leave is lawful. Those issues are fully contested. The affidavit filed in the proceedings to date contain irreconcilable differences as between the parties concerning significant facts the resolution of which will be critical to the findings and determination of the court at trial. Such differences cannot be resolved on affidavit but rather require a consideration of the evidence of witnesses as may be adduced by each side. They must await the trial of the action which it is understood is due shortly to take place.

Interim Injunction

54. That being so the first question is whether the interim injunctions obtained *ex parte* by the Board was validly granted. As a general rule injunctions should only be sought on an *ex parte* basis where, in the language of Clarke J. (as he then was) in *Dowling v. Minister for Finance* [2013] 4 IR 576 *"… there is no feasible alternative in order to protect the rights asserted".* However, he did make clear that in circumstances where even

a short period of notice ran the risk of irreparable harm occurring *"... it is appropriate for a court to make an interim order"* at *p.610* of the judgment. It was clear to Judge Stack at the interim hearing on the 30th August 2022 that substantive proceedings were in being raising significant issues seeking, *inter alia,* the declaratory reliefs expressly set out above and also seeking a wide range of injunctions restraining Mr. Burke, *inter alia,* from failing to comply with the directions of the school Board, from trespassing upon the property of the school, interfering with an appointed substitute teacher discharging duties and teaching, restraining Mr. Burke from attempting to teach any classes or any students for the duration of his paid administrative leave and restraining him for attending at the premises of the school for the duration of his paid administrative leave.

55. Concerning an interim injunction the leading author Hilary Biehler observes in *Equity and the Law of Trusts in Ireland* (7th Ed, Round Hall, 2020) at p.619: "*Where a matter is particularly urgent a plaintiff may apply for such an order on an ex parte basis and the order will generally continue until the next motion day when the defendant will have the opportunity to put his side of the case."* Biehler also observes "*... an interim injunction is obtained for a limited period and will have effect only until a further order is made and is often, although not invariably, sought on an ex parte basis*."

56. I am in entire agreement with the learned President and Mr. Justice Edwards in their assessment that a High Court judge rendering an *ex tempore* judgment on foot of an *ex parte* application for interim relief is not required to reference or recite all the relevant legal principles governing the granting of such relief. The said judge demonstrated a clear grasp of the material facts, stress-tested the propositions advanced and had proper regard to all relevant and material factors. The key material fact was adverted to *viz.* that Mr. Burke had been put on paid administrative leave by the school Board. The validity or otherwise underpinning the process that led to same demonstrably was a matter to be determined at

the trial of the action after a full hearing in light of the reliefs being sought in the plenary summons. She correctly analysed that, on the evidence adduced, that measures taken by the Board should stand until any determination is made by a court of competent jurisdiction that it had not been validly made.

57. In evaluating whether the said judge considered and determined that there was a fair issue to be tried disclosed by the application it is necessary to have regard not just to the transcript of what was said in court but the grounding affidavit, the writ, the *ex parte* docket and the exhibits that were before the court. It is self-evident from a consideration of the said material in light of the queries and observations made by the said judge that she gave consideration to the issue as to whether a fair issue to be tried was made out on the material before her and was satisfied that there was. In that assessment she was correct. It is implicit that she attached weight to the fact that the appellant was on paid administrative leave. Further through a series of queries it was evident that she was stress-testing the legal basis on which the appellant might go upon the property of the Board - the school premises. The evidence demonstrated *prima facia and* as a matter of law that his license to enter upon and remain on the school premises had necessarily been abrogated as of the 24th of August 2022 on foot of the terms of the letter from the Board informing him that he had been put on paid administrative leave pending the disciplinary process concluding.

58. It is particularly significant that Stack J. ordered on the 30th of August 2022 that the Board's solicitor *"Be at liberty to notify the making of this order forthwith to the defendant by email and in accordance with the Rules of the Superior Courts".* Further the court was granted liberty to serve short notice of motion for an interlocutory injunction returnable on the 7th of September 2022. It was a short-term holding measure to maintain the *status quo* that allowed the school to operate with the least risk of harm to any student. Further the appellant was on notice of the making of the order as and from the 30th of August 2022. If

he quibbled with or disputed any aspect of the said order or the factual material underpinning same, it was open to him to seek to re-enter the proceedings before the High Court ahead of the return date. He freely elected not to do so. Rather, having been served with the order perfected on the 30th of August 2022 with a penal endorsement thereon of even date he elected to ignore the order, defy its terms and continue to trespass upon the premises of the school.

59. I am satisfied that there was evidence before Stack J. on the 30th August 2022 to which she had regard which established that the Board had established a fair and *bona fide* question to be tried. It is a matter for the plenary hearing as to whether the process leading to the decision whereby the appellant was placed on administrative leave is lawful or unlawful and such evidence in respect of same can be adduced by the parties as they see fit. I am further satisfied that the respondent Board did have an arguable case made out on affidavit that supported the granting of the order. Further there was clear urgency in circumstances having due regard to the conduct of Mr. Burke, his continued attendance at and presence upon the private property of the Board in the context of him having been suspended on paid leave pending determination of the disciplinary process. Given that there was clear evidence on affidavit and documentary proof supporting same to satisfy Stack J. that Mr. Burke implied authorisation to be present upon the property had been revoked, I am satisfied that Stack J. was correct in her assessment and in the making of the orders as granted which were limited and proportionate.

Orders of Barrett J. 7th of September 2022

60. It is contended, *inter alia,* that Barrett J. erred in refusing to take Mr. Burke's submissions into account on that date. And further that he erred in refusing "… *to consider the Appellant's submissions regarding his freedoms of religion, conscience and expression"* at the hearing. "*The Court erroneously ruled these matters could not be taken*

into account at the interlocutory application stage and were relevant only at the full hearing of the dispute or at the hearing of the disciplinary process. The Court fundamentally erred in stating that the case was not about the Appellant's beliefs and fundamentally erred in stating "This case is not about transgenderism". The Court's refusal to consider the matters raised by the Appellant constituted a failure to consider the whole case in the round which is its legal duty when considering whether to grant injunctive relief." Mr. Burke relies on *HI, RB v, Minister for Justice Equality and Law Reform* [2007] IEHC 447 *"The Court must look at the whole case in the round"* and he also relies on *Hubbard v. Vosper* [1972] 2 QB 84 at 96 *"in considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case".*

61. Mr Burke further asserts that;

(ii) *The court erred in failing to properly distinguish between matters being finally decided and matters being taken into account.*

(b) The court erred in finding that there was a fair and bona fide question to be tried. The decision to put the appellant on administrative leave is plainly and manifestly unlawful.

(c) the court erred in finding that the balance of justice favoured the granting of the reliefs sought to the plaintiff

(i) The court erred in failing to consider the appellant's constitutional rights in weighing the balance of convenience and balance of justice. The effect of the order of the High Court is to deny the appellant the undoubted right to have his constitutionally guaranteed rights enforced.

(ii) the court erred in failing to take account of the appellant's stated conscientious objection to compliance with the terms of the proposed injunction in its consideration of the balance of justice.

62. Mr. Burke was aware of the return date for the interlocutory hearing from the 30th August 2022. The matter was being heard on affidavit. He took no step to put an affidavit to put before the High Court in response to or engaging with any of the averments contained in the grounding affidavit filed on behalf of the Board. Procedurally, if Mr. Burke wished to dispute or contradict any averment in the affidavit of the 30th August 2022 of Mr. Rogers it was incumbent on him to ensure that such an affidavit was before the court on the return date of the 7th September. However, it appears, that 48 hours or so before the return date he was taken before the High Court and committed for contempt of court having refused to comply with the orders of the court and trespassed on the school property. Hence Mr. Burke had not put any issue pertaining to freedom of religion, conscience or expression in issue appropriately on the return date.

63. Further in any event given the nature of the application and the fact that there clearly was an irreconcilable dispute between the Board and Mr. Burke in regard to virtually all the material facts and circumstances obtaining, Barrett J. was correct in his assessment that the determination of all these irreconcilable factors would fall to be decided at the substantive hearing. What was at issue accordingly was not the determination of substantive rights of either party but whether holding measures of the kind being sought on behalf of the Board were warranted in the form of interlocutory orders pending an early hearing. If one considers the check list of factors that would be uppermost in the mind of a judge carrying out the exercise of determining an application for an interlocutory order and as outlined by O'Donnell J. (as he then was) in *Merck Sharpe and Dohme Corporation v. Clonmel Health Limited* [2019] IESC 65 the court would consider whether if the school succeeded at the trial a permanent injunction might be granted. Clearly if the declaratory orders being sought in the plenary summons were granted at the conclusion of the trial, permanent injunctions of the kind being sought in the notice of motion particularly at

paras. 3-7 inclusive, would be granted, then there is the question of the fair question to be tried.

64. O'Donnell J. in *Merck* expressed the view that the assessment of the fair question may also involve a consideration of whether the case is of a kind that will probably go to trial. In the instant case it was very clear, given the irreconcilable difference of views between the Board and Mr. Burke that the matter would go to trial. O'Donnell J. was of the view in *Merck* that the straightforward application of *American Cyanamid* and *Campus Oil* would frequently yield the correct outcome. It will be recalled in *Chieftain Construction Ltd. v. Ryan* [2008] IEHC 147, a decision which has been cited in textbooks subsequently including *Equity and the Law of Trust in Ireland" Bieheler* (*opus cit*.) at p. 654 as the author observes:

> "*Edwards J. posed a question of whether the court's assessment should be confined to an issue of substance in the narrow sense, namely the utility of the argument, or whether the substance of the point should be considered in the broad sense, namely as encompassing both the utility and the strength of the case put forward. He said that he could derive no clear guidance from the judgments in Campus Oil as to whether regard could be had to the strength of the case in considering whether the plaintiff had raised a fair or substantial or serious issue to be tried but added that the interchangeability of the adjectives employed suggested strongly to him that what was required was a consideration of the "substance" of the point raised in the broad sense*."

Hilary Biehler then quotes from Edwards J. in the said judgment:

> " *…it seems to me that any evaluation of a plaintiff's prospects of success must necessarily involve a consideration of both the utility and the strength of the point in question. Moreover, the use of the adjective "real" imports a need to evaluate the*

"reality" of the prospects of success and that requires an examination, if it be possible, of the strength of a plaintiff's case."

At p. 655 Biehler observes:

"The reality, as Edwards J. adverted to in Chieftain, is that in many cases there will be conflicts of evidence which cannot effectively be resolved on the basis of affidavits alone and in such cases a court must be wary of making a determination based on the strength or otherwise of a plaintiff's claim. However, there is certain merit in the view expressed by Laddie J. in Series 5 Software Limited v. Clarke [1996] 1 All ER 853 *to the effect that where a court is in a position to form a clear view as to the relative strengths and weaknesses of the parties' cases on the basis of credible evidence adduced at the interlocutory stage it may take this into account, at least in assessing whether a serious or fair question has been made out."*

65. Having carefully considered the transcript of the hearing of the 7th September 2022 I am satisfied that a proper consideration did take place on the part of the judge as to whether a fair question to be tried had been established. The trial judge had the consideration of the existence of a fair question clearly uppermost in his mind. He observes at p.25 lines 25/26:

"Turning then just to the application in hand, is there a fair question to be tried? There is. The fair question is the issue of the suspension and was it lawful or not and what does that mean. So that is the fair question. I note that what is being sought is a prohibitory injunction not a mandatory injunction and as a consequence the burden is relatively low for the Board. "

As O'Donnell J. observed in *Merck* at para.64(3)

"If there is a fair issue to be tried (and it probably will be tried), the court should consider how best the matter should be arranged pending the trial, which involves a consideration of the balance of convenience and the balance of justice."

66. In a sense the balance of justice might be conveniently considered to be an element or aspect of the balance of convenience. Given the nature of the issues involved in this case including the fact that the property in question constituted a school attended by 400 young people, that a pupil who was a minor enjoying the protections provided for a child in law stood at risk from the wilful refusal of Mr. Burke to disclose how he intended to treat them, and where a serious and significant difference of views had emerged between Mr. Burke and the Board and Principal of the school with regard to the treatment of an individual student, it is difficult to see how Mr. Burke could contend that a fair question to be tried had not been established. In a sense his denial that a fair question to be tried existed as of 7th September 2022 speaks to his lack of insight into the welfare concerns that clearly animated the school and underlined the school's application for injunctive relief and the pressing sense of urgency concerning the welfare of the school children that has led to the applications and litigation being brought by the school in the first instance.

67. The decision in *Hubbard v. Vosper* [1972] 2 QB 84, which Mr. Burke seeks to rely upon does not assist him but rather supports the Board and makes clear *per* Denning MR p.96 that in granting an interlocutory injunction it is to be borne to mind that it is a remedy which *"... should be kept flexible and discretionary... and must not be made the subject of strict rules*" Biehler (*opus cit.)* points out at p.649 *"In principle, a court may grant an injunction of an interlocutory nature whenever it is 'just and convenient' to do so*", citing s.28(a) of the Supreme Court of Judicature (Ireland) Act 1877 and Order 50, r.6 of the Rules of the Superior Courts, 1986. This flexibility was also emphasised by O'Donnell J. in his judgment in *Merck Sharpe and Dohme.* It is evident from the brief decision of

Barrett J. on 7th September 2022 that he did look at the case as a whole such as it was and having regard to the state of the pleadings as of the 7th September. On that occasion he had before him the plenary summons, the *ex parte* motion, the notice of motion which had issued on the 31st August 2022 and the grounding affidavit of Mr. Rogers.

68. I am in full agreement with the President and Edwards J. that in the application of the principles governing the granting of an interlocutory injunction Barrett J. was correct in accepting that the balance of convenience on the evidence before him lay in favour of granting the injunctions sought. It was beyond doubt that Mr. Burke's continued attendance at the school would cause disruption to the operation of the school. It was logical and stood to reason and would be self-evident to any fair minded person that his presence would cause upset at least to some of the pupils. I am in agreement with the views of Edwards J. that the focus of attention of the judge when he considered prejudice was financial prejudice to Mr. Burke rather than prejudice per se in the interim pending the full hearing.

69. The context of the hearing is also relevant insofar as in the course of that hearing, and as the order of the court records, Mr. Burke refused to purge his contempt. The nature of the orders granted are worthy of note also. Two of the orders directly pertained to restraining trespass on the school property including attending at the premises for the duration of his paid administrative leave and trespassing on the property of the school.

70. I am in agreement also that the issue of adequacy of damages was properly determined and it was demonstrable from a perusal of the affidavit and exhibits before the court on that date that, given the statutory and legal obligations of the Board, damages would not be an adequate remedy for the School Board. The court quite properly noted that the school had furnished an undertaking as to damages in the ordinary way. The approach of Barrett J. aligns with the analysis of O'Donnell J. in *Merck Sharpe and Dohme*

at 64(8) where he emphasised the essential flexibility of the remedy of the interlocutory injunction noting: *"While a structured approach facilitates analysis and, if necessary, review, any application should be approached with a recognition of the essential flexibility of the remedy and the fundamental objective in seeking to minimise injustice, in circumstances where the legal rights of the parties have yet to be determined."*

71. I am satisfied that Barrett J. was correct in his assessment as to the nature of the application before him on the 7th September when he stated: *"What's before me today is not about, it's not a transgender issue, it's simply an application for interlocutory injunction".* That was correct. I am in entire agreement with the analysis of Edwards J. at para. 36 of his judgment in this case where he notes that *"... there is of course a background to the matter, in which the appellant's views concerning, and the registering of him of a conscientious objection to, the school's policy to support a student who is transitioning from one gender identity to another, undoubtedly features, but the injunction applications were not about that. Rather, they were about the appellant's determination to attend the school, and the disruptive effect on students and on the school's activities of his doing so, in circumstances where he had been placed on administrative leave, and his license to attend the school withdrawn".*

72. Manifestly the background derived from the gender critical views held by Mr. Burke as an element of his religion based on his asserted belief that sex is biologically determined, binary and immutable. This is an intrinsic element of his religious belief. That was not an issue before the High Court on the return date of the interlocutory injunction.

73. Sight must not be lost of the fact that the issue for determination before Barrett J. on the 7th September was whether to grant or refuse the prohibitory interlocutory injunctions specified in the respondent's notice of motion. The judge can scarcely be criticised for not taking into account assertions contained in the appellant's affidavit subsequently filed on

the 12th of September 2022 or indeed the Defence and Counterclaim he only later delivered. It is clear from the transcript of proceedings before Barrett J. on the 7th September that the option of affording time to Mr. Burke to file a replying affidavit was available to him. The Board signalled to the court its willingness to facilitate an adjournment for such purpose on the basis that *"... the interim orders to continue*". As is apparent from O.40 of the Rules of the Superior Courts where a motion is brought seeking interlocutory relief, evidence is given by affidavit.

Balance of convenience

74. A comprehensive critique has been carried out by the President in his judgment of the balance of convenience and in particular how the exercise of identifying and weighing all relevant factors in determining that balance was engaged in by Barrett J. on the 7th of September. That analysis is undoubtedly correctly. It was of crucial importance that the judge identified what the application was <u>not</u> about, as much as what the application was about. That distinction was crucial as was the necessity to disaggregate issues which would fall to be tried at the substantive oral hearing at the trial of the action but in respect of which the judge carrying out the exercise at the interlocutory stage was not in a position to make conclusive determinations by reason, *inter alia,* that Mr. Burke had failed to file any affidavit as of the hearing on the 7th of September 2022 and therefore the court was confronted with a series of bare assertions vehemently advanced by Mr Burke.

75. Further, context is everything, and both judges (Stack and Barrett JJ. necessarily had implicit regard to the fact that the school Board was charged with solemn responsibilities pertaining to the welfare of children and the discharge of its statutory and common law obligations in respect of same and were confronted with a state of affairs whereby the appellant had communicated unequivocally to the school principal and the Board his intention <u>not</u> to comply with the request of the Board regarding the treatment of

a student in the school for asserted religious reasons but at the same time was resolutely refusing to divulge to the school how he intended to interface with the said student or deal with or address the said child in the course of the forthcoming academic year.

76. As the President points out in his judgment, the behaviour of the appellant at the Chapel service in the school on the 21st June 2022 put the school on notice as to what lay in store for the student in question, the student body and the school which suggested a significant risk of non-compliance with the minimum standards articulated in the Mission statement and ethos of the school. Indeed having considered the averments in the affidavit of Mr. Burke filed on the 12th of September 2022 it is clear that he is quite proud of his conduct in the course of the said service which he characterises as a "contribution" and appears to lack any insight or concern for the risk that the approach being adopted by him in pursuance of the imposition of his gender critical views on the child and their parents, the student body and its constituent members risked impacting detrimentally on individual students or exposing them to potentially discriminatory or intimidatory behaviour in a school setting.

77. Ultimately, contrary to Mr Burke's arguments, as the President has comprehensively set out in his judgment - with which I entirely concur - in the context of the interlocutory injunctions as sought, it is the child at the centre of the controversy who was (and is) deserving of the court's consideration in the performance of the exercise of identifying where the balance of convenience lay and I am satisfied that in both instances in particular before Barrett J. and indeed subsequently before Roberts J. that exercise and assessment was comprehensively carried out and the balance was correctly identified in accordance with law for all the reasons specified by the President and further adumbrated in the judgment of Edwards J. herein.

Orders of Dignam J. of the 12th September 2022

78. The appellant contends that the said judge had erred in law and in fact in declining to grant and/or refuse to grant the reliefs sought by him at paras. 1,3 and 4 of his motion dated the 12th September 2022. It will be recalled that the specific orders sought by Mr. Burke in his *ex parte* docket were as follows:

(1) *An injunction restraining the Board of Management… from holding the disciplinary meeting at Mullingar Park Hotel, Co. Westmeath on Wednesday the 14th September 2022 or any other date.*

(2) *An injunction restraining the Board of Management…from putting the Defendant on paid administrative leave, or from continuing to put the Defendant on paid administrative leave.*

(3) *An injunction restraining the Board of Management…from the conduct of any disciplinary or investigation process in respect of the Defendant.*

(4) *An injunction restraining the Board of Management…from dismissing the Defendant…"*

79. It is clear from the transcript and the face of the order of Dignam J. perfected on the 13th September 2022 that counsel for the Board of Management gave an undertaking to the court that the disciplinary meeting which had been scheduled to take place on Wednesday the 14th September 2022 would not proceed and further "… *that should any further disciplinary or investigation meeting be held the Plaintiff shall give the Defendant not less than three days' notice in writing to the address at which he is at that point residing and also by email*". Dignam J. having noted the said undertaking made no order in relation to the reliefs 1,3 and 4 of the *ex parte* docket.

80. That approach was entirely correct. As was observed by Kelly J. (as he then was) in *Daly v. Killally* [2009] IEHC 172 an undertaking given to the court binds the party tendering the undertaking "… *as if it were a court order*…". Of course, such an

undertaking is not binding on any third parties but that is not an issue engaged at any level in the instant case nor is it identified as a basis for objection by Mr. Burke in this instance. It is well settled, at least since the decision of Brightman J. in *BIBA Limited v. Stratford Investments Limited* [1973] 1 CH 281, that an undertaking given in lieu of an injunction enjoys the same status as an injunction. Had any breach of the undertaking occurred it had the potential to lead to proceedings for contempt. It was a matter for the judge, in light of the evidence before him and in carrying out the balancing exercise required which he demonstrably did, to determine the parameters in terms of the undertakings that would be acceptable to the court in lieu of the injunctions that he might otherwise have granted.

81. An applicant for interlocutory relief does not have a veto over the terms of the undertaking assessed by the court to be appropriate and proportionate to be accepted in lieu of granting interlocutory relief in the context of an application for interlocutory orders nor is the prior concurrence or agreement of such an applicant decisively relevant to the judge's ultimate assessment. Where, as here, the undertaking given to the court was embodied in a court order the tenor and terms of same having been first fully considered by the judge it thereby had the same effect as a judgment or order. There was no difference in terms of effectiveness or enforceability between an undertaking and a judgment or order enjoining such conduct in the circumstances. Once the undertakings were accepted by Dignam J. those issues were moot and, as is observed by the President and Mr. Justice Edwards, the High Court is not there to decide moot issues.

82. A curious feature of this case is that Mr. Burke has not appealed the order of committal made in the High Court on the 5th September 2022. It is very evident from his stance and demeanour before this Court in the course of the appeal hearing that he is disposed to comply only with orders that he agreed with and is disposed to defy orders on a continuous and sustained basis as he may find disagreeable.

Decision of Roberts J.

83. I concur with the assessment articulated by Edwards J. at para. 42 of his judgment wherein he observes that since Mr. Burke no longer seeks any positive intervention in respect of the judgment and order of Roberts J. of the 14th September 2022 it is "*... neither necessary nor appropriate to proceed as he would wish*". On the 14th of September 2022, Roberts J. was confronted with an affidavit deposing to matters that presented a stark and total conflict with the averments in the affidavits of the respondent. I also would agree with Mr Justice Edward's assessment that the reference in her judgment to the Equal Status Act 2000 offers no basis for the contentions advanced by the appellant. On balance, in my assessment, the operative most relevant Act was the Education Act 1998, as amended. The relevant provisions are outlined above.

84. Leaving aside all legislation, the school and its Board had continuing and significant common law obligations towards children in respect of which it stood in *loco parentis.* Mr. Burke himself had – and continues to have - like obligations at law. Furthermore, the Admission Statement and ethos of the school amount to representations and assurances given to children and their parents on which they were entitled to rely in respect of the minimum standards that would be observed concerning mutual respect for others, tolerance of diversity and inclusiveness to be observed.

85. Further parents and students were entitled to expect that no individual student would be at risk of less favourable treatment than their peers, of being left vulnerable to discrimination, of not being accorded or treated equally with other students in terms of their human dignity by virtue of the potential conduct of a teacher in the school. The school having adopted its mission statement and statement of ethos as it was required to do by statute was bound by its terms. Not alone was it not open to the school, by omission, to resile from its obligations but, in my view, it had a positive duty to defend and vindicate

the school policy in circumstances where a clear risk had been identified in the conduct of Mr Burke which was capable of visiting discrimination and/or impacting detrimentally on the welfare of the student body in general and the individual student in particular. That was particularly important where the school was one which in the very words of Mr Burke " *all teachers have interaction with all pupils*". The applications to court for interim and interlocutory orders pending conclusion of the imminent disciplinary hearing were in discharge of such obligations.

Conclusion

86. In my view the appeals against the decisions of Stack J. and Barrett J. fall to be dismissed. Further the appeals against the judgments and orders of Dignam J. and Roberts J. likewise are not made out or in the case of Roberts J., not engaged at all for the reasons provided by the learned President and Mr Justice Edwards and no basis has been identified which would warrant this Court in disturbing the terms of same.

87. In large measure the issues identified by the appellant are matters that fall to be determined at the substantive trial and it is in the interest of all parties particularly the school and the student body that the substantive hearing take place in early course.

88. I would dismiss this appeal.